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MUNICIPAL MANUAL

BEING

A COMPLETE ANNOTATION

OF THE

ONTARIO MUNICIPAL ACT

AND

COMMENTARY ON CERTAIN ANALOGOUS SECTIONS OF THE MUNICIPAL ACTS OF THE OTHER PROVINCES

BY

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PREFACE

The municipal corporation is the organism of government which is closest to the people. It is in local government that the citizen finds his control or influence most direct. The growth of local power in the municipal form has been little short of marvellous. It has developed from mere maintenance of roads and market places to the complexities of modern highway construction and regulation and the operation of immense public services. So, accordingly has the power and responsibility of the citizen increased. Not only has there been this development of the sphere but the widening of the controlling body has proceeded apace. By the extension of the franchise the exercise of these much-spread municipal functions has almost changed hands. All this delegated power requires the control of some paramount authority. It is afforded by the Courts. The authority of the Courts in our municipal government can never safely be withdrawn. It is vital to the orderly, as well as to the effective, use of the instrumentality of municipal government. For assurance of this lawful possession of the representative office reliance is placed on the Courts. Likewise there exists the necessary supervising jurisdiction assuring the observance of legal limitations.

Statute law on municipal subjects in the Dominion is so voluminous and varied that it is impossible to reproduce it or comment on it within reasonable space. There

is a vast body of municipal jurisprudence to be found in our law reports. Much of this is in its principles common to all our jurisdictions. Our people are fortunate in having been assisted in this prominent field of self-government by the labors of judges, in many cases, fortunately, of previous experience in municipal affairs, who have given their best to guide the new municipal adventurer or to dispel the doubts of the more experienced. It is hoped that with a view to bringing the fruits of these judicial labors within the reach of interested persons this volume may be useful.

The laborious task of reading the final proofs and of preparing the Table of Contents, Table of Cases and Index was undertaken by Mr. C. M. Colquhoun, Assistant City Solicitor, Toronto.

H. A. R.
J. B. H.

Winnipeg.

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A. R. .....Appeal Reports (Ontario), 1876-1900.
Allen .....Allen (Massachusetts Supreme Court), 1861-7.
Am. Rep .....American Reports.
App. Cas. .....Appeal Cases (English—House of Lords and Privy Council), 1865-75.
Ark. .....Arkansas Supreme Court.
Atl. .....Atlantic Reporter (American).
Atl. Rep. .....Atlantic Reporter.

B. & Ad. .....Barnewall and Adolphus (English—King's Bench), 1830-34.
B. & Ald. .....Barnewall and Alderson (English—King's Bench), 1817-22.
B. & C. .....Barnewall and Cresswell (English—King's Bench), 1822-30.
B. & S. .....Best and Smith (English—Queen's Bench), 1861-70.
B. C. C. .....Lowndes and Maxwell (English) Bail Court.
B. C. L. R. .....British Columbia Law Reports.
B. C. R. .....British Columbia Reports.
B. W. C. C. .....Butterworth's Workmen's Compensation Cases (English).
Beav. .....Beaven (English—Rolls Court), 1838-1866.
Bing. .....Bingham (English—Common Pleas), 1822-1834.
Burr. .....Burrows (English—King's Bench), 1757-1771.

C. & J. .....Crompton and Jervis (English—Exchequer), 1830-32.
C. & P. .....Carrington and Payne (English—Nisi Prius), 1823-41.
C. B. .....Common Bench (English), 1845-1856.
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C. L. Ch. .....Common Law Chamber Reports (Upper Canada), 1851-52.
C. L. J. .....Canada Law Journal.
C. L. J. N. S. .....Canada Law Journal, New Series.
C. L. R. .....Common Law Reports (English), 1853-5.
C. L. T. .....Canadian Law Times.
C. L. T. Occ. N. .....Canadian Law Times, Occasional Notes of Cases.
C. P. .....Upper Canada Common Pleas, 1850-1881.
C. P. D. .....Common Pleas Division (English Law Reports), 1875-80.
Cald. .....Caldecott, Justice of the Peace Cases.
Can Cr. Cas. .....Canadian Criminal Cases.
Car. & P. .....Carrington and Payne (English — Nisi Prius).
Cart. .....Cartwright's Cases on the British North America Act.
Carthew .....Carthew (English—King's Bench), 1686-1701.
Cassels' Digest .....Cassels' Supreme Court of Canada Digest.
Ch. .....Chancery (English Law Reports), 1891.
Ch. Crs. .....Chancery Chambers Reports (Upper Canada), 1852-71.
Ch. D. .....Chancery Division (English Law Reports), 1875-1890.
Chit. R. .....Chitty's Reports (English—Bail Court), 1819-20.
Colo. .....Colorado.

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Ex. . . . . Exchequer (English), 1849-56.
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Ir. R. C. L. . . . . Irish Common Law Reports, 1866-1878.

J. P. . . . . Justice of the Peace.
Jur. . . . . The Jurist (English). 1837-1854.
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K. B. . . . . King's Bench (English Law Reports), 1891.
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L. J. Ch. . . . . Law Journal, Chancery Cases (English).
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L. J. K. B. . . . . Law Journal, King's Bench (English.
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L. T. .....Law Times.
L. T. (O.S.) .....Law Times, Old Series.
L. T. R. .....Law Times Reports (English).
Lev. .....Levinz's Reports (English—King's Bench), 1660-1697.
Ld. Ken. .....Lord Kenyon (English—King's Bench).
Lord Raymd. ....Lord Raymond (English—King's Bench), 1694-1734.

M. & Gr. .....Manning and Granger (English—Common Pleas), 1840-50.
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N. B. R. .....New Brunswick Reports.
N. E. .....North-eastern Reporter.
N. H. .....New Hampshire Superior Court.
N. J. Law .....New Jersey Law.
N. J. R. .....New Jersey Reports.
N. S. R. .....Nova Scotia Reports.
N. W. .....North-western Reporter.
N. Y. .....New York Reports.
N. Y. App. Div. ..New York Appellate Division.
N. Y. S. .....New York Supplement Reporter.

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O. W. N. .....Ontario Weekly Notes.
O. W. R. .....Ontario Weekly Reporter, 1902-1916.
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P. R. .....Practice Reports (Ontario), 1851.
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Penn. St. .....Pennsylvania State Reports.
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Q. B. D. .....Queen's Bench Division (English), 1875-1890.
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R. de J. .....Revue Critique de Legislation et de Jurisprudence, etc. (Quebec), 1871-3.
R. L. . . . . .Revue Legale (Quebec), 1869-1879.
R. R. . . . . .Revised Reports (English).
Rail. & Canal Traffic Cas.Railway and Canal Traffic Cases (English).
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Sask. . . . . .Saskatchewan Law Reports.
Sask. L. R.....Saskatchewan Law Reports.
Sc. L. R. .....Scottish Law Reporter.
Sid. . . . . .Siderfin (English—King's Bench), 1657-70.
So. . . . . .Southern Reporter (American).
Sol. Jl. .....Solicitor's Journal.
Stark. . . . . .Starkie, Nisi Prius (English), 1815-23.
Str. . . . . .Strange (English—King's Bench).
Swanst. . . ..Swanston (English—Chancery), 1818-19.

T. R. . . . . .Term Reports (English—King's Bench), 1785-1800.
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W. C. & I. Rep. ..Workmen's Compensation Reports (English).
W. L. R. .....Western Law Reporter.
W. N. . . . . .Weekly Notes (English).
W. R. . . . . .Weekly Reporter (English).
W., W. & H. .....Willmore. Wollarton and Hodge (English—Queen's Bench).
W. W. R. .....Western Weekly Reporter (Canadian).
Wall. (U. S.). } Wallace, United States Supreme Court Reports.
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The Municipal Act

REVISED STATUTES OF ONTARIO, 1914.

CHAPTER 192.

As amended by 4 Geo. V. c. 33; 5 Geo. V. c. 34; 6 Geo. V. c. 24; s. 27 c. 39; 7 Geo. V. c. 42; 8 Geo. V. c. 32; 9 Geo. V. c. 46.

An Act respecting Municipal Institutions.

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

PRELIMINARY.

1. This Act may be cited as *The Municipal Act*, 3 Edw. VII. c. 19, s. 1, part. 3 & 4 Geo. V. c. 43, s. 1.

Nature of Municipal Institutions.—In Smith v. City of London, 1909, 20 O. L. R. 133, an application was made to obtain an injunction restraining the City of London from acting on a contract said to be invalid, with the Hydro-Electric Power Commission, for the supply to the corporation of electrical power or energy for the use of the corporation and the inhabitants thereof. The object of the contract was to procure electrical power to sell, thus what is popularly called municipal trading, was involved.

It was urged for the plaintiff that private business is outside municipal functions, and that the Legislature could not give these private functions to a municipal body. This led to a discussion of the nature of municipal institutions in the D. C., the unanimous judgment of the Court being given by Boyd, C. In the course of the judgment, the following account of the development and nature of municipal institutions in Ontario was given:—

"These Acts (the Acts under which the City of London had made the contract in question) upon their face, by their very titles, claim to be classified under the heading of 'Municipal Institutions in the Province:' British North America Act, 1867, s. 92 (8). The main Act is intituled 'to provide for the Transmission of Electric Power to Municipalities,' 6 Edw. VII., c. 15; and the next one, to validate by-laws and contracts made under the former. They are all

in pari materia. They deal with the transmission of electricity from Niagara Falls through and to various municipalities making it available for all municipal corporations who apply. The installation of electric plant in the City of London would be per se 'a local work or undertaking,' a matter merely of local or private nature in the province: *ib.* s. 92, Nos. 10 and 16. Such legislation in England always falls under the heading of 'Local Acts.'

"The 'establishment of municipal institutions for the whole country' was recommended by Lord Durham's report of 1839, and the term 'Municipal Institutions' passed into statutory language and significance in 1858: 22 Vict., 1st sess., c. 99, 'An Act respecting the Municipal Institutions of Upper Canada,' and thence it is carried into the C. S. U. C., 1859, c. 54, which practically codified the municipal law of the province as it then was and as it continued to be till the date of Confederation in 1867. The term 'Municipal Institutions' appears intended to give compendious expression to the state of affairs which exists in a defined populated area, the inhabitants of which are incorporated and intrusted with privileges of local self-government or administration responsive to the needs, the health, the safety, the comfort, and the orderly government of an organized community. As put by Lord Herschell in 'The Liquor Prohibition Appeal of 1895' (bound volume in the Library of the Law Society of Upper Canada. See also S. C., sub-nom. Attorney-General for Ontario v. Attorney-General for the Dominion, [1896] A. C. 348), when speaking of its use in the British North America Act, 'Municipal Institutions' deals with two things, the constitution of municipalities or municipal bodies and their functions (argument at p. 35). Having created the municipality, the province is able to confer upon that body any or every power which the province itself possesses under the Confederation Act. In the same case Lord Watson expresses the opinion: 'The province might give the local body new powers and functions so long as these were powers and functions which the legislature of the province could exercise and legislate upon, and could therefore delegate to a municipal body: *ib.*, p. 44. These powers, he says again (p. 45), are to be administered for the benefit of the public and the inhabitants of the municipality. In the same case, at p. 51, this is to be found: Lord Davey: 'Suppose you would say that municipal institutions . . . . would include, for instance, the creation of a market and municipal police.' . . . Lord Watson: 'Or a separate body of commissioners for the purpose of supplying the locality with water; I should say all these were municipal institutions . . . or institutions created for the benefit of the particular municipality.' Lord Davey: 'And I should suppose it might include the establishing a gas works.' Lord Herschell: 'I should think it included every local body and every power that you can confer upon that local body:' *ib.*, pp. 51, 52. Lord Morris suggests, at pp. 54, 55, that the enacting part of s. 92 (8) should be read in this way: 'In each province the legislature may exclusively make laws in relation to matters coming within municipal institutions in the province.' And Lord Herschell considers that 'Municipal Institutions' refers not so much to the powers or functions as to the corporate body upon which the power or function is bestowed: p. 54.

"Be that as it may, it is pertinent to look at the Municipal Institutions Act existing at Confederation to see what subjects and powers were embraced in it or conferred by it. In particular we find that before Confederation municipal bodies were empowered to supply gas and water for public and also for private use and consumption: 29 & 30 Vict. c. 51 (1866), ss. 2, 3 and 4, of which give to the municipality the same powers as are possessed by private stock companies incorporated under C. S. C., 1859, c. 65, for supplying cities, towns, and villages with gas and water. Section 65 shews that the gas and water is to be supplied to private persons. When it is remembered that gas is available for heat and motive power, as well as for light, it is an easy step to say that it is equally right and proper to supply the new commodity, electricity, for purposes of light, heat, and power to the municipality and its inhabitants. The statute in hand then purports to confer a new power upon municipalities, and that power

relates to the management and administration of a local undertaking, i.e., the transmission of electrical energy for the common good of the inhabitants, in its public and private use.

"The provincial legislation in its course and development has been akin to that on the subject of lighting in England. The supply of gas by private companies preceded the manufacture and supply of gas for general use by municipal bodies. We are told by Mr. Clifford that Parliament has repeatedly refused to allow even municipal bodies to supply gas in competition with existing gas companies, and has always stipulated that if corporations want such a power they must buy the gas works: History of Private Bill Legislation, vol. 1, p. 232 *n.* (1885).

"And when electricity began to come to the front, the course of procedure was the same in regard to electric lighting companies: first the private company and then the option to purchase given to the municipal body. The English Electric Lighting Act of 1882 gives power to local authorities to supply light by license under a special Act (this for private as well as public purposes), and the expenses are to be defrayed out of local rates (ss. 7, 8 and 27). I may quote a summary of the situation in the mother country from Lord Courtney's book on the working constitution of the United Kingdom (1890). He says: 'Among the other duties of borough councils is that of seeing that the communities are adequately supplied with lighting and water. Gas and water works were, however, in most cases originally undertaken by private companies under local Acts of Parliament, and are, indeed, in many cases still so promoted. Newer systems of electric lighting have often, perhaps generally, been started under licenses from local authorities for a term of years. Most of the larger boroughs have, however, taken over and extended the gas and water works supplying their area, and some have started electric lighting. There is a clear tendency on the part of the municipalities to undertake these functions for themselves, applying at least some of the profits that may be realized in diminution of rates:' p. 242. He then speaks of tramways and concludes: 'These are examples of a process known as the extension of municipal trading, the policy of which is still in dispute:' p. 243. He says further: 'There are signs that the provision of electric power may, in appropriate places, come within the range of municipal enterprise. One ground of objection to the movement is found in the apprehension that popularly elected bodies may work these undertakings in the interest of working men voters rather than on commercial principles; but so far it cannot be said that experience has proved this danger to be substantial:' p. 243.

"Though thus referred to as municipal trading, the supply of light, whether by gas or other illuminant, is a proper function of municipal administration. So to hold does not at all infringe upon the meaning of 'trade and commerce,' as used in the British North America Act, where exclusive power is conferred upon the Dominion to legislate as to the regulation of trade and commerce (s. 91 (2)). These words would point to political arrangements in regard to trade, requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and the like, as indicated in Citizens' Insurance Co. v. Parsons, 7 App. Cas. 96, 110; but the comment of Lord Herschell on that case, in 'The Liquor Prohibition Appeal of 1895,' was that it 'allowed to the Provincial Legislature a very considerable power of dealing with trade within its own limits—within its own borders:' p. 115. And he says again, at p. 104: 'You may give a very broad construction to 'trade and commerce' and yet it may be that it would still leave open a very large power of dealing in such a way as to incidentally affect trade without its being a part of the regulations made within such meaning.'

"It appears to me that the Privy Council has passed upon this very point in reference to the provincial regulation of electric light and power in Hull Electric Co. v. Ottawa Electric Co., [1902] A. C. 237. A Quebec statute legalized a contract made by a municipal council for procuring a supply of electricity for light, heat and motive power for thirty-five years for the use of the municipality and its inhabitants. The validity of that legislation was attacked on much the same

grounds as are advanced here, viz., that electric light was a commercial commodity and as such fell within the exclusive competence of the Dominion Parliament to regulate trade, and that a monopoly had been created beyond the municipal power. These points were in controversy in the Courts below, in the first or primary Court then in review in the Superior Court, and lastly, in the Court of Queen's Bench, with varied successes and reverses. But when it came before the Judicial Committee the attack upon the by-law and the statute was abandoned. Upon this abandonment Lord Macnaghten, giving the judgment of the Privy Council, said: 'It is obviously untenable. The scheme in favour of which the by-law was passed was a purely local undertaking. As such it came within the exclusive jurisdiction of the Provincial Legislature, and not the less so because in such cases it is usual and probably essential for the success of the undertaking to exclude for a limited time the competition of rival dealers:' p. 247. That decision, though on a Quebec statute, is of equal force as to Ontario—the municipal system in both provinces being organized and developed on the same lines.

'Whether or not the distribution of electricity to private persons at a fixed price can fairly be called 'trading,' it is not needful to consider. Neither is it in place to consider what forms of municipal trading or industrial undertakings should be encouraged by the Legislature or what forbidden. Nor on what terms the permission should be granted. All such matters of discretion or expedience or advantage rest with the law-making body, and are subject to the exercise of its plenary power.

"But it is perhaps well to deal with the proposition advanced that the supply of house-light is a purely private matter, and that no public body can interfere with the right of a man to use any kind of light he pleases, and that there is no right to tax him for the supply of special light to other people. No doubt, this scheme for electrical light contemplates local taxation to defray the expenses of instalment and operation—though it is hoped that after a while the undertaking will carry itself, will defray the initial cost, and, it may be, yield a surplus for the general benefit of the inhabitants. The term of forty years for the subsistence of the contract is fixed between the Commission and the corporation, so that full opportunity may be given to work out beneficial and profitable results to both parties. I note in the English Electric Lighting Act of 1888 a period of forty years is given for the operation of a private undertaking before compulsory purchase can be enforced by the local authority.

"Taxation of a given locality to meet the expense of a business undertaking in that place should only be imposed if it is for the general benefit of the community. To install or support a private trade or business has not been considered as of municipal cognizance to be undertaken by the municipality. It is to be left to private enterprise. In the present development of economic utilities, it may become a question of kind and degree and availableness whether or not the promotion of the interests of the large aggregation of the inhabitants constitutes a public service or not. In regard to electric light from Niagara Falls, these considerations enter into the question; the individual cannot procure his own supply of electricity; it has to come to him by means of material conveyance over private and public property—streets and highways—which cannot be used without a right of franchise or expropriation. The transmission and storing and distribution of electrical energy necessitate a system of control and regulation for the interests of public and private safety. If economic and convenient use of electricity is to be obtained, these *desiderata* exclude the undertaking from the area of private enterprise and an ordinary business. It is removed within the range of municipal institutions. The proper uses and enjoyment of such a service affects the citizens as a community and not merely as individuals. The self-interest of the few must give way to the common interests of the whole body of incorporated inhabitants represented by the vote of the majority. The general proposition, as in effect expressed by the Massachusetts Bench, may be adopted as a good working rule on this head, viz., that matters which concern the welfare and convenience

of all the inhabitants of a city or town and cannot be successfully dealt with apart from the aid of powers and privileges derived from the Legislature, may be subjected to municipal control when the benefits received are such that each inhabitant needs them or may need them and may participate in them, and it is for the interest of each inhabitant that others as well as himself should possess and enjoy them. See opinion of the Justices of the House of Representatives, 150 Mass. at p. 597 (1890).

"The supply of light by means of gas or electricity, with the incidental advantages of heat and motive power connected therewith, appear to be a proper municipal function. The primary need, no doubt, is as to public places (streets and buildings, etc.); yet the vending of the commodity to private consumers is a convenient and comparatively inexpensive accompaniment. Both go far to promote the convenience, comfort and safety of all members of the municipality.

"I have no difficulty in deciding that as to the main and central question here agitated, as to the power of the City of London to engage in the business of acquiring and distributing electric energy, that it is one of the incidents of municipal government, whether or not in competition with private concerns is of no material significance in the constitutional aspect of this legislation.

"The Provincial Legislature has power to establish electrical works as a local work or undertaking under another clause of the Confederation Act, s. 92 (10): Consequently, it has power to delegate this undertaking to a competent municipal body."

The Act is a Consolidation Act.—The Municipal Act. R. S. O. 1914, c. 192, is a Consolidation Act. This follows from 3 and 4 Geo. V., c. 2, s. 9, which brings into force R. S. O. 1914, which is as follows:—

"9 (1) The Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation of the law as contained in the Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted, and the Legislature is not to be deemed to have adopted the construction which may by judicial decision, or otherwise, have been placed upon the language of any of the statutes included amongst the Revised Statutes.

"(2) The various provisions in the Revised Statutes corresponding to and substituted for the provisions of the Acts and parts of Acts so repealed, shall, where they are the same in effect as those of the Acts and parts of Acts so repealed, be held to operate retrospectively as well as prospectively, and to have been passed upon the days respectively upon which the Acts and parts of Acts so repealed came into effect.

"(3) If upon any point the provisions of the Revised Statutes are not in effect the same as those of the repealed Acts and parts of Acts for which they are substituted, then as respects all transactions, matters and things subsequent to the time when the Revised Statutes take effect, the provisions contained in them shall prevail, but as respects all transactions, matters and things anterior to the said time, the provisions of the said repealed Acts and parts of Acts shall prevail.

"(4) The marginal notes and headings in the body of the Revised Statutes and references to former enactments, and sections printed in bourgeois type which may appear thereon, shall be held to form no part of the said Statutes but to be inserted for convenience of reference only."

Headings.—While the headings and marginal notes form no part of a Statute, a Court will, in doubtful cases, look at the headings and marginal notes. The Master in R. ex rel. Carr v. Cuthbert, 1901, 1 O. L. R. 212, read a heading into a section following Eastern Counties v. Marriage, 1860, 9 H. L. C. 32, 31 L. J. Ex. 73; Hammersmith v. Brand, 1869, L. R. 4 H. L. 171, 38 L. J. Q. B. 265; The Queen v. Local Government Board, 1882, 10 Q. B. D. 309 at 321; Rayson v. South London Tramways Co., [1893] 2 Q. B. 304 at 307, 62 L. J. Q. B. 593.

Rules of Interpretation of Consolidation Acts.—If a Consolidation Act re-enacts with a like context a word or phrase which has received judicial interpretation, that interpretation will generally but not necessarily be applicable to the same word or phrase in the Consolidation Act. Maxwell on Statutes, 5th ed., p. 42, citing Mitchell v. Simpson, 25 Q. B. D. 183, 59 L. J. Q. B. 355; Smith v. Baker, [1891] A. C. 349, 60 L. J. Q. B. 691; Bank of England v. Vagliano, [1891] A. C. 144, 60 L. J. Q. B. 145.

The rule is different in the case of a codifying Act. In relation to the Sale of Goods Act, 1893, Cozens-Hardy, M.R., said:—

> "I rather deprecate the citation of the earlier decisions. The object and intent of the Statute was no doubt simply to codify the unwritten law applicable to the sale of goods; but in so far as there is an express statutory enactment that alone must be looked at and must govern the right of the parties even though the section may to some extent have altered the prior Common Law." Bristol v. Fiat Motors, [1910], 2 K. B. 831, 79 L. J. K. B. 1109; Maxwell, 41."

Oversight in Consolidation Act.—In Carrol v. Beard, 1895, 27 O. R. 349, the Court had to consider a case whereby a section in a revised statute which was carried forward unchanged referred to a section which had been amended in such a manner that it appeared that there had been an oversight, resulting in a situation probably not intended by the Legislature. Boyd, C., said:—

> "The modern method is to leave the remedy in the hands of the Legislature and not to qualify the enactment according to the presumed intention by judicial enactment."

In Rothchild v. Commissioners L. R. 1894, 2 Q. B. at 145, Mathew, J., said:—

> "Our limited function is not to say what the Legislature meant, but to ascertain what the Legislature has said that it meant."

In O'Connor v. Hamilton, 1904, 8 O. L. R. at 410, Meredith, J., said:—

> "If the legislation be objectionable, and ought to be mitigated, substantial relief in a constitutional way is likely to be retarded rather than accelerated by concealing its deformities in 'astute' or 'adroit' adjudication."

Similar Imperial Acts.—In Trimble v. Hill, 1879, 5 App. Cas. 342, 49 L. J. P. C. 49, the Judicial Committee laid down the rule that in colonies where an enactment had been passed which is similar to an English enactment, if the latter had been judicially interpreted in the Court of Appeal, the Colonial Courts should govern themselves by such interpretation when called upon to construe the colonial enactment; and in City Bank v. Barrow, 1880, 5 App. Cases 664 at 679, the House of Lords laid down the same rule.

See Pettit v. C. N. R., 1913, 23 M. R. 223, where Howell, C.J.M., speaking of R. S. M. 1902, c. 31, said:—"Our province has practically copied this Act, and we therefore take it subject to the judicial decisions upon it given in England."

In Jacobs v. Beaver, 1908, 17 O. L. R. at 496, Moss, C.J.O., said:—"Speaking for myself, I think that a decision of the highest Court of this province, while it remains unreversed by a tribunal having appellate jurisdiction over it, ought not to be set aside or ignored, simply for the reason that other Courts, not possessing appellate jurisdiction over it, and themselves subject to reversal by higher Courts, have subsequently expressed views that may appear not to be in harmony with the decision, and I do not think that the suggestion of the Judicial Committee in Trimble v. Hill, affords warrant for any such practice." In Pacific Lumber Agency v. Imp. Timber Co., 1914, 7 W. W. R. 260, Clement, J., considered it a debatable question how far the rule in Trimble v. Hill should apply to our Supreme Court.

See also Canada Furniture Co. v. Stephenson, 1910, 19 M. R. 631; Cambridge v. Sutherland, 1914, 6 W. W. R. 1219; Hollender v. Foulkes,

1895, 26 O. R. 61; Rutherford v. Murray, 1911, 19 O. W. R. 975; 3 O. W. N. 29, and Paradis v. The Queen, 1887, 1 Ex. C. R. 191; Wood v. Guillett, 1895, 10 M. R. 570, and Anglin, J., in Stuart v. Bank of Montreal, 1909, 41 S. C. R. at 548.

"Shall" and "May."—The Interpretation Act, R. S. O. 1914, c. 1, s. 29, provides:—

> The word "shall" shall be construed as imperative, and the word "may" shall be permissive. In Julius v. Oxford, 1880, 5 App. Cas. 214, 49 L. J. Q. B. 577, Lord Cairns discussed the phrase "it shall be lawful," as follows:—
>
> "The question has been argued and has been spoken of by some of the learned Judges in the Courts below as if the words 'it shall be lawful' might have a different meaning and might be differently interpreted in different statutes or in different parts of the same statute. I cannot think that this is correct. The words 'it shall be lawful' are not equivocal. They are plain and unambiguous. They confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the condition under which it is to be done, something in the title of the person for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so. Whether the power is one coupled with a duty such as I have described is a question which, according to our system of law, speaking generally, it falls to the King's Bench to decide on an application for mandamus."

Many of the most important questions arising under the Municipal Act arise in connection with duties imposed by such expressions as "shall be exercised by by-law," "shall give notice," etc. In every case there arises the fundamental question whether an imperative duty is imposed, the neglect of which is fatal, or a direction as to procedure is given, the neglect of which results in a mere irregularity. The use of "may" presents a similar alternative. Is it optional to do the act specified or is the option as to the mode of doing the act? Where a power is conferred, coupled with a specification of the mode in which the power is to be exercised, there may be an implied exclusion of power to act except by the mode specified: Liverpool v. Liverpool, 1902, 35 N. S. R. 233; 33 S. C. R. 180 at 192.

Attitude of Courts with Respect to Interpretation Clauses.—Interpretation clauses are often inserted *ex abundanti cautela* and are not necessarily to be construed as positive enactments.

An interpretation clause merely defines for the purpose of the Act and not for other purposes and even for the purpose of the Act, the interpretation clause does not more than say that where you find in the Act the words in question they shall, unless there be something repugnant in the context or in the sense, have the special meaning prescribed: Lord Selborne, in the House of Lords, in Meux v. Jacob, 1875, L. R. 7 H. L. 481, 44 L. J. Ch. 481 at 486.

An interpretation clause in providing that a given term shall include certain things does not give an exclusive or complete definition of the term, and does not prevent the term being applied in its natural and obvious sense: Lord Coleridge, in the House of Lords, in R. v. Hermann, 1879, 48 L. J. M. C. 106, and London v. Jackson, 1881, 7 Q. B. D. 502, 50 L. J. M. C. 134.

As a rule an interpretation clause should be used for interpreting words which are ambiguous or equivocal only, and not so as to disturb the meaning of such as are plain: London v. Jackson, above.

In Ely v. Bliss, 1852, 2 DeG. M. & G. 459, Lord St. Leonards, criticizing interpretation clauses generally, said: "They attempt to put a general construction on words which, in the different senses in which they are introduced in the various clauses of an Act, do not admit of such."

The interpretation section of the Municipal Act extends to all Acts relating to municipal matters. The Interpretation Act, R. S. O. 1914, c. 1, s. 31.

2. In this Act,

(*a*) "Arbitration" shall mean an arbitration under the provisions of this Act.

An arbitration under the Municipal Act is subject to the Municipal Arbitration Act: see s. 332 and generally Part XVI. Outside of Part XVI. arbitrations are directed in the following cases:—

Sec. 36 (e)—On separation of senior and junior townships;

Sec. 38 (2)—On erection of village or annexation of territory;

Sec. 325—Where lands are expropriated;

Secs. 383-4-5—As to site and use of court house or gaol;

Sec. 455—As to maintenance of boundary lines;

Sec. 465 (2)—As to apportionment of damages for joint liability to repair highways;

Secs. 466-7—As to joint jurisdiction over highways and bridges;

Sec. 473—As to sufficiency of new road where only old highway is stopped up.

2.—(*b*) "Bridge" shall mean a public bridge, and shall include a bridge forming part of a highway or on, over or across which a highway passes.

Part XXI. deals with highways and bridges.

County Bridge is defined in s. 429. Outside of Part XXI. the term will be found in:

Sec. 289 (2e), authorizing debts not payable out of current year's estimates to construct certain bridges without reference to ratepayers;

Sec. 398 giving power to regulate driving on bridges, ss. (8) and (9); to construct works to prevent damage to bridges by flooding, ss. (16); and to prohibit vehicular traffic on sidewalks or bridges, ss. (37).

What is a Bridge?—This is a most important question for the purposes of determining liability to erect, maintain and to pay damages resulting from failure to maintain. A bridge is to be distinguished from a mere culvert on the one hand and from an embankment on the other. When an embankment on both sides leads up to a bridge across water, it is an important question when the approaches of the bridge begin. A structure over a dry ravine or over a highway is a bridge, within the meaning of the Act. For discussion see Part XXI.

2.—(*c*) "City," "town," "village," "township," and "county" shall respectively mean city, town, village, township or county, the inhabitants of which are a body corporate within the meaning and for the purposes of this Act.

2.—(*d*) "Electors," when applied to a municipal election, shall mean the persons entitled to vote at a municipal election, when applied to voting on money by-law shall mean the persons entitled to vote on the by-law and when applied to voting on any other by-law or on a resolution or question unless otherwise provided by the Act, by-law, or other authority under which the vote is taken, shall mean municipal electors.

A Municipal Election means the election of any member of a council by the procedure prescribed in Part III. The persons entitled to vote are those whose names are entered on the proper voters' list, s. 57, who are not subject to any of the disqualifications enumerated in the Act. Disqualifications are enumerated in ss. 57, 58, 59, 60, 61, 187, 188 and 189. Section 260 *infra*, defines "electors" again for the purposes of voting on by-laws.

Voting on By-laws takes place under the provisions of Part X., and in many respects differs from a municipal election. Electors entitled to vote on a money by-law are those entitled to vote at a municipal election, with the exception of farmers' sons, income voters and certain tenants, s. 265, and a list of such persons is to be prepared. Sections 266, 267 and 268.

2.—(*e*) "Highway" shall mean a common and public highway, and shall include a street and a bridge forming part of a highway, or on, over or across which a highway passes.

A Common and Public Highway is defined in Part XXI., s. 432. A public square may be a highway and part of a highway may be withdrawn from highway purposes by being set apart as a boulevard. Highway, at common law, includes street and bridge as well as lane and footpath or carriageway. The name is not material so long as all the public have the right to pass and repass and to stop as incident to the right of passage though the right may be limited to foot passengers or to vehicles: *infra*, P.

Shall include *infra*, P.

2.—(*f*) "Land" shall include lands, tenements, and hereditaments, and any estate or interest therein, and any right or easement affecting them, and land covered with water.

Estate may be freehold or leasehold, legal or equitable or partly legal and partly equitable. For definitions see s. 52 (1e) and (1f).

Interest is to be distinguished from a mere license to use lands. It is synonymous with estate. The Court of Appeal in Warr v. London County Council, [1904] 1 K. B. 713, 73 L. J. K. B. 362 held that licensees under an agreement entitling them to sell refreshments in a theatre had "no estate or interest in land."

Any Rights or Easements Therein.—Rights in gross, *profits a prendre*, easements of air, easements of light and rights of way are estates in land.

What is included in the term "land" becomes of importance in settling the right to compensation where land is expropriated or is injuriously affected by the exercise of any of the powers of the corporation. For further discussion, see Part XV. See Belleville Bridge Co. v. Ameliasburg, 1907, 10 O. W. R. 988; 15 O. L. R. 174 (bridge over navigable water) liable to assessment, and Essery v. Bell, 1909, 13 O. W. R. 395 (easement liable to assessment).

Land Covered With Water.—"Whether a lake or river be vested in the Crown as represented by the Dominion, or as represented by the province in which it is situate, it is equally Crown property, and the rights of the public in respect of it, except so far as they are modified by legislation, are precisely the same. . . . There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. . . . Whatever proprietary rights were at the time of the passing of that Act (the B. N. A. Act of 1867), possessed by the provinces remain vested in them, except such as are by any of its express enactments transferred to the Dominion," per Lord Herschell, giving the judgment of the Judicial Committee: In re Provincial Fisheries, 1896, 26 S. C. R. 444, s.c. Att.-Gen. Canada v. Atts.-Gen. Ontario, Quebec and Nova Scotia, 1898, A. C. 700; 67 L. J. P. C. 90, where it was held that "public harbours," whether public work has been executed on them or not, are vested in the Dominion, while lands not public harbours covered by the water of rivers, whether navigable or not, and lakes, were not by the B. N. A. Act, 1867, vested in the Dominion: see, also, Keewatin v. Kenora, 1908, 13 O. L. R. 237; 16 O. L. R. 184 C. A., where it was held that not a grant of lands bordering on a non-tidal river, whether navigable or not, carries the bed of the river *ad medium filum aquae* unless the grant is expressly otherwise, and in the case of a tidal river the presumption is that the bed is not granted. In the case of lands bordering on non-tidal lakes, such as the great lakes, while the *ad medium filum* rule is subject to qualification. "If the whole or a great part of this province (Ontario), had been granted to a great company, like the Hudson's Bay Company . . . and had been described as bounded on the south and southwest by the great lakes and rivers, would any one doubt that the grant would carry the title *ad medium filum*, subject to the highway over them. . . . But it is said, is it not absurd that, if the Crown grant a farm lot of a few acres, or a town lot of but a few feet frontage upon one of the great lakes, it should carry with it a strip of land perhaps sixty miles deep? Of course, it is absurd, and so manifestly so as to unmistakeably indicate such a contrary intention as to take the case out of the rule." Meredith, J.A., in Keewatin v. Kenora, supra. On this subject see also Merritt v. Toronto, 1912, 23 O. L. R. 365; 27 O. L. R. 1; 48 S. C. R. 1.

The Assessment Act, R. S. O. 1914, c. 195, s. 2 (h), is as follows:

"Land," "real property" and "real estate" shall include—

1. Land covered with water;
2. All trees and underwood growing upon land;
3. All mines, minerals, gas, oil, salt, quarries and fossils in and under land;
4. All buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under, or affixed to, land;
5. All structures and fixtures erected or placed upon, in, over, under, or affixed to any highway, lane, or other public communication or water; but not the rolling stock of any railway, electric railway, tramway or street railway.

The Registry Act, R. S. O. 1914, c. 124, s. 2 (e), is as follows:—

"Land" shall include lands, tenements, hereditaments and appurtenances and any estate or interest therein.

Land.—"Land in its restrained sense means soil, but in its legal acceptation it is a generic term comprehending every species of ground on earth as meadows, pastures, woods, moors, waters, marshes, furze and heath; it includes also houses, mills, castles and other buildings;

for with the conveyance of the land the structures upon it pass also. And besides an indefinite extent upwards it extends downwards to the globe's centre," Wharton. See, also, Williams v. Cornwall, 1909, 32 O. R. 255, where the right to maintain a house in a position where it encroached on a street was held to be an "interest in lands" and to come within the meaning of "lands" in sec. 32.

Tenements and Hereditaments. — "Lands, houses and immoveable property—things capable of being held in the way above described (by feudal tenure)—were called tenements or things held. They were also denominated hereditaments because on the death of the owner they devolved by law to his heir. So that the phrase 'lands, tenements and hereditaments' was used by the lawyers of those times to express all sorts of property of the first or immoveable class; and the expression is in use to the present day." Williams R. P. 6.

2.—(*g*) "Local municipality" shall mean a city, a town, a village and a township.

County is not included. It has jurisdiction over the local municipalities which are geographically situated within it unless they are "separated" for municipal purposes.

2.—(*h*) "Member" or "members," referring to a member or members of a council shall include the head of the council, and a member or members of a Board of Control.

By virtue of ss. 46, 47, 48 and 50, the heads of councils, deputy reeves and members of boards of control are members of the councils of the respective municipalities by which they are elected. This sub-section would appear to be unnecessary, or if necessary, is incomplete in not referring to deputy reeves and inaccurate in including a warden who is elected from among the members of a county council. A section similar to ss. 46, 47 and 50 was held, by Richards, J., in R. ex rel. Pollard v. Prosser, 1859, 2 P. R. 330, to shew plainly that a mayor was a member of a council.

2.—(*i*) "Money by-law" shall mean a by-law for contracting a debt or obligation or for borrowing money.

Part XII. deals with money by-laws. Money by-laws must contain certain recitals, s. 288, and in certain cases must be submitted to a vote of the electors, s. 289, and must be registered, s. 296.

2.—(*j*) "Municipal Board" shall mean Ontario Railway and Municipal Board.

The Ontario Railway and Municipal Board, R. S. O. 1914, c. 186, s. 21, confers on the Municipal Board general power to make orders binding upon municipal corporations which are constructing, maintaining or operating any public utility in violation of any general or special act, regulation or order.

Powers of the Board under The Municipal Act.—The formation of new municipal corporations and the alterations of boundaries of municipalities, Part I., though a new division into wards is left to the Lieutenant-Governor in Council, s. 44;

The extending of time for issuing debentures beyond the time limited by the Act, s. 288 (9);
Authorizing an increase of the rate of interest on debentures, s. 291;
Cancelling unissued debentures, s. 292;
Certifying debentures, s. 295;
Authorizing diversion of sinking fund to redemption of debentures, s. 304;
Supervision over bonuses in aid of railways, s. 397;
Authorizing borrowing in certain cases without reference to electors, s. 400 (3);
Approving abandonment of roads by counties, s. 448;
Settling disputes over county boundary lines, s. 469.
Prescribing forms of by-laws, notices, etc., s. 536.

2.—(*k*) "Municipal electors" shall mean the persons entitled to vote at a municipal election.

2.—(*l*) "Municipality" shall mean a locality, the inhabitants of which are incorporated. 3-4 Geo. V. c. 43, s. 2, (*a-l*).

Notwithstanding this section, the term "municipality," "county," "city," etc., are frequently used in the Act as equivalent to "the corporation of the local municipality," or "the corporation of the county."

2.—(*m*) "Population" shall mean population as determined by the last preceding census taken under the authority of the Parliament of Canada, or under a by-law of the council, or by the last preceding municipal enumeration by the assessor, whichever shall be the latest, or by such means as the Municipal Board may direct. 3-4 Geo. V. c. 43, s. 2 (*m*); 5 Geo. V. c. 34, s. 1.

The Census is Conclusive as to Population.—Even though the population as shewn by a census or enumeration can be shewn to be incorrect, nevertheless the census or enumeration governs and must be taken to be correct for the purposes of the Act, and is not open to question in any proceeding to set aside any act based on population as shewn by the method designated by clause (m). R. ex rel. Sullivan v. Church, 1914, 26 O. W. R. 375, 6 O. W. N. 116, 365.

Census under By-law.—This is authorized in the case of any municipality, s. 398 (4).

Municipal Enumeration.—This must be made by the assessor under the provisions of the Assessment Act, R. S. O. 1914, c. 195, s. 22.

A Special Census of a District may be directed under s. 13 (4). For the purpose of changing the method of electing aldermen or councillors in cities and towns, under the provisions of ss. 46, 47 and 48, the last Dominion census governs, s. 49.

2.—(*n*) "Prescribed" shall mean prescribed by or under the authority of this Act.

Even without this limitation the term, if used in a statute, would mean prescribed by that statute and not prescribed by general law.

2.—(*o*) "Published" shall mean published in a newspaper in the municipality to which what is published relates or which it affects, or if there is no newspaper published in the municipality, in a newspaper published in an adjacent or neighbouring municipality; and "publication" shall have a corresponding meaning.

The directions in the Act as to publication of notices and of copies of by-laws are in many cases imperative, and non-compliance therewith may invalidate the whole proceedings. In other cases, omission to publish as directed may be an irregularity merely. Of the former may be mentioned the notices required under ss. 263 and 475, N.B.

2.—(*p*) "Separated town" shall mean town separated for municipal purposes from the county in which it is situate.

2.—(*q*) "Supreme Court" shall mean Supreme Court of Ontario.

2.—(*r*) "Township" shall include a union of townships, and a municipality composed of two or more townships.

Union of townships, ss. 25-30.
Municipality composed of two or more townships, s. 18.

2.—(*s*) "Two-thirds vote" shall mean the affirmative vote of two-thirds of the members of a council present at a meeting thereof.

A Two-thirds vote is required:—
(1) to pass a resolution as to a new division into wards: s. 44;
(2) to override the Board of Control: s. 213 (15);
(3) to authorize purchase of armoury: s. 289 (2g);
(4) to establish fuel yards in cities and towns: s. 399 (39a);
(5) to establish residential streets in cities and towns: s. 406 (10);
(6) to purchase fire apparatus for villages: s. 407 (1);
(7) to regulate the location of stables in cities: s. 409 (2a).

An affirmative three-fourths vote is required in the case of certain bonus by-laws: s. 278.

2.—(*t*) "Unorganized territory" shall mean that part of Ontario without county organization.

See the Territorial Division Act, R. S. O. 1914, c. 3.

2.—(*u*) "Urban municipality" shall mean and include a city, a town, and a village. 3 Edw. VII. c. 19, ss 2 and 4. 3 & 4 Geo. V. c. 43, s. 2 (*n-u*).

Application of s. 2.—Section 2 applies to all acts relating to municipal matters by s. 31 of R. S. O. 1914, c. 1 The Interpretation Act.

3.—(1) Where under the provisions of this Act evidence is taken orally before a Special Examiner or a Judge he may direct that the same be taken in shorthand by a stenographic reporter.

3.—(2) The fees of the stenographic reporter, including those for the transcribing of his notes, shall be paid by the party on whose behalf the evidence is taken, and the same shall form part of the costs of the proceedings in which the evidence is taken. 3 & 4 Geo. V. c. 43, s. 3.

Section 173 (2) provides that evidence of corrupt practices in proceedings under Part IV. shall be taken before a Judge or before a special examiner. In R. v. Riel, 1885, 55 L. J. P. C. 28, where a statute directed a magistrate to take or cause to be taken in writing full notes of the evidence and other proceedings, the Judicial Committee held that the provision was complied with where the notes were taken in shorthand. Possibly under s. 173 (2) it might be argued that the Judge or special examiner should take the evidence down himself.

The fees payable to Court reporters are fixed by the Judges of the Supreme Court. The Judicature Act, R. S. O. 1914, c. 56, s. 109 (1d).

4. Where registration in a registry office is prescribed or provided for by this Act it shall mean where *The Land Titles Act* is applicable, registration in the office of the Master or Local Master of Titles of the locality in which the land is situate. 3 & 4 Geo. V. c. 43, s. 4.

The following must be registered:—
Agreements as to maintenance of boundary lines: s. 444;
Orders as to county bridges: s. 449;
Money by-laws: s. 296.

5. A person in the actual occupation of land under an agreement with the owner for the purchase of it shall be deemed to be the owner, and the unpaid purchase money shall be deemed to be an encumbrance on the land. 3 & 4 Geo. V. c. 43, s. 5.

Actual Occupation.—For discussion, see s. 51 (1e). 'Actual occupation' means possession; residence not necessary; control is the point: R. ex rel. Sharpe v. Beck, 1909, 13 O. W. R. 457.

Purchaser not Freeholder.—In re Flatt and Prescott, 1890, 18 A. R. 1, the C. A. held that a purchaser under an agreement for purchase was not a freeholder within the meaning of s. 13 *infra*. Hagarty, C.J.O., said:—

"A man may become, for certain purposes as between himself and his co-contractor, the owner of a property agreed to be conveyed to

him on certain conditions, but the rule does not go further, and as regards the rest of the world he is not a freeholder either legal or equitable."

For the purposes of qualification either as elector or candidate for election, the assessment roll governs. This section is therefore a direction to assessors to enter purchasers in actual occupation in the roll as owners. See Re Dale and Blanchard, 1910, 21 O. L. R. 497; 23 O. L. R. 69.

6. Where power to acquire land is conferred upon a municipal corporation by this or any other Act, unless otherwise expressly provided, it shall include the power to acquire by purchase or otherwise and to enter on and expropriate. 3 & 4 Geo. V. c. 43, s. 6.

In re Boyle and Toronto, 1913, 5 O. W. N. 9, 25 O. W. R. 67. Middleton, J., said:—

"By s. 576 (3) the council of any city or town may pass a by-law 'for acquiring any estate in landed property within or without the city or town, for an industrial farm.' At the time of the passing of this statute (1903), the word 'acquire' had not the wide significance now given to it by the Municipal Act of 1913, s. 6, which provides that the power to acquire shall include the power to acquire by purchase or expropriation . . . ; it only enabled the municipality to acquire by purchase."

See ss. 321 and 331.

7. Except where otherwise expressly provided, this Act shall not affect the provisions of any special Act relating to a particular municipality. 3 Edw. VII. c. 19, s. 1, *part*. 3 & 4 Geo. V. c. 43, s. 7.

This section is merely a statement of the rule of law which would be applied by the Courts. The rule was stated at a very early date in Stradling v. Morgan, 1571, Plowd. 204, as follows:—

"From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance; and those statutes which comprehend all things in the letter they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only; which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances; so that they have ever been guided by the infent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion;"

and has since been uniformly applied and was cited by Lord Hatherley in the House of Lords with approval in Garnett v. Bradley, 1878, 3 App. Cas. 944; 48 L. J. Ex. 186. See also Maxwell, 5th Edn., p. 285.

8. The inhabitants of every county, city, town, village, and township shall be a body corporate for the purposes

of this Act. 3 Edw. VII. c. 19, s. 5, *amended;* 3 & 4 Geo. V. c. 43, s. 8.

Shall be a body corporate.—The Interpretation Act, R. S. O. 1914, c. 1, s. 27, provides:—

"In every Act, unless the contrary intention appears, words making any association or number of persons a corporation or body politic and corporate shall

(*a*) vest in such corporation power to sue and be sued, to contract and be contracted with by their corporate name, to have a common seal, to alter or change the same at their pleasure, to have perpetual succession, to acquire and hold personal property or moveables for the purpose for which the corporation is constituted, and to alienate the same at pleasure;

(*b*) Vest in a majority of the members of the corporation the power to bind the others by their acts; and

(*c*) Exempt individual members of the corporation from personal liability for its debts, obligations or acts if they do not contravene the provisions of the Act incorporating them."

Sections 8, 9 and 10 with the operation of s. 27 of the Interpretation Act confer upon all municipal corporations the essential incidents of corporate capacity which may be enumerated as follows:—

1. A corporate name as the principal means by which identity notwithstanding constantly changing members, can be manifested.

2. A common seal by which the assent of the corporate body can be manifested, notwithstanding internal differences of opinion.

3. Perpetual succession.

4. Power to acquire and hold property for authorized purposes and to alienate the same. As to lands the general powers given by s. 27 are modified and limited. Secs. 6. 322 (1), 398 (32) and (33).

5. Power to sue and be sued.

6. Power to contract and be contracted with.

7. Power of majority to bind others.

8. Exemption of agents from liability when acting in conformity with the fundamental law of the corporation.

9. A governing body, the council which is not the corporation, though it exercises the powers of the corporation.

The fundamental and essential character of the corporate powers enumerated above will more clearly appear from a perusal of the judgment of the Judicial Committee in John Deere v. Wharton, 1915, A. C. 330, 84 L. J. P. C. 64, where an interference by a province with the corporate status of a Dominion company as conferred on it in part by s. 30 of the Interpretation Act, R. S. C. 1906, c. 1, in effect the same as s. 27 *supra*, was checked.

City Engineer's Certificate as to Performance of Control.—A city engineer acting under contract by which all works are to be done to his satisfaction must act impartially, and if his action is influenced by the corporation which employs him his decision will not be final and binding: Hickman v. Roberts, 1913, A. C. 229; Bristol Corporation v. Aird, 1913, A. C. 241; Hill v. South Staffordshire, 1864, 12 L. T. R. 63, 65. The employer, however, has the right to direct the attention of the engineer before he certifies to alleged defects of performance and to ask for care and diligence in the discharge of his duty, but he has no right to dictate or impose his own opinion, and any attempt by the employer to do so, especially if yielded to by the servant, is in the nature of a fraud, or is at all events evidence of fraud which will, if established, relieve the plaintiff from the necessity of obtaining the certificate: Wallace v. Temiskaming, 1906, 37

S. C. R. 696; Price v. Forbes, 1915, 36 O. L. R. 136, 23 D. L. R. 532; Brennan v. Hamilton, 1917, 39 O. L. R. 367.

Can a Municipal Corporation Accept a Gift for Charitable Purposes?—A corporation created by statute has only the capacities conferred by its statute, and it has accordingly been held that railway companies cannot, without express power, acquire property for their undertaking: 1891, 1 Q. B. 440; 60 L. J. Q. B. 438, C.A., and the same rule would apply to municipal corporations. A gift of lands to a municipal corporation, however, may be for public purposes within the scope of the objects for which the corporation was created, and if so, may be accepted, as for example, the gift of land for a public hall. In some American states it has been held that municipal corporations can accept the gift of a church or chapel; see Maysville v. Wood, 1897, 102 Ky. 263, and Phillipps v. Harrow, 93 Iowa 92; 61 N. W. 343.

9. The name of the body corporate shall be "*The Corporation of the County* [*United Counties, City, Town, Village, Township* (as the case may be)], of (naming the municipality)." 3 Edw. VII., c. 19, s. 7, amended. 3 & 4 Geo. V. c. 43, s. 9.

10. The powers of a municipal corporation shall be exercised by its council. 3 Edw. VII. c. 19, s. 10, *amended.* 3 & 4 Geo. V. c. 43, s. 10.

Delegation by Board or Council of Power to Discharge Servants.—In Mackell v. Ottawa Separate School Trustees, 1914, 32 O. L. R. 245, the board delegated to the chairman power to discharge, select and engage teachers, but the resolutions purporting to do this were held to be *ultra vires.*

Council cannot delegate to clerk the duty of ascertaining if the requirements of The Shops Regulation Act as to petitions have been complied with: Re Halladay and Ottawa, 1907, 15 O. L. R. 65.

PART I.

Formation of New Corporations and Alterations of Boundaries of Municipalities.

I. *Powers of County Councils as to erection of villages or towns.*

11. In this Part, "district" shall mean part of a township or parts of two or more townships which it is proposed to erect into a village or town, or part of a township which it is proposed to add to another municipality, or the part so erected or added, as the case may be. *New* 1913. 3 & 4 Geo. V. c. 43, s. 11; 5 Geo. V. c. 34, s. 2.

12. Under and subject to the provisions and conditions hereinafter mentioned, a district may be erected into a village by the council of the county in which it is situate, or if the district comprises parts of two or more counties by the council of the county in which the larger or largest part of the district is situate. 3 Edw. VII., c. 19, s. 11 (1), *part amended.* 3 & 4 Geo. V. c. 43, s. 12.

13.—(1) Where a petition, signed, if the district or part of it lies within one mile of the limits of a city having a population of not less than 100,000, by at least two-thirds and in other cases by at least one-half of the freeholders and resident tenants of the district whose names are entered on the last revised assessment roll of the municipality in which the district is situate, and in the case of tenants who have been resident in the district for at least four months next preceding the presentation of the petition, all of the petitioners being British subjects of the full age of 21 years, and at least one-half of them freeholders, praying for the erection of the district into a village, is presented to the council, the council, if the district has a population exceeding 750, shall, within three

months after the presentation of the petition, pass a by-law erecting the district into a village, to take effect on and from a day to be named in the by-law, declaring the name which it shall bear and its boundaries. 3 & 4 Geo. V. c. 43, s. 13 (1); 5 Geo. V. c. 34, s. 3.

(2) Opposite the name of every petitioner there shall be shown, by reference to the number of the lot, the land owned or occupied by him, and where it is or forms part of a lot laid down on a registered plan, the reference shall be to the number of the lot according to the plan, and the petition shall also shew whether the petitioner is a freeholder or resident tenant. 3 Edw. VII. c. 19, s. 11 (1), *part;* and (2-3), *redrafted.*

(3) A petition shall be deemed to be presented when it is lodged with the clerk, and the sufficiency of the petition shall be determined by him and his certificate shall be conclusive in reference thereto. *New* 1913.

(4) The number of the inhabitants of the district shall be ascertained by a special census taken by direction of the council. 3 Edw. VII. c. 19, s. 11 (1), *part.*

(5) The by-law shall not be passed before the expiration of one month after the presentation of the petition, or unless within two months next preceding the meeting of the council at which it is to be considered notice has been given of the intention of the council to take it into consideration.

(6) The notice shall be published at least once a week for two successive weeks, and shall contain a description of the district sufficiently full to indicate the land which it is intended to embrace in the proposed village. 3 Edw. VII. c. 19, s. 11 (4), *redrafted.*

(7) The council may require that the expenses of taking the census and of publishing the notice be paid by the petitioners, or that a sum sufficient to defray them be deposited with the clerk. *New* 1913.

(8) The clerk shall forthwith, after the passing of it, transmit a certified copy of the by-law to the Provincial Secretary, who shall cause notice of it to be published in the *Ontario Gazette*. *New* 1913.

(9) After the expiration of three months from the publication of the notice of the by-law, and after the final disposition of any application to quash if made within that period, if the application is unsuccessful, the by-law shall not be liable to be quashed on any ground, and the village thereby erected shall be deemed to have been duly erected in accordance with the provisions of this Act. *New* 1913. 3 & 4 Geo. V. c. 43, s. 13.

By-laws Creating New Corporations or Altering Boundaries of Corporations must be Registered.—As to registration of by-laws, etc., erecting a village, town or city, or enlarging, diminishing or altering the boundaries of a municipality, see the Registry Act, R. S. O. 1914, c. 124, s. 70, which, as amended by 8 Geo. V. c. 27, s. 10, is as follows:—

"(1) Every by-law passed since the 29th day of March, 1873, or hereafter passed by a municipal council under the authority of which any street, road or highway is closed or under the authority of which any street, road or highway is opened upon any private property shall, before the same becomes effectual in law, be registered in the registry office of the registry division in which the land is situate; and the same shall be registered without further proof by depositing a copy certified under the hand of the clerk and the seal of the municipality.

"(2) Every by-law passed before the 29th day of March, 1873, and every order and resolution of the Quarter or General Sessions of the Peace passed before that day under the authority of which any street, road, or highway, has been opened upon any private property may at the election of any person or municipality interested and at the cost and charges of such person or municipality be registered by depositing a certified copy of the by-law under the hand of the clerk and the seal of the municipality, or a certified copy of the order or resolution of the Quarter or General Sessions under the hand and seal of the Clerk of the Peace.

"(3) Every by-law, proclamation, Order-in-Council, Order of the Ontario Railway and Municipal Board and other instrument of a public or quasi public nature whereby a village, town or city becomes incorporated, or the boundaries of any municipality are enlarged, diminished or altered, shall be registered in the proper registry office by the municipality passing or procuring the same, and a copy of a by-law, certified under the seal of the corporation and by the head and the clerk of the municipality, and a copy of the proclamation, Order-in-Council, Order of the Ontario Railway and Municipal Board or other instrument certified by the Clerk of the Executive Council or the Secretary of the Board, as the case may be, shall be sufficient proof for the purpose of registration.

"(4) A money by-law of a municipal corporation shall be authenticated for registration by the production of a duplicate original or a copy of the by-law certified under the seal of the corporation and the signature of the head thereof, or of the person presiding at the meeting at which the by-law has been passed and that of the clerk of the corporation.

"(5) The by-law or copy so certified shall be open to public inspection and examination at all reasonable times and hours upon payment of the proper fees.

14.—(1) Subject to sub-section 2, the area of a town or village hereafter erected shall not exceed five hundred acres for the first one thousand or less, with two hundred acres or fraction thereof added for each additional one thousand or fraction thereof in excess of one thousand of its population. 3 Edw. VII. c. 19, s. 12 (1). *Amended.* 3 & 4 Geo. V. c. 43, s. 14 (1); 4 Geo V. c. 33, s. 1.

(2) In unorganized territory, the area of a town shall not exceed 750 acres for the first 500 of its population, with 300 acres or fraction thereof added for each additional 500 of its population or fraction thereof. 2 Edw. VII. c. 30, s. 1, *part amended.* 4 Geo. V. c. 33, s. 2.

(3) An addition shall not be made to any town or village which will have the effect of increasing its area beyond the prescribed area.

(4) Land occupied by highways, parks, and public squares, and land covered by water shall be excluded in determining the area. 3 Edw. VII. c. 19, s. 12 (3-4), *part amended.* 3 & 4 Geo. V. c. 43, s. 14 (1-4); 4 Geo. V. c. 33, s. 3.

15.—(1) Where a village comprises parts of two or more counties, it shall be annexed to, and form part of, that one of them which shall be agreed on by the councils, or which, failing an agreement within six months after the presentation of the petition, the Lieutenant-Governor in Council may by proclamation direct.

(2) If an agreement is come to, the clerk of each of the councils shall forthwith notify the Provincial Secretary of it, and if an agreement is not come to within the period mentioned in s.-s. 1, shall forthwith, after the expiration of that period, notify the Provincial Secretary of the fact. 3 Edw. VII. c. 19, s. 14, *amended.*

(3) Where the councils agree as to the county to which the village shall be annexed, the Provincial Secretary shall forthwith, after notice of the agreement, cause to be published in the *Ontario Gazette* notice of the

county to which the village has been annexed. *New.* 3 & 4 Geo. V. c. 43, s. 15 (1-3).

16. *A police village* may be erected into a village in the manner and subject to the conditions mentioned in s. 13. 9 Edw. VII. c. 73, s. 1, *first part.* 3 & 4 Geo. V. c. 43, s. 16.

Preliminary.—The provisions of ss. 11 to 16 enable the inhabitants of a district which meets the requirements laid down in the Act, if a sufficient number of them desire it, to become incorporated into a municipal corporation. The machinery provided to effect the incorporation is to be operated by a county council, but the council has no discretion to refuse to act if all the requirements of the Act are complied with. This procedure is to be contrasted with that prescribed by ss. 17 to 23, 30 and 31, where the Railway and Municipal Board has jurisdiction to act, and by ss. 24 and 27, where a Judge of the District Court has the power, and from s, 26, where the Lieutenant-Governor in Council has jurisdiction.

Freeholders.—In re Flatt and Prescott, 1890, 18 A. R. 1, the C. A. quashed a by-law incorporating a village because the petition was not signed by the necessary number of freeholders, holding that while the term "freeholder" in the section meant an equitable freeholder, persons who were in possession of lands under agreements to purchase were not freeholders within the meaning of the section. In that case the Court considered the sufficiency of the petition.

Sufficiency of the Petition.—The Council and the Court on a motion to quash must now, by reason of s. 13 (3), accept the clerk's certificate as to the sufficiency of the petition. While the certificate exists it must be acted upon. Re Williams and Brampton, 1908, 17 O. L. R. 408, was decided on a statute which contained no corresponding provision for determining the sufficiency of a petition and in that case the Court investigated the matter. If the clerk certifies that a petition is insufficient, there is nothing in the statute to prevent a new petition from being lodged with him as soon as its execution can be procured. The numerous questions as to the form and execution of the petitions which have been discussed upon applications to quash local option by-laws are merely of academic interest in connection with petitions under s. 13.

In re Michie and Toronto, 1862, 11 C. P. 379, Draper, C.J., refused to entertain an objection put forward against a by-law on motion to quash that the necessary originating petition had not been signed as required, saying:—

> "I think the fourth objection that the petition on which the by-law is based, was not signed by three-fourths in number and one-half in value of the owners of the real property to be benefited, cannot be entertained by us. The Municipal Institutions Act, s. 300, expressly provides that the number of the owners and the value of the real property is to be ascertained and 'finally determined' in the manner and by the means provided by by-law. There is a by-law for that purpose, under which the clerk of the city council has acted. It is not objected that he acted corruptly and fraudulently, and though, as I gather from the unanswered statements, in the relator's affidavits, the city clerk has fallen into error, an error easily accounted for, as his conclusions were drawn from the assessment roll only, yet I think we cannot on that account annul the whole proceeding.
>
> "The 191st section of the Act plainly contemplates that this objection should be heard and disposed of by the council of the city before the by-law is passed.
>
> "I am not to be understood as determining that he should have confined his enquiry to the assessment roll, when he was required to ascertain and finally determine the matter of number and value, but I

think that having acted as we must assume, *bona fide*, the legislature intended his determination to be final, as the foundation for the by-law authorizing the improvement, and imposing the special rate."

Withdrawals by Petitioners.—In cases where a petition amounts to a *quasi* contract, names of petitioners cannot be withdrawn. Gibson v. N. Easthope, 1894, 21 A. R. 504, affirmed 24 S. C. R. 707, where a petitioner for drainage works vainly attempted to withdraw. In Halladay v. Ottawa, 1907, 14 O. L. R. 458, 15 O. L. R. 65, withdrawals from a petition for an early closing by-law, were allowed, and probably withdrawals would be allowed from a petition under s. 13 before it was acted on. See also In re Canada Temperance Act and the County of Kent, 1884, Cassels' Digest, p. 106, The cases are reviewed in Re Keeling and Brant, 1911, 25 O. L. R. 181.

See Re Misener v. Wainfleet, 1881, 46 U. C. R. 457; In re Robertson and N. Easthope, 1888, 15 O. R. 423, reversed, 1889, 16 A. R. 214; Williams v. Citizens, 1883, 40 Ark. 290; State v. Gerhardt, 1896, 145 Ind. 439.

Compelling Council to Act on Petition.—If a council refuses to act upon a sufficient petition when the district has the necessary population, it can be compelled by mandamus. Re Williams and Brampton, 1908, 17 O. L. R. at 408; R. ex rel, Sovereign v. Edwards, 1912, 22 M. R. 790; Carr v. North Bay, 1913, 28 O. L. R. 623.

Restraining Council from Acting without Jurisdiction.—If the council assumes to act when the conditions precedent to action are not fulfilled, it can be restrained by injunction. Brock v. Robson, 1914, 25 M. R. 64, but see Stephenson v. Cowan, 1914, 25 M. R. 67.

Quashing By-laws Erecting Villages.—In Almas v. Haldimand (unreported, see 10 O. R. p. 45), Rose, J., quashed a by-law incorporating a village because the petition for incorporation was not sufficiently signed, and in Re Fenton v. Simcoe, 1885, 10 O. R. 27, Wilson, C.J., quashed a by-law incorporating a village because the census was taken before the by-law authorizing it to be taken was posted and was in fact based on falsehood and fraud. In R. ex rel. Sullivan v. Church, 1914, 26 O. W. R. 375, 6 O. W. N. 116, 365, where the right to a deputy reeve under s. 51 was in question, Britton, J., said:—

> "Many sections of the Municipal Act refer to population. Population must be determined by the census or otherwise according to the interpretation clause. That may not be correct, but it must be accepted as correct for the specific purpose."

In Arthur v. Arthur, 1891, 21 O. R. 60, an attempt to incorporate a separate school, Boyd, C., said:—

> "The creation of corporations is a prerogative act, and when the power to make is delegated to private persons to be exercised in a certain way, any deviation therefrom is not an exercise of the power delegated; in such a case the form is of the substance and blunder in form means invalidity and accordingly, as the proceedings had been initiated by less than five qualified residents as required, he held that there had been a fundamental error which vitiated all the proceedings."

Application to quash may be made by the township affected: s. 285.

Shall Pass a By-law Erecting the District into a Village and declaring . . . its Boundaries.—Can the council when put in motion erect a part only of the district mentioned in the petition into a village or can it include in the new village territory not mentioned in the petition? It would appear that the prayer of the petition must be granted if all conditions precedent have been complied with, and that only the district mentioned in the petition can be erected into a village. The provision that the by-law is to declare the boundaries of the village simply is a direction as to what the by-law is to contain. In re Southampton v. Bruce, 1904, 8 O. L. R. 106, 664, was decided on a very different section, namely, s. 18 of 3 Edw. VII., c. 19.

On the formation of new school districts, a council must deal only with the lands mentioned in the petition. In re Sydenham School Section, 1903, 6 O. L. R. 417, 7 O. L. R. 49. Exact statement of boundaries is essential. Re Sydenham, *supra*.

Notice of Intention to Pass.—Publication must be in accordance with s. 2 (*p*), which means a seven-day period, not a calendar week.

Failure to publish as directed would probably be fatal to the by-law on a motion to quash. See Quashing By-laws, *infra*, p. 36.

The Village shall be Deemed to have been Duly Erected.—Not only can no application to quash be made after the time limited by s.-s. (9), but (s. 13) in any action in which the legality of the corporation may be called in question, the village shall be deemed to have been duly erected. This is to avoid the serious consequences which might follow if an attack were made after the village had been created and become a distinct body from the remainder of the township with representation in the county council. The area would not be taxed by the township, and if the village corporation were dissolved, much confusion would result as pointed out by Wilson, C.J., in Re Fenton and Simcoe, 1885, 10 O. R. 27. S.-s. (9) would undoubtedly cure mere irregularities in connection with the proceedings leading up to the erection of the village. But would it cure "a fundamental error" which vitiates all proceedings based on the assumption that a valid corporation had been called into existence, such as was considered in Arthur v. Arthur, *supra?* On the question of statutory conditions precedent to jurisdiction, see McKillop v. Logan, 1899, 29 S. C. R. 702 at 705, a drainage case. See also Re Johnston and Tilbury E., 1911, 25 O. L. R. 242 C. A.; and Otto v. Roger, 1917, 40 O. L. R. 381, App. Div.

Similar validating statutory provisions will be found in s. 296 (5) as to money by-laws after registration, and were considered by the Court of Appeal for Manitoba, in Molison v. Woodlands, 1915, 25 M. R. 634, where a certain certificate was made conclusive evidence that the corporation had been legally formed. See also Canadian Agency v. Tanner, 1913, 6 Sask. at 161, and Wenlock v. River Dee, 1888, 38 Ch. D. 534, 57 L. J. Ch. 946.

See also s. 20 (7) for a similar provision.

Police Villages.—See Part XXIII. A police village is not a corporation. Smith v. Bertie, 1913, 28 O. L. R. 330.

Area of Town or Village.—Section 14 is a positive declaration forbidding the erection of any town or village of more than the prescribed area. If the section is not complied with, it will be a ground for quashing the by-law.

II. *Powers of the Municipal Board as to status and boundaries.*

Orders of the Ontario Railway and Municipal Board should be upheld.—In Bell v. Burlington, 1915, 34 O. L. R. 410, 619, where an order of the Board was attacked on the ground that it contained a misrecital, the order was upheld, Boyd, C., saying:

> "Having regard to the statutory safeguards which are thrown around the acts of the Board and to the fact that the Board exercises the administrative authority formerly delegated to the Lieutenant-Governor, every assumption should be made in favour of the validity of such orders—particularly when the Legislature has provided an easy means of relief by summary application to the Lieutenant-Governor: R. S. O. 1914, ch. 186, sec. 47; and also on questions of jurisdiction or of law by direct appeal to a Divisional Appellate Court; *ib.* sec. 48."

But now see section 19 (2) as amended after this decision.

17. The Municipal Board may, upon the application of the council of a village, annex a district to it where

from the proximity of the streets or buildings in the district or the probable future exigencies of the village, the Board deems it expedient. 3 Edw. VII. c. 19, s. 16, *amended.* 3 & 4 Geo. V. c. 43, s. 17.

18.—(1) The Municipal Board may annex land in unorganized territory to an adjacent incorporated township therein, and may also, on the application of two or more adjacent townships in such territory form them, with or without additional territory, into one township municipality, bearing such name as the Board may direct. R. S. O. 1897, c. 225, s. 64 (1), *amended.*

(2) The Board, on the application of the council of a city or town in unorganized territory, may annex to the city or town the whole or any part of an adjoining unorganized township, on such terms and conditions as may be determined by the Board. 2 Geo. V. c. 17, s. 35 (2). 3 & 4 Geo. V. c. 43, s. 18 (1-2).

19.—(1) Subject to s.-s. 2 of s. 14 the Municipal Board may, upon the application of not less than 75 male inhabitants of the locality, each of the full age of twenty-one years, incorporate as a town the inhabitants of a locality having a population of at least 500, and situate in one or more of the provisional judicial districts, whether or not it lies within an existing township municipality.

(2) The order of the Board shall declare the name which the town shall bear, and its boundaries and the date when the incorporation shall take effect, and shall also provide for the apportionment, collection and payment over of the taxes for the current year. 2 Edw. VII. c. 30, ss. 1 and 2, *part.* 3 & 4 Geo. V. c. 43, s. 19 (1-2). 5 Geo. V. c. 34, s. 4.

See Bell v. Burlington, *supra.*

20.—(1) The Board may erect a town having a population of not less than 15,000 into a city, and a village having a population of not less than 2,000 into a town,

and declare the name which it is to bear. 3 Edw. VII., c. 19, s. 21, *first part.*

(2) Where, from the proximity of streets or buildings or the probable future exigencies of the newly erected city or town, the Board deems it desirable that part of one or more adjacent townships should be included in it, the Board may, subject to the provisions of s.-s. 6, detach such part from the township or townships and annex it to the newly erected city or town. 3 Edw. VII. c. 19, s. 22, *amended.*

(3) The newly erected city or town shall be divided into wards bearing such numbers or names as the Board may direct.

(4) The number of wards in the town shall not be less than three, and each of the wards in the city or town shall have a population of not less than five hundred. 3 Edw. VII. c. 19, s. 23, *amended.*

(5) Notice of the application for the erection of the town into a city or of a village into a town shall be published at least once a week for three months.

(6) Where it is proposed that part of one or more adjacent townships shall be embraced in the newly erected city or town, the notice shall so state and shall designate the part proposed to be embraced therein. 3 Edw. VII. c. 19, s. 21, *par. 1 amended.*

(7) The order shall be conclusive evidence that all conditions precedent to the making of it have been complied with, and that the city or town has been duly erected in accordance with the provisions of this Act. *New.* 3 & 4 Geo. V. c. 43, s. 20 (1-7).

21.—(1) Where the council of a city or town by resolution declares that it is expedient that part of an adjacent township should be annexed to the city or town, and the majority of the municipal electors in such part petition the Board to add the same to such city or town, and after due notice of such resolution and petition has

been given by the council of such city or town to the council of such adjacent township, and also, where the part is proposed to be added to a city or to a separated town to the council of the county in which the township is situate, the Board may, by order to take effect upon a day to be named therein, annex such part to the city or town upon such terms and conditions as to the adjustment of assets and liabilities, taxation, assessment, improvements, or otherwise as may have been agreed upon, or as shall be determined by the Board. Provided, however, that should the terms and conditions agreed upon not meet with the approval of the Board.the petitioners or the city or town may withdraw from the proposed annexation. 3-4 Geo. V. c. 192, s. 21 (1); 8 Geo. V. c. 32, s. (1).

(2) The order may, before it takes effect, be amended in any respect by a further order, and may at any time when it does not correctly set forth the terms and conditions as to the adjustment of assets and liabilities, taxation, assessment, improvements or otherwise agreed upon, be amended to conform with the agreement. 6 Edw. VII. c. 34, s. 1; 8 Edw. VII. c. 48, s. 1, *amended.*

(3) The Board may direct that a vote be taken for determining whether or not the majority of the municipal electors of the part proposed to be annexed are in favour of its being annexed, and may fix the time and place for the taking of the vote, name the returning officer, and make such other provisions as may be deemed necessary. *New.* 3 & 4 Geo. V. c. 43, s. 21 (2-3).

22. Where territory constituting or forming part of a local municipality becomes part of a local municipality in another county, it shall thereafter form part of that county except for the purpose of representation in the Assembly. 3 Edw. VII. c. 19, s. 25, *amended.* 3 & 4 Geo. V. c. 43, s. 22.

23.—(1) The Board may annex a town or a village to an adjacent urban municipality, where:

(*a*) The councils of the town or village and of the adjacent urban municipality by by-law assent to the annexation; and

(*b*) The assent of the municipal electors of the town or village is given to the by-law of the council thereof.

(2) Subject to the provisions of s.-s. 5, the by-law may provide for the annexation unconditionally, or on such terms as may be deemed expedient.

(3) If the urban municipality to which the town or village is annexed has the requisite population, it may be erected into a city or town bearing such name as the Board may direct.

(4) Such redivision into wards of the city or town as the annexation renders necessary shall also be made.

(5) If a petition, signed by at least 150 electors of a town or village, praying that it may be annexed to an adjacent urban municipality, either unconditionally or on such terms as may be stated in the petition, is presented to the council of the town or village the council shall within four weeks after the presentation of the petition submit to the electors of the town or village for their assent thereto, a by-law providing for its annexation on the terms mentioned in the petition. 3 Edw. VII. c. 19, s. 26, *redrafted*. 3 & 4 Geo. V. c. 43, s. 23.

(*Note.—Section 26a struck out as contradictory to the Representation Act, 8 Edw. VII. c. 2, s. 2, cl.* (*c*).)

(*Note.—SS. 27 and 28, providing for the separation of a town from a county, and the reunion of a separated town with a county, struck out as being more properly a subject of special legislation, as in the case of a separation of a union of counties. Under the present law, if the county does not approve of the separation the town is not to be allowed any interest in the property of the county, and in the case of a proposed reunion the by-law of the town must be confirmed by a county by-law*

before the reunion can take place, even though an arbitration has been had as to the adjustment of assets and liabilities.)

Changes with Respect to Status and Boundaries of Municipalities.—By ss. 17 to 23 the Ontario Railway and Municipal Board is given jurisdiction upon a proper application to effect changes in the status of existing municipalities by erecting a village into a town or a town into a city, with full power to constitute wards, and the Board is also given jurisdiction by order upon application to annex districts or municipalities to existing municipalities. While the Municipal Act provides for application being made to the Board, the Board nevertheless has jurisdiction to act on its own motion or upon the request of the Lieutenant-Governor in Council to enquire, hear and determine any matter or thing which it may enquire into upon application or complaint.

While s. 20, s.-s. 7, *supra*, provides that an order of the Board made under s. 20 shall be conclusive evidence that the town or city has been duly erected, it should be noted that all orders of the Board are, by s. 45, ss. 3, of the *Ontario Railway and Municipal Board Act*, binding and conclusive with respect to any question of fact, and by s. 48 (8) every order of the Board is final, except as hereinafter mentioned, and no order of the Board can be questioned, reviewed, restrained or removed by prohibition, injunction, certiorari or any other process or proceeding in any Court.

The orders of the Board are subject to an appeal upon a question of jurisdiction or a question of law under s. 48 of the *Ontario Railway and Municipal Board Act*, and under s. 47 the Lieutenant-Governor in Council may, upon petition, vary or rescind any order of the Board.

It will therefore appear that when the Board has made an order under any of the foregoing sections, the order must be assumed to be good for all purposes unless set aside on appeal or on petition to the Lieutenant-Governor in Council.

Annexation of Part of Township to Village. Postponement of Time for Taking Effect. Erection of Village Including Annexed Portion into Town before Time for Taking Effect. Assessment of Lands in Annexed Territory. The Ontario Municipal Board, by an order dated 10th June, 1914, annexed part of a township to a village, and directed that the annexation should take effect from and after the 31st of December, 1914. On the 9th of December, 1914, the Board made a second order erecting a village into a town, subsequently by the advice of the Board a supplementary assessment of the newly annexed territory was made in 1915, and on the basis of this assessment taxes were levied in 1915, The Appellant Division held that the assessment was a nullity, and the municipality was not entitled to demand taxes based on it. The only assessment that could legally be made in 1915, could not be made the basis of a tax levy in 1915. Bell v. Burlington, 1915, 34 O. L. R. 410, 619. But note that sec. 19 (2) has been amended since this decision.

Townships.

24.—(1) The inhabitants of a township in unorganised territory having a population of not less than 100, and the inhabitants of a locality not surveyed into townships having an area of not more than 20,000 acres and a population of not less than 100, may become incorporated as a township municipality. R. S. O. 1897, c. 225, s. 1 (1)

(2) Upon the receipt of a petition praying for incorporation, signed by not less than 30 of the resident house-

holders of the township or locality, and defining the limits of the proposed municipality, and a deposit being made of a sum sufficient to defray the expenses of the meeting to be held as hereinafter mentioned, a Judge of the District Court of the Provisional Judicial District in which the township or locality is situate may call a meeting of the inhabitants of it to consider the expediency of becoming incorporated and to choose a reeve and four councillors for the proposed municipality, and he shall name a fit person to be the chairman of the meeting, and make such provisions as he may deem proper for the conduct of the meeting and the manner of choosing the reeve and councillors; and notice of the meeting shall be given in such manner as the Judge shall direct. R. S. O. 1897, c. 225, ss. 2, 3, 4, *part.*

(3) Every resident male householder of the full age of 21 years and a British subject shall be entitled to vote or to be elected as reeve or councillor at such meeting. R. S. O. 1897, c. 225, s. 6.

(4) The chairman shall preside at the meeting and shall record the votes given, and in the case of an equality of votes between two candidates for the office of reeve or councillor he shall give the casting vote, and he shall forthwith, after the close of the meeting, make a report in writing of the result of it to the Judge. R. S. O. 1897, c. 225, s. 4. *part.*

(5) The report shall contain a statement of the votes given for and against the proposed incorporation, and for and against each person proposed for reeve or councillor, and shall be verified by the oath of the chairman. *New. See* R. S. O. 1897, c. 225, s. 4.

(6) If it appears to the Judge from the report that a majority of the inhabitants present at the meeting voted in favour of incorporation, and that those so voting number or include not less than 30 resident householders and no objection to the report or to the manner in which the meeting was conducted or the reeve and councillors were chosen has been filed with the Judge within 10 days after

the receipt by him of the report, the Judge shall declare in writing, Form 1, the inhabitants of the township or locality to be incorporated in accordance with the prayer of the petition and state the persons who were elected as reeve and councillors and fix the time and place for the first meeting of the council, and shall forthwith transmit to the Minister of Lands, Forests and Mines, and to the Provincial Secretary, a certified copy of the declaration, and the Provincial Secretary shall thereupon cause notice of it to be published in the *Ontario Gazette*. *New*. *See* R. S. O. 1897, c. 225, s. 5, *last part*, and s. 15.

FORM 1.

DECLARATION OF INCORPORATION.

TOWNSHIPS IN UNORGANIZED TERRITORY.

I, Judge of the District Court of the Provisional Judicial District of hereby certify:

1. That the inhabitants of the township of in the said district (or of that part of the said district described as follows [*describing it*]), or of the townships of and in the said district (*as the case may be*), are incorporated as a township municipality (*or* as a union of townships municipality, *as the case may be*), by the name of the Corporation of the township of (*or* of the united townships of , *as the case may be*).

2. That was elected reeve and were elected councillors for the municipality.

3. The first meeting of the council shall be held on the day of at .

Dated at this day of , 19 .

(7) If such an objection is filed within the prescribed time the Judge shall hear and determine the matter complained of, and if he finds that the complaint is well founded shall call a new meeting and perform the other duties assigned to him by s.-ss. 2 and 6. *New*.

(8) The incorporation shall be deemed to be complete when the Judge has signed the declaration, but shall not take effect until the 31st day of December following. *New*. 3 and 4 Geo. V. c. 43, s. 24.

Union of Townships.

25. A union of townships shall consist of two or more townships united for municipal purposes and having in

common, as if one township, all offices and institutions established by law pertaining to township municipalities. *New.* 3 & 4 Geo. V. c. 43, s. 25.

26. The Lieutenant-Governor in Council may, by proclamation, annex a township, or two or more townships lying adjacent to one another laid out by the Crown in unorganized territory, to any adjacent county, and may erect the same with another township of such county into a union of townships. 3 Edw. VII. c. 19, s. 29, *amended.* 3 & 4 Geo. V. c. 43, s. 26.

27.—(1) The inhabitants of two or more townships in unorganized territory, adjacent to one another, and having in the aggregate a population of not less than 100, may become incorporated as a union of townships.

(2) The proceedings for and incidental to the incorporation and the election of the members of the first council shall be the same as provided by s. 24. R. S. O. 1897, c. 225, s. 1 (2), *part amended* 3 & 4 Geo. V. c. 43, s. 27, (1-2).

28. If two-thirds of the resident freeholders and tenants of a junior township whose names are entered on the last revised assessment roll petition the council of the county to be separated from the union to which it belongs, and to be attached to another adjoining township in the county, and the council considers that the interest and convenience of the inhabitants of the township would be promoted thereby, such council may separate it from the union, and may erect it with such adjoining township into a union of townships. 3 Edw. VII. c. 19, s. 31 (2), *amended* 3 & 4 Geo. V. c. 43, s. 28.

29. The order of seniority of townships forming a union of townships shall be determined by the number of freeholders and tenants thereof whose names are entered on the last revised assessment roll, and the township having the largest number of them shall be the senior township, and the other or others the junior township or town-

ships, and where there is no such assessment roll for all or any one or more of the townships their seniority shall be determined by the functionary or body by which the union is formed. 3 Edw. VII. c. 19, s. 35, *amended* 3 & 4 Geo. V. c. 43, s. 29.

Separation of Junior Township from Union.

30.—(1) When a junior township of a union of townships has 100 resident freeholders and tenants whose names are entered on the last revised assessment roll, the county council, if the union is not in unorganized territory may separate the township from the union. 3 Edw. VII. c. 19, s. 30, *amended.*

(2) If the junior township is in unorganized territory and has a population of not less than 100, the Municipal Board, upon the application of not less than 15 of the assessed freeholders and tenants therein, may separate the township from the union. R. S. O. 1897, c. 225, s. 1 (2), *part amended.*

(3) If a junior township has 50, but less than 100 resident freeholders and tenants whose names are entered on the last revised assessment roll, and two-thirds of such resident freeholders and tenants petition the council of the county to separate the township from the union and the council considers the township to be so situated with reference to natural obstructions, that its inhabitants cannot conveniently remain united with the inhabitants of the other township or townships, the council may separate it from the union. 3 Edw. VII. c. 19, s. 31 (1), *amended.*

(4) Where a union of townships consisting of more than two townships is dissolved by the withdrawal of a junior township, the remaining townships shall constitute the union which shall be continued under its former name, omitting that of the junior township.

(5) Where a union of townships consisting of two townships only is dissolved, the inhabitants of each of the

townships shall become a separate corporation bearing the name of the township. *New.* 3 & 4 Geo. V. c. 43, s. 30 (1-5).

New Townships.—The Territorial Division Act, R. S. O. 1914, c. 3, s. 11, provides as follows:—

"11. Subject to the provisions of the Municipal Act the Lieutenant-Governor in Council may, by proclamation, constitute, from a day named therein, townships and unions of townships in those parts of Ontario in which townships or unions thereof have not been constituted, and may fix the metes and boundaries thereof."

Changing Names of Townships.—The Territorial Division Act, *supra*, s. 12, provides as follows:—

"(1) The Lieutenant-Governor in Council may change the name of any township where no letters patent have been issued granting lands therein.

"(2) The Order in Council shall forthwith be published in the Ontario Gazette."

Annexation of Gores, Islands, etc., to Townships.—The Territorial Division Act, ss. 14 and 15, provides as follows:—

"14. The Lieutenant-Governor in Council may, by proclamation, annex any gore or tract of land not forming part of any township to any adjacent township or parts thereof to adjacent townships.

"15. Where, in the application of the provisions of this Act, there is doubt as to the township in which any island or other tract of land or land covered with water lies, the Lieutenant-Governor in Council may, by proclamation, declare to what township the same belongs."

Status of Certain Officers on Alteration of Boundaries.—The Territorial Division Act, s. 13, provides as follows:—

"13. Where a part of a county or of a provisional judicial district has been or shall be formed into or annexed to another district, the coroners, justices of the peace and commissioners for taking affidavits, residing in the territory so dealt with, shall be the coroners, justices and commissioners for the territorial district into which the territory in which they reside is formed and to which it has been attached, by the same tenure of office, and without their again taking any oath."

Date when new Incorporation to take Effect.

31.—(1) Where a corporation is constituted under this Act the incorporation shall take effect on the 31st day of December next after the proclamation, Order of the Municipal Board, or by-law by which it is effected, or on such other day as the functionary or body by which such incorporation is effected may fix, and the functionary or body by which the new corporation is constituted may, and where necessary shall, fix the dates and the place or places for holding the first nomination meeting and election, appoint a returning officer and otherwise provide for the holding of the election according to law. 8 Geo. V. c. 32, s. 2.

(2) The returning officer shall perform all the duties in connection with the election which in other cases are to be performed by the clerk of a local municipality, and shall act as clerk of the new municipality until a clerk is appointed and has taken the oath of office. *New.* 3-4 Geo. V. c. 43, s. 31 (2).

Matters Consequent upon the Formation of New Corporations.

32. The erection of a district into a village, or town, of a village into a town, or of a town into a city, or the separation of a township from a union of townships shall not affect the by-laws then in force in the district or municipality but the same shall remain in force until repealed by the council of the newly erected municipality, but nothing herein shall authorize the amendment or repeal of a by-law which the council by which it was passed could not lawfully amend or repeal. 3-4 Geo. V. c. 43, s. 32; 5 Geo. V. c. 34, s. 6.

Meaning of "In Force," s. 32.—In Re Denison and Wright. 1909, 19 O. L. R. 7, a local option by-law, was finally passed by a township on January 25th, containing a provision that it should come into operation and be of full force and effect on the 1st day of May following. After 25th January and before 1st May following, a district, part of the township, was erected into a village, and the question was, was the by-law in force in the village? Meredith, C.J., said:—

"In my opinion, the by-law in question had the force of law from the time of its final passing, although its prohibition did not become operative until a later day, and it certainly was an existing by-law.

"The words 'in force' are used in various parts of the statute law of this province, and not always, as I think, in the same sense, and the meaning to be attached to them must be gathered in each case by a consideration of the subject matter to which they relate. . . . Section 56 (now s. 32), which is in *pari materia* with s. 55 (now s. 33), deals with the case of an addition to the limits of a municipality, and its provision is that by-laws of the municipality are to extend to the additional limits, and that the by-laws of the municipality from which the addition has been detached are to 'cease to apply to the addition, except only by by-laws relating to roads and streets,' and that 'these shall remain in force until repealed by the council of the municipality to which the addition has been made.'

"It is plain that the words 'remain in force' are used as the equivalent of 'continue to apply.'

"The expression 'the by-laws in force therein' in s. 55 (now s. 33), means, I think, the existing by-laws of the municipality, and has the same effect as if the section had provided, as is done in s. 56 (now s. 32), that the by-laws of the municipality of which the new municipality formed part, or of which it was comprised, should continue in force or continue to apply to the new municipality until repealed or altered by the council of the new corporation.

"It is most improbable that the Legislature intended that an existing by-law was not to affect the new municipality if the time

for its coming into operation had not arrived when the new municipality came into existence."

Quashing By-law Passed before Erection of Village.—In Re Vivian and Whitewater, 1902, 14 M. R. 153, a local option by-law passed by a municipality from which a district had subsequently been detached, was quashed without notice being given to the municipality of which the district was a part. It was held that the by-law still continued in force in the district and the order was so limited.

33. Where a district or a municipality is annexed to a municipality, its by-laws shall extend to such district or annexed municipality, and the by-laws in force therein shall cease to apply to it, except those relating to highways, which shall remain in force until repealed by the council of the municipality to which the district or municipality is annexed, and except by-laws conferring rights, privileges, franchises, immunities or exemptions which could not have been lawfully repealed by the council which passed them. 3 Edw. VII. c. 19, s. 56, *amended* 3-4 Geo. V. c. 43, s. 33.

See Windsor v. Southern Rly., 1893, 20 A. R. 388, decided under then sec. 54, which provided that all by-laws should cease to apply except only by-laws relating to roads and streets.

By-laws which can not Lawfully be Repealed: s. 33.—In Alexander v. Huntsville, 1894, 24 O. R. 665, Rose, J., quashed a village by-law which was passed to repeal a township by-law in force in the village, passed before the village was erected, saying:—

"The statute gave power to exempt for ten years, but once that power had been exercised, it does not seem to me there was any power to repeal the by-law so as to destroy rights granted thereunder: Wright v. Incorporated Synod, etc., of Huron, 29 Gr. 348, 11 S. C. R. 95; Harrison's Mun. Manual, 5th ed., p. 211, note *ee*.

"There is, I think, power in the Court to entertain this motion and to make the order, if there was no excuse for passing the repealing by-law; and I do not stay to determine whether such power be purely statutory or at common law."

See also In re Cunningham v. Almonte, 1871, 21 C. P. 459, and Cornwallis v. C. P. R., 1891, 19 S. C. R. 702.

Assets, Debts and Liabilities.

34. Where a junior township is separated from a union of townships the senior or remaining township or townships shall be liable to the creditors of the union for all the debts and obligations of the union. 3-4 Geo. V. c. 43, s. 34.

(*Note.—Section 34 is a change in the law so as to conform with the principles applicable to cases of annexation of territory or formation of new corporations.*)

35. Where a junior township is separated from a union of townships all taxes imposed by the council of the union for the year in which the separation takes place shall be collected and paid over to the senior or remaining township or townships. 3 Edw. VII. c. 19, s. 60, *first part,* 3 Geo. V. c. 43, s. 35.

36. After a junior township is separated from a union of townships the property of the union shall be disposed of as follows:—

(*a*) The real estate situate in the junior township shall become the property of that township:

(*b*) The real estate situate in the remaining township or townships shall be the property of the remaining township or townships;

(*c*) The two corporations shall be jointly interested in the other assets of the union, and the same shall be retained by the one, or shall be divided between both, or shall be otherwise disposed of, as they may agree;

(*d*) The one shall pay or allow to the other, in respect of the disposition of the real and personal estate of the union, and in respect of its debts, such sum as may be just;

(*e*) If the councils of the two corporations do not, within three months after the first meeting of the council of the junior township, agree as to the disposition of the personal estate, or as to the sum to be paid by the one to the other, or as to the time of payment thereof, the matters in dispute shall be determined by arbitration;

(*f*) The amount so agreed upon or determined shall bear interest from the day on which the union was dissolved; and the same shall be provided for by the corporation which is to pay it, as in the case of other debts. 3 Edw. VII. c. 19, s. 32, 3-4 Geo. V. c. 43, s. 36.

37. Where one local municipality is annexed to another the corporation of the latter shall become and be liable to the creditors of the corporation of the former for its debts and obligations and all the property and assets of the corporation of the annexed municipality shall be vested in the corporation of the municipality in which it is annexed, and that corporation shall have the *same rights and* powers as respects the collection and recovery of all unpaid taxes imposed by the council of the annexed municipality including those for the year in which the annexation takes effect, as if such taxes had been imposed by the council of the municipality to which it is annexed. 3-4 Geo. V. c. 43, s. 37.

Debts.—See Woodstock v. Oxford, 1910, 22 O. L. R. 151, 44 S. C. R. 603, where it is said "debts" means net debts. See below.

Debts.—See the use of this term in Part XII. (Money By-laws), also in Part XIII. (Yearly Rates and Estimates), and Part XIV. (Respecting Finances): a debt means a liquidated sum owed whether due and payable or not.

An obligation includes a debt but also includes other duties in respect of which a municipality may become liable to creditors: *e.g.*, an obligation to continue or abandon expropriation or arbitration proceedings.

Claims for unliquidated damages are not debts or obligations before judgment. Jones v. Thompson, 1858, 27 L. J. Q. B. 234, and In re Newman, 1876, 3 Ch. D. 494 C. A., but would be considered an obligation under s. 34.

Surplus Fund Accumulated by Keeping Within Actual Estimates.—In Woodstock v. Oxford, 1910, 22 O. L. R. 151, C. A., affirmed, 44 S. C. R. 603, the city of Woodstock, after separation from the county of Oxford by special Act and adjustment of assets and liabilities had been made discovered that the county had a secret surplus fund made up of accumulated yearly surplus taxes. The city brought action to open up the settlement and for its share of the fund. By special Act, s.-s. 3 of s. 21 of the Municipal Act, 1903, was made applicable. This was as follows:—

> "In case the application is for the erection of a town into a city, the town shall also pay to the county of which it forms part, such portion, if any, of the debts of the county as is just; or the council of the town shall agree with the council of the county as to the amount to be so paid, with interest from the time of the erection of the new city, and as to the periods of payment; or, in case of disagreement, the same shall be determined by arbitration under this Act; and upon the council proving to the Lieutenant-Governor in Council the payment, agreement or arbitration, the Lieutenant-Governor may, by proclamation, erect the town into a city, by a name to be given thereto in the proclamation."

Maclaren, J.A., in a dissenting judgment, said:—

> "If the matter had been referred to arbitration under the Act, and the existence of this fund to which the town of Woodstock had materially contributed, and in which it was interested, had been concealed from the arbitrators, relief would have been granted under the principles laid down as to an arbitration under a somewhat analogous statute in Re Corporations of St. Catharines and Lincoln. 1881, 46 U. C. R. 425, at p. 430. See also Russell on Arbitration and Award. 9th ed., p. 322; Ingram v. Milnes, 1807, 8 East 445; Mitchell v. Staveley, 1812, 16 East 58.

"I cannot see how the just share of the city in the debts of the county could be determined without taking into account this surplus of $37,000, which was at the time in the county treasury, unappropriated and available for the payment of the debts of the county *pro tanto*. The language of the statute is very broad, and I do not think that it should be narrowed by any technical construction that would work such an injustice as to divert these moneys which had been in part contributed by the town, and in which they were fairly and equitably entitled to share."

Moss, C.J.O., in giving judgment against the claim of the city in the result of which the majority of the Court agreed, said:—

"It is difficult, too, to understand the position which the plaintiffs take with reference to their right to a portion of the fund. Putting it at the highest for them, the legislation did no more than to place them in the position the town occupied with reference to the fund at the date of the erection of the plaintiffs into a city. What was that position?

"However, or through whatever means, the fund was permitted to accumulate—and they are to be assumed not to have been improper or dishonest—it constituted and was a surplus fund. It represented rates received from the municipalities comprising the county, provided for and raised by the county, as prescribed by ss. 402 to 407, inclusive, of the Municipal Act, 1903. Under the provisions of the Assessment Act then in force, these rates were collected by the tax collectors for the various municipalities, and with this duty the councils of the municipalities have nothing to do; it is a statutory obligation which the clerk of the municipality owes to the county and is bound to perform: Mowat, V.-C., in Grier v. St. Vincent, 1867, 13 Gr. 512, at p. 519; R. S. O. 1897, c. 224, ss. 129, 130, 133, 144, 265.

"For several years the sums collected appear to have exceeded the estimates, and so, by operation of s. 408, the balance would form part of the general fund of the municipality.

"Whether or not, by means of an information by the Attorney-General, at the instance of one or more of the minor municipalities, or of a ratepayer or ratepayers in one of them, the defendants could have been compelled to administer the fund in accordance with the terms of s. 408, need not be inquired into. No such proceedings were taken. It seems plain that no one of the municipalities comprising the county had, as a distinct entity, any property in or right to an aliquot or even a proportionate part.

"Any benefit that might accrue to them or any of them could only come through the action of the county council, and whether any disposition of it would benefit any particular municipality, as apart from the other portions of the county, would depend upon considerations which it would be the province of the county council to deal with.

"If the plaintiffs had continued as a town in the county, these would be their sole rights, and the legislation under which they withdrew does not appear to have placed them in any more advantageous position.

"Then it is said that this is a trust fund upon which the Court may fasten and direct its administration. But it is a trust fund only in the sense that it is in the hands of the county and under the control of the county council, whose duty it is to deal with it in accordance with the Municipal Act. It cannot be said that it is a trust fund held for the benefit of the plaintiffs, nor that they represent in this action the ratepayers by whom the rates were paid, for the purpose of enforcing any supposed trust in respect of it. If a trust is to be enforced, it can only be at the instance of some person or body of persons entitled as an entity to benefit by the trust, and in an appropriate form of action with all parties interested in the trust properly represented.

"The agreement of the 10th February, 1902, was made with reference to matters with which the parties were competent to deal

as consequent upon the erection of the plaintiffs into a city, but in no case could it have dealt with the fund in question, unless, perhaps, by consent of all the municipalities.

"From no point of view does it appear to me that the plaintiffs are entitled to relief in this action. And, in my opinion, the judgment appealed from should be affirmed, and the appeal dismissed with costs."

38.—(1) Where a district is erected into a village or town or is detached from one and annexed to another local municipality, there shall be an adjustment of assets and liabilities between the corporations of the municipality from which the district becomes or is detached and the corporation of the village or town or of the municipality to which the district is annexed, as the case may be, and if the interest of the district in the assets of the corporation of the municipality from which it becomes or is detached exceeds its proportion of the liabilities thereof, that corporation shall pay to the corporation of the village or town or of the municipality to which the district is annexed, as the case may be, the amount of the excess; but if the district's proportion of such liabilities exceeds its interest in such assets the corporation of the village or of the municipality to which the district is annexed, as the case may be, shall pay to the corporation of the municipality from which the district becomes or is detached the amount of the excess. 3-4 Geo. V. c. 43, s. 38 (1); 5 Geo. V. c. 34, s. 7.

In the valuation of assets and liabilities:—

(*a*) School houses not to be allowed for as they are vested in School Boards, whose limits of control may or may not be the same as the municipal limits.

(*b*) Sidewalks are allowed for as within municipal control and liability

(*c*) Mistakes in construction (*e.g.* waterworks), should not reduce value, being common incidents of such construction: see Southampton v. Saugeen, 1906, 12 O. L. R. 214.

Adjustments in respect of Schoolhouses, Sidewalks and Mistakes in Construction of Works.—In re Southampton and Saugeen, 1906, 12 O. L. R. 214, a district was detached from the town of Southampton and added to the township of Saugeen. An arbitration was held and an award made. The evidence of the dissenting arbitrator was taken for the purpose of determining what claims were made and what admitted by the arbitrators, following Buccleuch v. Metropolitan Board of Works, 1872, L. R. 5 H. L. 418; 41 L. J. Ex. 137, and Re Christie and Toronto Junction, 1895, 22 A. R. 21, affd., 25 S. C. R. 551, and having thus discovered how the award was made up, Falconbridge, C.J., thus dealt with the matter:—

" . . . the two arbitrators should not have included in the assets of Southampton, of which Saugeen was entitled to a share, the

value of the school houses. The school houses are vested in a separate board and the limits of control by the school boards may be the same limits or different limits from that of the municipal corporation.

"To a certain extent, the sidewalks are in like position, inasmuch as (s. 599 of the Consol. Municipal Act, 1903), the soil and freehold thereof are vested in His Majesty. But the possession and control of and liability for sidewalks are immediately attached to the municipal corporation and to no other body. I therefore find against the contention of Southampton as to the sidewalks.

"The alleged mistakes in construction may reduce the value of the waterworks as an asset, but these mistakes are common incidents of such construction and have been a misfortune alike of Southampton and of these petitioners, and I do not see that Southampton can claim any relief in this regard."

Attempt by Township to make Expenditure for Works in District Shortly to be Detached and Added to a Town.—In Re Angus and Widdifield, 1911, 24 O. L. R. 318, a district, part of the township of Widdifield, had, by proclamation dated 7th April, 1910, been annexed to the town of North Bay, the annexation to take effect on 1st January 1911. On 2nd September, 1910, the township submitted a by-law to the electors and it was duly passed to spend $33,000 in carrying out certain improvements in the district. Meredith, C.J.C.P., upheld the by-law, but his order was reversed in the D. C. on the technical ground that the copies of the by-law were not posted up as required, and on the ground of gross unreasonableness. Unreasonableness is no longer a ground on which by-laws in Ontario can be quashed: s. 249 (2).

Adjustment in Respect of Drainage Works.—In re Township of Sarnia and Town of Sarnia, 1882, 1 O. R. 411, the arbitrators appointed to make the adjustment necessary where a portion of the township has been added to the town, refused to consider the indebtedness of the township in respect of the benefit to roads resulting from a drainage scheme, and the award was set aside and referred back with instructions to take this into consideration, but on the contrary such portion of the liability in respect of drainage scheme as has been directly assessed upon the lands benefited, should not be taken into consideration. In Re Point Edward and Township of Sarnia, 1879, 44 U. C. R. 461, it was held that liability to assessment in respect of government drainage was not a matter to be adjusted in case of the erection of a village.

Date of Adjustment, Interest on Amount Awarded.—In re Middlesex and London, 1855, 14 U. C. R. 334, an award made in connection with an arbitration to settle differences between the newly created city of London and county of Middlesex, was held good in so far as the award was made as of the date on which London was declared a city and not as of the date of the award, and was also held good in so far as it gave the city three months in which to pay the sums found to be due, but was set aside in so far as it assumed to make an adjustment for the future in connection with the maintenance of prisoners and the upkeep of the court house and gaol.

Adjustment in Respect of Schools.—In re Hamilton and McNichol, 1908, 12 O. W. R. 1015, a part of a township was added to the city of Hamilton, and within the added part was an entire school section, having a school house and lands. The Hamilton Board used the school lands for educational purposes for a time, and then offered them for sale. It was held that the Board had a good title and could sell.

No Adjustment in Respect of Expenditure on Roads in Some Cases.—In re Northumberland and Cobourg, 1860, 20 U. C. R. 283, the arbitrators appointed to adjust matters resulting from the separation of the town, found that all the indebtedness of the county had been incurred for making roads which had been of no benefit to the town, and they not only ordered that the town should pay nothing in respect of such

indebtedness, but on the contrary, ordered the county to refund the amounts paid by the town in respect of the indebtedness, and the award was upheld.

Adjustment of Fund Appropriated but not Expended.—In East Toronto v. York, 1899, 16 O. R. 566, the Ontario Municipalities Fund paid to the county of York, under R. S. O. 1887, c. 184, ss. 378 and 379, was invested by the county, the interest being appropriated to school boards. When the villages of East Toronto and West Toronto were erected, they claimed that the fund was divisible. Boyd, C., distinguished Re Albemarle and Eastnor, 1879, 45 U. C. R. 133, 46 U. C. R. 183, where a fund appropriated and expended was held to be neither an asset or liability of the union and held that the fund, though appropriated, was not expended and was therefore divisible.

Adjustment of Bonus Debentures.—In re North Norwich and Norwich, 1878, 44 U. C. R. 34, the liability in respect of by-law authorizing a bonus to a railway company was adjusted between the township and a newly erected village, by providing that the village should pay one-ninth of the indebtedness.

No Adjustment in Respect of Bridges in Some Cases.—In Ottawa v. Nepean, 1910, 16 O. W. R. 969, 17 O. W. R. 1051, 2 O. W. N. 49, 480, where a certain portion of the township of Nepean was annexed to the city of Ottawa, an arbitration was held in which the arbitrators awarded that the city of Ottawa pay to the township of Nepean a certain sum in respect of debentures issued by Nepean to obtain money to construct bridges within the annexed territory and they also ordered a payment by Nepean to Ottawa in respect of the interest which the annexed territory had in the bridges, at the time of annexation. The Court of Appeal held that bridges erected by Nepean on original road allowances did not come within the words "property and assets" in s. 58 of the Cons. Mun. Act, 1903. The bridges were devoted and dedicated to the public, and after the annexation the inhabitants of the added territory are as fully entitled to their use as they were before.

(2) If the corporations do not within three months after the separation takes effect agree as to such adjustment, the matter shall be determined by arbitration.

On a motion to set aside an award made by two out of three arbitrators for the settlement of the terms of separation and annexation, the evidence of the dissenting arbitrator as to the basis of the award is admissible: Re Southampton v. Saugeen, 1906, 12 O. L. R. 214.

As to arbitration generally, see Part XVI.

(3) Where a district is detached as well from a county as from the local municipality, of which it forms part, there shall be a similar adjustment of the assets and liabilities of the corporation of the county from which the district is detached between that corporation and the corporation of the county to which the district is annexed, and the provisions of s.-ss. 1 and 2 shall *mutatis mutandis* apply.

(4) If the corporation of the county, or of the local municipality, does not within three months after the

separation takes effect, notify the corporation of the other county or local municipality that it requires an adjustment of the assets and liabilities, its right to claim an adjustment shall be barred.

(5) Where a town not being a separated town is erected into a city, or a town or village is annexed to a city or separated town, there shall be a similar adjustment of the assets and liabilities of the corporation of the county from which the town or village is withdrawn between that corporation and the corporation of the city or separated town. See 3 Edw. VII. c. 19, s. 58 (1).

(6) Where a town is erected into a city the city shall not be entitled, in the adjustment of assets and liabilities to any allowance in respect of its interest in the court house or gaol of the county. 3 Edw. VII. c. 19, s. 510 (1), 3-4 Geo. V. c. 43, s. 38.

39.—(1) Where a district is erected into a village or town or is detached from one local municipality and annexed to another, the real estate belonging to the corporation from which the district becomes or is detached and situate therein, shall belong to and be vested in the corporation of the village or town, or of the municipality to which the district is annexed, as the case may be, but this shall not apply to a town hall and the land on which it is erected or which is used or enjoyed in connection with it, but the same shall remain the property of the corporation of the municipality from which the district becomes or is detached. See 3 Edw. VII. c. 19, ss. 13 and 32; 3-4 Geo. V. c. 43, s. 39 (1); 5 Geo. V. c. 34, s. 8.

(2)Except where otherwise provided, the taxes imposed by the council of the municipality from which the district becomes or is detached for the year in which it is detached shall belong to the corporation of that municipality and may be collected and recovered by it as if the district had not been detached but still remained part of the municipality. 3-4 Geo. V. c. 43, s. 39 (2); 5 Geo. V. c. 34, s. 9.

Where limits are extended to take in township lands which were exempted from taxation: See Windsor v. Canada Southern, 1893, 20 A. R. 388.

Former Law as to Liabilities Incurred by United Townships: —The former law will be found in Wigle v. Gosfield South, 1901, 1 O. L. R. 519 C. A. It provided that after a separation or union of townships, each township which formed the union should remain subject to the debts and liabilities of the union as if the same had been contracted or incurred by the respective counties or townships of the union after the dissolution thereof. Section 55, Consolidated Municipal Act, 1883. In this case a claim for damages resulting from drainage works, was under consideration.

40.—(1) Where a work or service coming within the provisions of *The Municipal Drainage Act* or of *The Local Improvement Act* has been undertaken by a corporation, and after it has become liable for the carrying out of the same, any land liable to be specially assessed becomes a new municipality or is annexed to another municipality, the corporation of the municipality from which such land becomes or is detached may complete such work or service, and may enter upon and acquire any land lying within such new or other municipality necessary for the completion of such work or service; and may take all such proceedings, pass all such by-laws, make all such special and other assessments, impose all such special and other rates, issue and sell all such debentures, borrow all such money, and do all such other acts and things as are necessary to complete such work or service, and to provide for the cost thereof in the same manner as if the land so liable had not become a new municipality or been annexed to another municipality.

(2) The corporation by which the work or service was undertaken shall be indemnified by the corporation of the municipality which is constituted from such land or to which such land is annexed against all debts and liabilities incurred by it before the formation of the new corporation or the annexation of such land for or in respect of any such work or service to the extent to which the land lying within such new or other municipality was specially assessed and in adjusting the assets and liabilities consequent on the detachment of such land the debts incurred by the corporation of the municipality from which it was detached, for its share of the cost of

such work or service, shall be taken into account; see 3 Edw. VII. c. 19, s. 58 (2-3).

(3) Where the land specially assessed lies wholly within such new or other municipality, the corporation thereof shall be liable for the entire debt in respect of such work or service, and the clerk of the municipality from which the land was detached shall furnish the clerk of such new or other municipality with certified copies of all the by-laws relating to such work or service and the rates imposed by such by-laws shall be collected by the corporation of the new or other municipality, and that corporation shall pay the principal and interest of the debentures issued in respect of such work or service as they become due and shall indemnify the corporation of the municipality from which the land was detached against the same. See 3 Edw. VII. c. 19, s. 58 (4).

(4) Where part only of the land specially assessed lies within the new or other municipality the clerk of the municipality from which it was detached shall furnish the clerk of such new or other municipality with a certified copy of the by-law imposing the special assessment, and the corporation of such new or other municipality in each year in which a special rate upon such lands is payable, shall collect the same and shall pay over the sums collected to the treasurer of the municipality from which such land was detached, when and as the same is collected and in the adjustment of the assets and liabilities consequent upon the detachment of such land the debts incurred by the corporation of the municipality from which it was detached for its share of the cost of such work or service shall be taken into account. See 3 Edw. VII. c. 19, s. 58 (5); 3-4 Geo. V. c. 43, s. 40.

Payment of Special Rates to Treasurer of Old Corporation: —In Elderslie v. Paisley, 1884, 8 O. R. 270, a village corporation which had been detached from a township collected special rates imposed for school purposes, and instead of paying the sums collected to the treasurer of the township, paid them without express authority to the treasurer of the school district who converted the money to his own use and died insolvent. The township sued the village for the amount and succeeded. It would have made no difference had the township directed the money to be paid as it was, because the statute imperatively directed to whom the rates should be paid, and neither corporation could authorize or excuse payment to another. It is no objection to a claim for moneys

lost as above, that the defendants have no power to levy and collect, as to which see Frontenac v. Kingston, 1871, 30 U. C. R. 584 at 595, where it is said:—

> "The defendants are by law liable to the demands now made. . . . Then why should not the plaintiffs obtain a judgment against them? The objection can only be because it may be said it may be of no use to the plaintiffs; they will not be able to enforce it; it would be illegal on the part of the defendants if they were to pay it. But the inability to make the judgment productive is no defence to the action, nor any reason why the judgment should not be obtained."

Assets.—As to whether "bridges" are "assets" within the meaning of this section, see Ottawa v. Nepean, 2 O. W. N. 49, 480; 16 O. W. R. 969; 17 O. W. R. 1051, and sec. 38 (1) supra.

41. Where the land detached is subject to rates for the payment of a bonus or aid granted by a part of a township in aid of a railway, the provisions of s. 40 shall, *mutatis mutandis,* apply. 3-4 Geo. V. c. 43, s. 41.

42. Where a district is erected into a village, or a village into a town, or a town into a city, or a township is separated from a union of townships, the council having authority in the district or municipality at the time of the erection or separation shall, until the council of the new corporation is organized, continue to have the same powers as before such erection or separation. 3 Edw. VII. c. 19, s. 62; 3-4 Geo. V. c. 43, s. 42.

Officials and Sureties.

43.—(1) The separation of a junior township from a union of townships shall not affect the office, duty, power or responsibility of any officer of the union who continues to be an officer of the remaining township or townships after such separation, or of the sureties of such officer or their liability, further than by limiting such office, duty, power, responsibility, suretyship and liability to the remaining township or townships. 3 Edw. VII. c. 19, s. 63.

(2) Every such officer shall, after the separation, be the officer of the remaining township or townships as if he had been originally appointed an officer thereof. 3 Edw. VII. c. 19, s. 64.

(3) The sureties for such officer shall remain liable, as if they had become his sureties in respect only of the

remaining township or townships, and all securities shall, after the separation, be read as if they had been given only to or for the benefit of the remaining township or townships. 3 Edw. VII. c. 19, s. 65; 3-4 Geo. V. c. 43, s. 43.

New Division into Wards.

44. Where the council of a city or town before the 15th day of July in any year, by a vote of two-thirds of all the members, passes a resolution affirming the expediency of a division or a new division into wards of the city or town or of a part of it, the Municipal Board may divide or re-divide the city or town or part of it into wards as it may deem expedient, provided that no ward shall have a population of less than five hundred, and that there shall be at least three wards in any such city or town. 5 Geo. V. c. 34, s. 10.

PART II.

MUNICIPAL COUNCILS—HOW COMPOSED.

Counties.

45. The council of a county shall be composed of the reeves and deputy reeves of the towns, not being separated towns, villages and townships in the county. 6 Edw. VII. c. 35, s. 1, *part amended.* 3 & 4 Geo. V. c. 43, s. 45.

County Councils.—The number of members of a county council is now determined by the joint operation of ss. 45 and 51, and the number may fluctuate from year to year according to the number of municipal electors on the respective voters' lists of the towns, townships and villages in the county. The members of the county council now represent the several local municipalities within it and not artificial county council divisions as formerly.

Where the right of a local municipality to a deputy-reeve is contested, the privilege of doing so is by 4 Geo. V. c. 33, s. 5, given to any municipal elector in the county or (?) where the validity of the election is contested. Before this amendment was made, the right of a local municipality to a deputy-reeve could only be contested by an elector of such local municipality.

As to the number of deputy-reeves to which a local municipality is entitled, see s. 51.

Cities.

46.—(1) Subject to subsection 7 the council of a city shall be composed of a mayor, the members of the Board of Control, if the city has such a board, and

(*a*) Three aldermen for each ward, or

(*b*) Where the council by by-law so provides two aldermen for each ward; 3 Edw. VII. c. 19, s. 70 (1), *part amended,* or

(*c*) In the case of a city having a population of not more than 15,000, where the council by by-law so provides, one alderman for every 1,000 of the population. 3 Edw. VII. c. 19, s. 71*a* (3), *part amended.*

(2) In the case provided for by clause (*c*) of subsection 1, or where the council of a city having a population

of more than 15,000 by by-law so provides, the aldermen shall be elected by general vote, and the number of aldermen shall be the same as if they were elected by wards. 3 Edw. VII c. 19, s. 71*a* (5), *amended.*

(3) A by-law for the purposes mentioned in clause (*b*) or (*c*) of subsection 1 shall not be repealed until at least two annual elections have been held under it, and a by-law under subsection 2 shall not be repealed until at least five annual elections have been held under it. 3 Edw VII. c. 19, ss. 70 (2) and 71*a* (7), *part,* and 10 Edw. VII. c. 85, s. 1, *amended.*

(4) A by-law for any of the purposes mentioned in subsections 1 and 2 and a by-law repealing any such by-law shall be passed not later in the year than the first day of November and shall not be passed unless it has received the assent of the municipal electors. 3 Edw. VII. c. 19, s. 70 (1), *part,* and s. 71*a* (6), *amended.*

(5) Every such by-law including a repealing by-law shall take effect at and for the purposes of the annual election next after the passing of it. 3 Edw. VII. c. 19, s. 71*a* (9).

(6) Subject to subsection 3 where the petition of at least one-fifth of the municipal electors is presented on or before the first day of November in any year, praying for the passing of a by-law repealing a by-law for the purpose mentioned in clause (*c*) of subsection 1, or where a petition of not less than 400 electors is presented praying for the passing of a by-law for the purpose mentioned in subsection 2, or for the repeal of a by-law passed under that subsection, the council shall submit the question of making the proposed change to a vote of the municipal electors at the next ensuing annual election and if the voting is in favour of the change shall without delay pass a by-law in accordance with the prayer of the petition. 3 Edw. VII. c. 19, s. 71*a* (7), *part amended.*

(7) Notwithstanding anything in any special Act the council of the City of Toronto shall consist of the mayor

and four controllers to be elected by general vote, and three aldermen for each of the wards numbers 1 to 6 inclusive and two aldermen for Ward Number 7 until its population, according to the municipal enumeration by the assessor, reaches 30,000, and after that three aldermen for that ward. In the event of a new division into wards of the said city under the provisions of this Act, this subsection shall become inoperative. 9 Edw. VII. c. 73, s. 6, *amended;* 3 & 4 Geo. V. c. 43, s. 46 (7); 6 Geo. V. c. 39, s. 2.

Dominion Census Governs.—So far as the composition of a city council depends on population, changes can only be made when the population varies as shewn by the Dominion census, s. 49, but this does not apply to the adoption of a Board of Control. See s. 210.

Board of Control.—The council of a city having a population of less than 100,000 but more than 45,000 as determined by Dominion census, or under a by-law or by the assessor at the last enumeration, whichever is latest, s. 2 (m), may by by-law to be approved by the electors provide for a Board of Control or with the assent of the electors repeal any such by-law, s. 210.

Aldermen are to be Elected by Wards, but Election by General Vote is Optional.—In Toronto the election of aldermen by wards is fixed by s. 46 (7), and by s. 209, the Board of Control is a fixed institution, also controllers are really aldermen elected by general vote.

The election of aldermen by general vote is optional in other cities. The system can only be adopted by a by-law which has received the assent of the electors, s. 46 (4), and once adopted cannot be repealed until at least five annual elections have been held under it, s. 46(3), except in the case of cities with population under 15,000, where a repealing by-law may be passed after two annual elections by a general vote. Repealing by-laws must receive the assent of the electors.

While the council can introduce by-laws for the purpose of establishing or abolishing the system, one-fifth of the electors in cities having a population of not more than 15,000 can by petition compel the council to submit a by-law to abolish the method of electing aldermen by general vote, and in other cities 400 electors in like manner can compel the council either to submit by-laws to either establish or abolish the system as the case may be. On receipt of any such petition the discretion of the council is at once taken away and it is under an imperative duty to submit the by-law petitioned for. The legal questions arising from the provisions of s. 46 (6) as to petitions and their effect, have been so frequently considered by the Courts in dealing with similar provisions respecting local option by-laws that the law is clear and well settled. For discussion, see Part XI., Quashing By-laws.

Number of Aldermen.—Three for each ward, s. 46 (1a), or two for each ward if the council so provides by by-law, s. 46 (1b), with the assent of the electors, s. 46 (4). Such a by-law cannot be repealed till after two annual elections.

Where aldermen are elected by general vote in cities having a population of not more than 15,000, the number is one alderman for every thousand, s. 46 (1c), and in other cities the same as if they were elected by wards, that is 3 or 2, if provided by by-law, s. 46 (1a) and (1b).

Towns.

47.—(1) The council of a town in unorganized territory shall be composed of a mayor and six councillors to be elected by general vote. 2 Edw. VII. c. 30, s. 4.

(2) If the town has a population of not less than 5,000 the council may provide that the council shall be composed of a mayor and nine councillors to be elected by general vote. 9 Edw. VII. c. 73, s. 3 (1), *amended;* 3 & 4 Geo. V. c. 43, s. 47.

48.—(1) The council of a town not in unorganized territory having a population of more than 5,000 shall be composed of a mayor, a reeve, as many deputy reeves as the town is entitled to and three councillors for each ward where there are less than five wards, or two councillors for each ward where there are five or more wards. 3 Edw. VII. c. 19, s. 71 (1), *first part amended.*

(2) Where there are less than five wards the council on the petition of not less than 100 municipal electors shall provide that the number of councillors shall be two for each ward, or may without petition provide that the number of councillors shall be one for every 1,000 of the population to be elected by general vote, or if the population is less than 6,000 that the number of councillors shall be six to be elected by general vote. 3 Edw. VII. c. 19, s. 71 (1), *last part,* and s. 71*a* (3), *part amended.*

(3) Where the town has a population of not more than 5,000 the council shall be composed of a mayor, a reeve, as many deputy reeves as the town is entitled to and

(*a*) Six councillors to be elected by general vote; or

(*b*) Where the council so provides one councillor for each ward and the remaining councillors to complete the full number of six to be elected by general vote. 3 Edw. VII. c. 19, s. 71*a* (1-2), *amended.*

(4) A by-law for any of the purposes mentioned in subsection 2 of section 47 or subsection 2 or clause (*b*)

of subsection 3 of this section shall not be repealed until two annual elections have been held under it, and a by-law for the purpose mentioned in clause (*b*) of subsection 3 shall not be passed until two annual elections under clause (*a*) have been held. 3 Edw. VII. c. 19, s. 71*a* (4) and (7), *last part amended.*

(5) A by-law for any of the purposes mentioned in subsection 2 of section 47 or in subsections 2 and 3 of this section, and a by-law repealing any such by-law shall be passed not later in the year than the first day of November and shall not be passed unless it has received the assent of the municipal electors. 3 Edw. VII. c. 19, s. 71*a* (6), *amended.*

(6) Every such by-law, including a repealing by-law, shall take effect at and for the purposes of the annual election next after the passing of it. 3 Edw. VII. c. 19, s. 71*a* (9).

(7) Subject to subsections 2 and 4, where a petition of not less than one-fifth of the municipal electors is presented on or before the first day of November in any year praying for the passing of a by-law for any of the purposes mentioned in this section or for repealing any such by-law, except a by-law reducing the number of councillors to two for each ward, the council shall submit the question of making the proposed change to a vote of the municipal electors at the next ensuing annual election and if the voting is in favour of the proposed change shall without delay pass a by-law in accordance with the prayer of the petition. 3 Edw. VII. c. 19, s. 71*a* (7), *part amended.*

(8) Subject to s.-s. 4, where a by-law has been passed for reducing the number of councillors to two for each ward, the council, upon the petition of not less than 100 resident municipal electors, presented not later in the year than the first day of November shall submit the question of repealing the by-law to a vote of the electors at the next ensuing annual election and if the voting is in

favour of the repeal shall without delay pass a by-law in accordance with the prayer of the petition. 3 Edw. VII. c. 19, s. 71 (2), *amended.* 3-4 Geo. V. c. 43, s. 48, 1-8.

49. For the purposes of sections 46 to 48 the population shall be determined by the latest census of Canada. 3 Edw. VII. c. 19, s. 71*a* (10).

Villages and Townships.

50. The council of a village and the council of a township shall consist of a reeve, as many deputy reeves as the municipality is entitled to, and a sufficient number of councillors to make up with the deputy reeves four in all, and they shall all be elected by general vote. 3 Edw. VII. c. 19, ss. 72 and 73, *amended.*

(2) The council of a township in unorganized territory shall consist of a reeve and four councillors. 3-4 Geo. V. c. 43, s. 50; see R. S. O. 1897, c. 225, s. 2.

Towns, Villages and Townships.

51.—(1) A town not being a separated town, a village and a township, shall each be entitled where it has more than 1,000 and not more than 2,000 municipal electors to a first deputy reeve, or where it has more than 2,000 and not more than 3,000 municipal electors, to a first deputy reeve and a second deputy reeve, and where it has more than 3,000 municipal electors to a first deputy reeve, a second deputy reeve and a third deputy reeve. 6 Edw. VII. c. 35, s. 2, par. 1, *amended.*

2. The number of municipal electors shall be determined by the last revised voters' list but in counting the names, the name of the same person shall not be counted more than once. *New.* 3-4 Geo. V. c. 43, s. 51, 1-2.

How Councils are Composed.—Councils of towns are composed of:
(1) A mayor or reeve in each case, ss. 47 and 48;
(2) As many deputy reeves as the town is entitled to under s. 51;
(3) Councillors, who are to be elected as follows:—
(*a*) In unorganized territory by general vote in all cases, s. 47(1);

(*b*) 1. In organized territory by wards in towns of more than 5,000 population, s. 48 (1), but a change from the ward system to election by general vote can be affected by by-law passed with the assent of the electors: s. 48 (2) and (5);

2. By a general vote in towns of not more than 5,000 population: s. 48 (3); but a change to a mixed system of electing one councillor for each ward and the remaining councillors to which the town is entitled by a general vote may be made by by-law passed with the assent of electors: s. 48 (3) and (5).

Election by General Vote.—The mayor or reeve and deputy-reeves so far as their respective local municipalities are concerned, are really councillors elected by general vote, who have certain functions and powers not possessed by ordinary councillors. The tendency in recent years is to increase the number of members of council elected by general vote, as for instance, by constituting boards of control in cities, controllers being in effect aldermen elected by general vote, having in addition special powers when acting with the mayor as a board. The same tendency is indicated by the provisions enabling the ward system to be wholly or partly abolished. The purpose aimed at seems to be to secure councillors who will represent the general interests of a municipality rather than ward representatives.

Method of Changing System of Election.—Whatever system is adopted must remain in force for at least two annual elections: s. 48 (5). In all cases where a change is authorized, one-fifth of the electors can, by petition, compel the council to submit a by-law for the purpose of changing the system of electing councillors: s. 48 (7). In view of the similarity between the provisions of s. 48 (7) and the provisions respecting Local Option By-laws, a discussion of the questions respecting petitions, their form, authentication, presentation, etc., the duty of councils to act on the same and the means of compelling councils to act in case they refuse to do so, will be found below.

Number of Councillors to be Elected.—The number of councillors is fixed at six in towns in unorganized territory, but where such towns have not less than 5,000 population, the number may be increased to nine by by-law passed with the assent of the electors: ss. 47 (2) and 48 (5). In towns in organized territory, where the population is more than 5,000, the number is three per ward, if there are less than five wards and two per ward if there are five or more wards, but these numbers can be changed by by-law passed with the assent of the electors: s. 48 (5), as follows:—If there are less than five wards, the council can be put in motion by a petition of not less than one hundred electors and must them introduce and submit a by-law that the number shall be two councillors per ward, or the council may, without petition, introduce a by-law making the number one per thousand of the population, or if the population is less than 6,000 the by-law shall fix the number at six: 48 (2). Where the population is under 5,000, the number of councillors is to be six: s. 48 (3).

Last Dominion Census Governs.—By s. 49, no matter what the population is, the changes in the constitution of councils of towns, so far as they are based on population, are governed by the population as shewn in the last Dominion census. If it were not for this provision, a special census could be taken: s. 2 (m). The last Dominion census must be accepted as correct. Britton, J.: R. ex rel. Sullivan v. Church, 1914, 6 O. W. N. 116, 135; 26 O. W. R. 375.

Deputy-Reeves.—So far as local municipalities are concerned deputy-reeves are really councillors elected by general vote. So far as the county council is concerned, they are in effect representatives of their local municipality. The county council contains no members elected by general vote throughout the county. Even the head is elected from among the representatives of the local municipalities which is in contrast with the method

followed in the case of other local heads of councils. The right to sit in a county council thus depends on the right to sit in the council of a local municipality. The only persons who can contest the right to sit in a county council are those named in s. 161, that is, electors in the local municipality which elected the mayor, reeve or deputy-reeve, whose right to sit is called in question, excepting only where the right to sit is called in question on the ground that the local municipality has elected more deputy-reeves than it is entitled to, in which case any elector in the county can contest the right of the local municipality to such deputy-reeve. The principle seems to be that the right of representatives of a local municipality to sit in County Council shall only be contested by the electors they represent, but the question as to how many representatives a local municipality is entitled to under the Act, can be raised in proceedings under Part IV. by any elector in the county.

As no provision in that Act enables a local municipality to be represented in proceedings under Part IV., the right of a local municipality to a deputy-reeve may be determined in proceedings under that part, between any elector in the county and the second or third deputy-reeve, as the case may be, and without notice to it or its being added as a party. This was held by Britton, J., in R. ex rel. Sullivan v. Church, 1914, 6 O. W. N. 116, 26 O. W. R. 375.

No Scrutiny to Determine Number under s. 51.—In R. ex rel. Sullivan v. Church, *supra*, Britton, J., said:—

> "A scrutiny was entered upon before the Master. It seems clear to me that for the purpose of determining the right to a deputy-reeve, no scrutiny is contemplated by the Act beyond that of seeing that the name of any elector is not counted more than once: s. 51 (2). 'Determined' in that sub-section must mean, in the first instance at least, determined by the council. *Prima facie* that determination shall stand. If it is wrong the onus of shewing error must be upon the attacking party. . . .
>
> "In the scrutiny before the Master evidence was given as to tenants who had moved away from town, persons who had died, and tenants who had changed their places of residence in the town. I reject that and come to the count, assuming that the determination of the council, if incorrect, must be so shewn by proper evidence, and that the count is subject to the limitation of s. 51 (2). . . .
>
> "With the voters' list before the Court, verified as to the number of names and the not counting more than once, the onus is on the person attacking the list to prove his case."

Testing Right to Deputy-Reeve by Motion to Quash By-law for Holding Election.—The Master, in R. ex rel. Sharpe v. Beck, 1909, 13 O. W. R. 457, 539, thought that the obvious course for a person who wished a declaration that Brampton was not entitled to a deputy-reeve would be to move to quash the by-law passed in November for holding the election, and Britton, J., in R. ex rel. Sullivan v. Church, 1914, 26 O. W. R. 375, 6 O. W. N. 116, 365, intimated that this procedure might be followed. These remarks were *obiter*.

In R. ex rel. Sullivan v. Church, 1914, 26 O. W. R. 375, the question of the right to a deputy reeve was determined without the municipality being represented.

Qualifications.

52.—(1) Subject to s.-s. 6, no person shall be qualified to be elected a member of the council of a local municipality unless he

(*a*) Resides in or within two miles of the municipality where it is situate in a county and in or within

five miles of the municipality where it is situate in unorganized territory. 3-4 Geo. V. c. 43, s. 52 (1), *part;* 5 Geo. V. c. 34, s. 11.

(*b*) Is a British subject;

(*c*) Is a male of the full age of twenty-one years;

(*d*) Is not disqualified under this or any other Act, and

(*e*) In any municipality is at the time of the election in actual occupation of a freehold estate rated in his own name or in the name of his wife on the last revised assessment roll of the municipality for at least $2,000, whether or not the same is encumbered, and of which he or she is the owner; or

(*f*) Is or his wife is at the time of the election the owner or tenant of a freehold or leasehold or *partly freehold and partly leasehold* estate, *legal* or *equitable,* or partly legal and partly equitable, in land assessed in his or her name on the last revised assessment roll of the municipality, if not in unorganized territory, of at least the value according to such assessment roll *over and above,* in the case of an owner, *all liens,* charges and encumbrances thereon, of

I. In a village, if freehold, $200; or if leasehold, $400;

II. In a township, if freehold, $400; or if leasehold, $800;

III. In a town, if freehold, $600; or if leasehold, $1,200;

IV. In a city, if freehold, $1,000; or if leasehold, $2,000;

Or if in unorganized territory,

V. In a township (except at the first election), if freehold, $100; or if leasehold, $200;

VI. In a city or town, if freehold, $400; and if leasehold, $800.

(2) A person who would have had the qualification prescribed by s.-s. 1, if he or his wife had continued to be the owner or tenant of land in respect of which his or her name was entered on the last revised assessment roll down to and at the time of the election, if otherwise qualified, shall be qualified to be elected, notwithstanding that he or his wife has alienated the estate in the land for which he or she was assessed, or, if a leasehold estate, it has been determined by effluxion of time, surrender or otherwise between the date of the return of the assessment roll and the time of the election, if at the time of the election he is a resident of the municipality and he or his wife has at the time of the election an estate in other land of a sufficient assessed value, according to the last revised assessment roll, to qualify him for election under s.-s. 1 if he or she had been assessed for it.

(3) S.-ss. 4 and 5 of s. 56 shall apply to the rating qualifications prescribed by this section.

(4) Where territory has been annexed to an urban municipality, until an assessment roll for the municipality, including such territory, has been made and revised, it shall be sufficient for the purposes of this section if the assessment is upon the last revised assessment roll of the municipality in which the territory, before its annexation, was situate, and for a sufficient amount to qualify him for election to the council of that municipality.

(5) In this section "leasehold" and "leasehold estate" shall mean a tenancy for one year or more, or a tenancy from year to year. 3 Edw. VII. c. 19, s. 76; 6 Edw. VII. c. 35, s. 5, *amended.*

(6) Where the inhabitants of a township or locality in unorganized territory have become incorporated as a

township or a union of townships, the only qualification necessary at the first election shall be that the person is a male of the full age of twenty-one years, a British subject and a householder resident in the municipality. *New.* *See* R. S. O. 1897, c. 225, s. 6.

(7) If there are not at least two persons qualified to be elected for each seat in the council, no qualification beyond that of a municipal elector shall be necessary. 3 Edw. VII. c. 19, s. 79, *amended.* 3 & 4 Geo. V. c. 43, s. 52, 1-7.

Comment on the history of this section, see R. ex rel. Morton v. Roberts, 3 O. W. N. 1089; 22 O. W. R. 50; 26 O. L. R. 263.

Four Qualifications Required.—The qualifications which must be possessed by a candidate at the time of election are: (1) residence; (2) citizenship; (3) full age; (4) property qualification, and (5) there must be an absence of disqualification.

Residence.—What constitutes residence is an important question, not only as affecting the right to be a candidate but also as affecting the right to vote in the case of tenant, income and farmers' son voters under s. 57. A full discussion will be found under s. 57, *infra.*

Citizenship.—The law as to British nationality and the status of aliens was consolidated and amended by the British Nationality and Status of Alien Act, 1914, 4-5 Geo. V., c. 17. At the time the Act was drawn, it was contemplated that similar Acts would be passed by the Dominions, so that uniform provisions would be in force throughout the Empire. Accordingly the Dominion Parliament, by c. 44 of the Statutes of 1914, passed the British Nationality and Status of Aliens Act, which, with the necessary minor changes, is identical with the Imperial Act, and this Act now embodies the law on the subject.

Who are British Subjects?—Section 1 of the British Nationality and Status of Aliens Act provides that the following persons shall be deemed to be natural born British subjects:—

"(*a*) Any person born within His Majesty's Dominions and allegiance; and

"(*b*) Any person born out of His Majesty's Dominions, whose father was a British subject at the time of that person's birth and either was born within His Majesty's allegiance or was a person to whom a certificate of naturalization had been granted; and

"(2) Any person born on board a British ship whether in foreign territorial waters or not:

"Provided that the child of a British subject, whether that child was born before or after the passing of this Act, shall be deemed to have been born within His Majesty's allegiance if born in a place where by treaty, capitulation, grant, usage, sufferance, or other lawful means, His Majesty exercises jurisdiction over British subjects."

Sec. 2 provides:—

"A person born on board a foreign ship shall not be deemed to be a British subject by reason only that the ship was in British territorial waters at the time of his birth."

Marriage or Dissolution of Marriage as Determining Status.—Sec. 10 provides:—

"The wife of a British subject shall be deemed to be a British subject and the wife of an alien shall be deemed to be an alien."

Sec. 11 provides:—

"A woman who, having been a British subject, has by or in consequence of her marriage become an alien, shall not, by reason only of the death of her husband or the dissolution of her marriage, cease to be an alien, and a woman who having been an alien, has by or in consequence of her marriage become a British subject, shall not, by reason only of the death of her husband or the dissolution of her marriage, cease to be a British subject."

Status of Minor Children.—Sec. 12 provides:—

"Where a person being a British subject ceases to be a British subject, whether by declaration of alienage or otherwise, every child of that person, being a minor, shall thereupon cease to be a British subject unless such child on that person ceasing to be a British subject does not become by the law of any other country naturalized in that country: Provided that where a widow who is a British subject marries an alien, any child of hers by her former husband shall not, by reason only of her marriage, cease to be a British subject, whether he is residing outside His Majesty's dominions or not.

"(2) Any child who has so ceased to be a British subject may, within one year after attaining his majority, make a declaration that he wishes to resume British nationality and shall thereupon again become a British subject."

British Subjects by Naturalization.—Sec. 3 provides:—

"A person to whom a certificate of naturalization is granted by the Secretary of State of Canada shall, subject to the provision of this Act, be entitled to all political and other rights, powers and privileges, and be subject to all obligations, duties and liabilities to which a natural born British subject is entitled or subject, and on and from the date of his naturalization have to all intents and purposes the status of a natural born British subject.

"Sec. 28 provides that a certificate of naturalization issued under the Act or under the Imperial Act or under the corresponding Act of any Dominion, may be proved in any legal proceeding by the production of the original certificate or a certified copy."

Loss of British Nationality.—The Act provides that British nationality shall be lost:

(1) By foreign naturalization;

(2) By declaration of alienage in certain cases of dual nationality;

(3) Naturalized subjects may divest themselves of their status as British subjects.

Status of Aliens.—Sec. 17 provides that aliens may hold property, and alienate it in the same manner as British subjects, but provides that nothing in the section shall qualify the alien for any office or for any municipal, parliamentary or other franchise.

Status of Aliens under Repealed Acts.—The British Nationality and Status of Aliens Act repeals all previous statutes, but preserves the status of a person acquired under the repealed Acts and states the law applicable in the future. Lord Reading, in R. v. Albany, [1915] 3 K. B. 716, 84 L. J. K. B. 2121, where it was held that a child born before the passing of the Act, in a foreign state, of a naturalized British subject, does not acquire the status of a British subject. The status of British nationality is a status which must be acquired by the individual himself. It is not a status which can be transmitted to him by his parent. It is therefore necessary in every case to see whether status has been acquired either by the common law or under the provisions of some statute. Lush, J., in R. v. Albany, *supra*.

Proof of Alienage or Citizenship.—No difficulty arises where a certificate of naturalization or a certificate of birth can be produced by an alien, but frequently it is desired to establish that certain persons are not British subjects, and it then becomes a difficult question as to what evidence must be adduced in order to warrant the opinion that they are not British subjects.

In R. ex rel. Carroll v. Beckwith, 1854, 1 P. R. 278, Robinson, C.J., said:—

> "We must presume the resident and assessed inhabitants of this country to be British subjects till something is shewn to the contrary, from which the Court can determine that they are aliens,"

and he refused to accept as satisfactory evidence an affidavit stating that they were aliens, which did not give particular evidence to shew that they were aliens and how aliens as having been born in a certain place named out of the allegiance of the British Crown.

In R. v. Hayes, 1904, 5 O. L. R. 202, the evidence shewed that R. was born in the United States, but his parents were born in Canada. There is no evidence that either he or his parents were ever naturalized in the United States. Street, J., held that the presumption arising was that R.'s parents were British subjects though residing in the United States, and that, therefore, R. was a British subject.

Of the Full Age of 21 Years.—A person born on the 1st day of January, 1900, will be of the full age of 21 years at the first moment of the 31st day of December, 1921.

1 Blackstone; Commentaries, 413.

The law will not take note of fractions of a day.

Lester v. Grant, 1808, 15 Vesey 248.

Must Qualifications Continue Throughout Term of Office; Effect of Requiring Declaration of Qualification; Effect of Enumeration of Acts Rendering Seat Vacant.

In R. ex rel. Morton v. Roberts, 1912, 26 O. L. R. 263, Riddell, J., discussed the question whether or not the property qualification must continue to exist after a candidate is elected, and takes his seat as a member of council, as follows:—

> "It is, however, to be observed that from almost the very earliest times the qualification has been expressed to be that entitling a person 'to be elected.'
>
> "The first general Act (1838), 1 Vict. c. 21, providing for the election of certain officers—clerk, assessor, collector, etc.—has no qualification for the officer to be elected, although it has for the voter (ss. 2, 4).
>
> "The Municipal Act of 1841, 4 & 5 Vict. c. 10, s. 11, provides that 'every person to be elected a member of a district council . . . shall be seized and possessed,' etc., etc.
>
> "Baldwin's Act, 12 Vict. c. 81, ss. 22, 57, 65, 83, contains the same language; the Act of 1858, 22 Vict. (stat. 1) c. 99, which is the same as (1859) C. S. U. C. c. 54, s. 70, also; and the terminology appears in the various amendments and re-enactment down to the present Act of 1903, s. 76. Sometimes, indeed, the provision is negative, as at present, and sometimes positive, as was the original form—but, whether it be 'no person but', or 'every person who' it is always 'to be elected.'
>
> "Language quite different was used almost from the first in respect of certain cases. It is true that in the Act 4 & 5 Vict. c. 10, it was provided (s. 12) that 'no person . . . in Holy Orders or . . . Minister . . . of any religious sect . . . nor any Judge . . . shall be qualified to be elected a councillor . . .;' but the language was soon changed. In the Act of 1849, by s. 132, it was enacted 'that no Judge . . . and no person having . . . any interest . . . in any contract with . . . the township . . .shall be qualified to be or be elected . . . councillor . . . And in Baldwin's Act, C. S. U. C. c. 54, s. 73, it is provided that such person shall not be qualified 'to be a member of the

council of the corporation.' The same language continues down to the present Act, s. 80 (1).

"And, in like manner, the Act of 1849, s. 112, provides that, if any member of a municipal council 'be declared a bankrupt . . . or shall compound by deed with his creditors, then . . . such person shall . . . immediately become disqualified, and shall cease to be a member of such municipal corporation . . . and the vacancy thereby created . . . filled as in the case of the natural death of such member. . . ." In the C. S. U. C. c. 54, s. 121, the occasions for the seat becoming vacant are increased in number, introducing amongst others 'assigns his property for the benefit of creditors'—and so it has continued to the present time (Consolidated Municipal Act, 1903, s. 207), appearing in substantially the same words in the nine or ten re-enactments and amendments.

"The difference in the terminology affords a very cogent argument against the view that the Legislature intended the sale of the qualifying property to operate as an act *ipso facto* disqualifying the member, at all events after proper declaration of qualification made—had that been the intention, it is difficult to see why the provision that an assignment for the benefit of his creditors is made specifically a ground of disqualification, without the addition 'a sale or assignment of qualifying property.'

"So in the Act of 12 Vict. c. 81, s. 110, it is provided that the absence of the head of the council 'vacates' the seat.

"On the other hand, a consideration of the form of the oath or declaration affords a strong argument that the ownership of the property qualification must continue—at all events until the oath or declaration was made. . . .

"From a very early period it has been a statutory requirement that a councillor, etc., should make a declaration (or take an oath). The Act of 1838 provides for a promissory oath, and it was to be made (ss. 9, 36) within twenty days of being notified of election, upon penalty of a fine of £5. But the Act of 1841 contained a provision 'that no person elected a councillor . . . shall be capable of acting as such until he shall have taken and subscribed' the statutory oath—and he was given (s. 16) ten days after notice of his election to take this oath, otherwise he was deemed to have refused the office, and was liable to a fine—his office was deemed vacant and a new election had. The oath is not only promissory (s. 15), but also 'that I am seized and possessed, to my own use, of lands,' etc., and that such 'lands are within the district of . . . and are of the real value of £300,' etc., etc. The Baldwin Act, 12 Vict. c. 81, provides (s. 129), 'that every person who shall be elected . . . to any office which requires a qualification of property . . . shall, before he shall enter into the duties of his office, take and subscribe an oath or affirmation to the effect following, that is to say: 'I, A. B., do swear . . . that I am truly and *bona fide* seized to my own use and benefit of such an estate (specifying it) as doth qualify me to act in the office of (naming it) . . . according to the true intent and meaning of a certain Act of Parliament,' etc., etc. Note that in these earliest qualification oaths the present tense is used in speaking of the ownership, and also (in 12 Vict.) that the ownership of the estate doth qualify to act in the office.

"The language in 22 Vict. (stat. 1) c. 99, s. 175, is 'before he . . . enters on his duties . . . ;' and the declaration (a solemn declaration now being substituted for an oath) is still, 'I am truly and *bona fide* seized . . . does qualify me to act in the office,' etc.

"The statute 29 & 30 Vict. c. 51, s. 178, makes no change from the language of the Consolidated Statute—the Act of 1873, 36 Vict. c. 48, s. 211, brings in the form still in use—'have and had to my own use and benefit . . . as proprietor . . . at the time of my election to the office of . . .' does qualify me to act . . . precisely the same as the form in the statute of 1903, s. 311 (the word 'proprietor' being used instead of 'owner'), but without the addition made by (1906), 6 Edw. VII., c. 34, s. 10.

"The statute, in my view, lays down three prerequisites to a *de jure* occupation of the office (I do not pause to inquire as to others): (1) possession of property qualifications; (2) election by acclamation or otherwise; (3) making the declaration prescribed. Absence of any one of these will prevent the seat being filled *de jure*—absence of one or all will not, of course, prevent it being filled *de facto*.

"Where the statute requires a prescribed oath of office before any person elected 'shall act therein,' a person cannot justify as such officer unless he has taken an oath in substantial, not necessarily literal, compliance with the law:' Dillon on Municipal Corporations, 5th ed., s. 395, and American cases cited in note 1, at bottom of p. 680.

"In The King v. Swyer (1830), 10 B. & C. 486, the capital burgesses and common council of Shafton were authorized to elect one of the burgesses each year to be mayor. The charter provided that 'he who . . . shall be elected . . . mayor . . . before he be admitted to execute that office, or in any way to intermeddle in the same office, shall . . . take . . . all the oaths by the laws . . . appointed . . . and that after such oath so taken, he can and may execute the office of . . . mayor . . .' Lord Tenterden, C.J. (p. 491): 'A party becomes mayor not merely by reason of his being elected, but of being sworn into office.' Bayley, J. (pp. 491, 492): 'By the clause authorizing the election of a mayor, the capital burgesses are to elect and nominate one of the burgesses to be mayor; and he, before he executes his office, is to be sworn in. He becomes the head of the corporation, not when he is elected and nominated, but when he is sworn in.' It will be seen that no point is made of the clause in the charter that 'after such oath so taken, he can and may execute the office of . . . mayor,' which is the only point of differentiation between the Shafton charter and our statute in that regard.

"In The King v. Mayor, etc., of Winchester (1837), 7 A. & E. 215, the language of the statutes (9 Geo. IV., c. 17, ss. 2, 4 and 5, and 5 and 6 Wm. IV., c. 76, s. 50), is a little different, but not substantially so—and Lord Denman, C.J. (p. 221), clearly shews that it is the making of the declaration that constitutes the acceptance of the office. See also per Littledale, J., at p. 222.

"In a case under our own statute, upon language identical with that in the present statute, Cameron, J. (afterwards Sir Matthew Cameron, C.J.), said: 'I am of opinion that until a person elected a member of a municipal corporation has made the declaration of qualification prescribed by the 265th section of c. 174, R. S. O. 1877, he has no right to exercise or discharge the functions pertaining to the office:' R. ex rel. Clancy v. St. Jean (1881), 46 U. C. R. 77, at p. 81. On p. 81 the learned Judge continues: 'I think there can be no doubt that this declaration is an essential prerequisite to the discharge of the duties of the office of alderman.' In the case of R. ex rel. Clancy v. Conway (1881), 46 U. C. R. 85, at p. 86, the same learned Judge gave (in a certain event, which will be considered later) leave to file an information in the nature of a *quo warranto*, 'on the ground that without making the declaration of qualification he (Conway) illegally exercises the franchises of the office.'

"Such cases as United States v. Bradley (1836), 10 Peters 343, are quite different, as they determine only that an appointment in the nomination of the President, upon confirmation by the Senate of the United States, becomes an absolute appointment, vesting the office in the nominee upon appointment by the President and confirmation by the Senate, although the nominee has not given the bond which a statute requires him to give for the security of the Government. Compare United States Bank v. Dundridge (1827), 12 Wheat, 64."

Election of Women to Office Where Not Specially Enabled to Act—The Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 11, provides that a person is not qualified to be elected nor to be a councillor unless possessed of certain qualifications. This section gave rise to the famous case: Beresford-Hope v. Lady Sandhurst, 1889, 23 Q. B. D. 79;

58 L. J. Q. B. 318, in which it was held that "person" did not include women, and that votes given for a woman were to be held as if they had never been given at all, and also to the case De Sousa v. Cobden, 1891, 1 Q. B. 687; 60 L. J. Q. B. 33 C. A., in which Lord Esher thought that women had such a total lack of status to be elected that the form of electing one could not be called an election at all.

Sub-section (d), Some Statutory Disqualifications:—

1. Sec. 53: Numerous disqualifications on account of bias.
2. Sec. 152: Conviction for a criminal offence, insolvency, absence.
3. Sec. 180: Corrupt practices.
4. Sec. 302 (5): Misapplication of sinking fund.
5. Sec. 319 (3): Illegal borrowing.
6. See rule Disqualification at common law, under s. 53.

Property Qualification. — The qualification, partly freehold and partly leasehold, is satisfied by half the amount being freehold and half leasehold: R. ex rel. Burnham v. Hagerman, 31 O. R. 636. Title by possession confirmed by conveyance after election is a sufficient qualification: *Ibid.*

As Owner or Tenant.—See R. ex rel. Harding v. Bennett, 27 O. R. 314, see R. ex rel. O'Shea v. Letherby, 16 O. L. R. 581, and notes to ss. 395 (*b*) and 396 (*e*) below.

At the Time of the Election.—The election commences with the nomination.

The candidate must have the qualifications on that day.

See R. ex rel. Adamson v. Boyd, 4 P. R. 204.

In Actual Occupation.—This does not mean exclusive occupation. Each of partners jointly assessed may be in actual possession.

R. ex rel. Harding v. Bennett, 27 O. R. 314; R. ex rel. Joanisse v. Mason, 28 O. R. 495.

The English authorities as to what constitutes actual occupation under the Poor Law are not to be applied to the Ontario Act. Per Street, J., ibid.

Having control of the freehold and right to possession is "actual occupation" within the meaning of section: R. ex rel. Milligan v. Harrison, 16 O. L. R. 457.

R. ex rel. Sharpe v. Beck, 13 O. W. R. 457, 539.

Having agreed to sell equity of redemption will not disqualify. Ibid.

Rated on the Last Revised Assessment Roll.

Where a list under special authority was prepared before 31st Dec. for, and to take effect in the next year and not before, it was not the last list for an election which commenced by nominations in Dec.

R. ex rel. Clancey v. McIntosh, 46 U. C. R. 98.

Under a similar provision in 14 & 15 U. C. 109 Sch. "A" par. 11, Robinson, C.J., held that property owned by a candidate but not mentioned in the assessment roll cannot be made available as a qualification.

R. ex rel. Carroll v. Beckwith, 1 P. R. 276.

See also R. ex rel. Metcalfe v. Smart, 10 U. C. R. 89, and R. ex rel. Langdon v. Baby, 2 C. L. Ch. 130.

As to the binding nature of the assessment roll see the Assessment Act, R. S. O. 1914, c. 195, s. 70, and note remarks of Armour, J.

In R. ex rel. Hamilton v. Piper, where P. was entered on the assessment roll in an irregular manner. The roll was held conclusive.

The roll is conclusive as to the rating of those mentioned in it. R. ex rel. Fluett v. Semandie, 5 P. R. 19; R. ex rel. Hamilton v. Piper, 8 P. R. 225.

Irregularities in Assessment Roll.—There are several cases where the effects of deviations from the prescribed forms of the Statute in assessments are considered.

Applegarth v. Graham, 7 U. C. C. P. 171; R. ex rel. McGregor v. Ker, 7 U. C. L. P. 67; De Balquiere v. Becker, 8 U. C. C. P. 167; Laughtenborough v. McLean, 14 U. C. C. P. 175; R. ex rel. Lachford v. Frizell, 6 P. R. 12.

The requirements of the Assessment Act, R. S. O. 1914, c. 195, as to the roll are in some respects directory only and so long as the candidate is rated in the roll an error in describing his estate is not necessarily fatal to his qualifications.

R. ex rel. Carroll v. Beckwith, 1 P. R. 276.

Joint Assessments.—See s. 56, s.-ss. 4 & 5.

As far back as 1861 these sections had been held to apply to the qualification to be elected.

R. ex rel. McGregor v. Ker, 7 U. C. L. J. O. S. 67, and see R. ex rel. Harding v. Bennett, 27 O. R. 314.

The rating of a husband is respect of property owned by his wife as provided by the Assessment Act, R. S. O. 1914, c. 195, s. 37, s.-s. 11, is not a joint rating, per Meredith, C.J.

R. ex rel. Milligan v. Harrison, 16 O. L. R. at 479.

As between themselves joint tenants may agree that the whole amount of the assessment may be charged to one, but this will not allow that one to claim the whole amount at which he stands jointly rated with his co-tenant in the roll.

R. ex rel. Dexter v. Gowan, 1 P. R. 104.

Whether or not the same is Encumbered.—Even before these words were inserted encumbrances were not considered under this subsection.

R. ex rel. Flater v. Von Velson, 5 P. R. 319; R. ex rel. Philbrick v. Smart, 5 P. R. 323; R. ex rel. Ferris v. Spect, 28 O. R. 486.

Of which he or she is the owner.—See notes to s. 5.

Prior to R. S. O. 1897 (?) c. 184, s. 73, the language of the corresponding section was "has to his own use and benefit in his own right or *in the right of his wife.*'

R. ex rel. Felitz v. Howland, 11 P. R. 264.

Peaceable and undisturbed possession for 14 years, paying no rent and giving no acknowledgment of title, held sufficient.

R. ex rel. Burnham v. Sharpe, 31 O. R. 636; R. ex rel. Martin v. Moir, 7 O. W. R. 300; R. ex rel. Snider v. Richardson, 3 O. W. R. 276; R. ex rel. Ingoldsby v. Speers.

An administrator cannot qualify even if the property is assessed in his own name.

R. ex rel. Stock v. Davis, 3 L. J. 128.

It is not enough to be assessed. The candidate or his wife must actually be the owner. The mere fact of being rated as owner is not conclusive. See under similar provisions.

R. ex rel. Telfer v. Allan, 1 P. R. 214.

An Indian agent occupying a lot on the Reserve for which he is assessed has no estate whatever but a mere possession which might be determined in an hour.

R. ex rel. Lachford v. Frizell, 6 P. R. 12.

Having agreed to sell equity of redemption will not disqualify. Ibid.

R. ex rel. Sharpe v. Beck, 13 O. W. R. 457.

A trustee cannot qualify under this sub-section but might under s.-s. 1 (f).

R. ex rel. Morton v. Roberts, 26 O. L. R. 263.

Disqualification.

53.—(1) The following shall not be eligible to be elected a member of a council or be entitled to sit or vote therein:

(*a*) A judge of any court;

(*b*) A gaoler or a keeper of a lock-up;

(*c*) A sheriff, deputy sheriff or sheriff's bailiff;

(*d*) A high bailiff or chief constable of a city or town;

(*e*) An assessment commissioner, assessor, a collector of taxes, a treasurer, a clerk, or any other officer, employee or servant of the corporation of a municipality;

(*f*) A clerk or bailiff of a division court;

(*g*) A crown attorney or a clerk of the peace;

(*h*) A registrar or a deputy registrar of deeds;

(*i*) A master or a local master of titles;

(*j*) A member of a public or separate *school board* or of a board of education, of a city, town or village, or a member of a high school board, unless he has at least ten days before the day of nomination filed his resignation with the Secretary of the Board;

(*k*) A person licensed to sell spirituous liquor by retail;

(*l*) A license commissioner or an inspector of licenses;

(*m*) A police magistrate;

(*n*) A clerk of a county or district court;

(*o*) A deputy clerk of the Crown or a local registrar;

(*p*) A person having himself or by or with or through another an *interest in any contract* with the corporation or with any commission or person acting for the corporation or in any contract for the supply of goods or materials to a contractor for

work for which the corporation pays or is liable directly or indirectly to pay, or which is subject to the control or supervision of the council or of an officer of the corporation, or who has an unsatisfied claim for such goods or materials;

(*q*) A person who either himself or by or with or through another has any claim, action or proceeding against the corporation;

(*r*) A person who, either himself or by or with or through another is counsel or solicitor in the prosecution of any claim, action or proceeding against the corporation or in opposing or defending any claim, action or proceeding by the corporation. 3 Edw. VII. c. 19, s. 80 (1); 6 Edw. VII. c. 34, s. 3; 8 Edw. VII. c. 48, s. 2; 10 Edw. VII. c. 85, s. 2, *amended*.

(*s*) A person who at the time of the election is liable for any *arrears of taxes* to the corporation of the municipality. *New*.

(*t*) A person against the land in respect of which he qualifies there are at the time of the election any arrears of taxes. *New*. See 9 Edw. VII. c. 73; 3 & 4 Geo. V. c. 43, s. 53 (1).

Strict Construction.—Disqualifying clauses must be construed strictly and according to their very words and their qualifying effect cannot be extended by implication. Per Armour, J.

R. ex rel. Brine v. Booth, 3 O. R. at 147. Citing Regina v. Oldham, L. R. 4 Q. B. 290; Lewis v. Carr, L. R. 1 Ex. D. 484; LeFeuvrie v. Lankester, 3 El. & Bl. 530. (This case has been criticized).

Doubtful Construction.—If the construction of the statute is doubtful the sitting member should not be unseated.

R. ex rel. Chambers v. Allison, 1 U. C. L. J. N. S. 244; R. ex rel. Ford v. Cottingham, 1 U. C. L. J. N. S. 214.

Disqualification at Common Law—A member of a council is disqualified from voting in the council upon any subject in which he has a personal or pecuniary interest distinct from that which he has as a ratepayer in common with other ratepayers.

In re L'Abbe and Corporation of Blind River, 7 O. L. R. 230.

E.g., a mortgage of premises likely to be affected by a by-law to reduce the number of licenses, ibid.

The interest or bias which disqualifies may be a direct monetary interest but may also be substantial interest other than pecuniary and then the

question arises as to whether there is a real likelihood of bias . . . it appears to be a question of fact in each instance. Ibid. p. 234, and see The King v. Trustees of Sunderland, 1901, 2 K. B. 357.

See also, In re Vashon & Township of E. Hawkesbury, 30 C. P. 194; Re Baird and Village of Almonte, 41 U. C. R. 415.

Effect of Disqualification.—S. 153 infra, provides:—

. . . If a member of a council forfeits his seat or his right to it or becomes disqualified to hold it and does not forthwith resign his seat proceedings may be taken under ss. 160 to 179 to declare it vacant.

Once the disqualification arises the result cannot be avoided by removing the disqualification.

By s. 46, s.-s. 1 of the Local Government Act, 1894, "A person shall be disqualified for . . . being a member . . . of a board of guardians if he . . . is concerned in any bargain or contract entered into with the . . . board . . . " and by s.-s. 7, "Where a member of a . . board of guardians becomes disqualified for holding office . . . the . . . board shall forthwith declare the office to be vacant . . . and the office shall thereupon become vacant."

A member of a board claimed a small commission for collecting rents.

Alverstone, C.J., said: "Nothing is said in s.-s. 1 to the effect that during such time as he had an interest in the contract he should be disqualified. I also think that the language of s.-s. 7 is inconsistent with the suggestion that when the contract terminated the disqualification ceased."

Sterling J. said: "I have been looking at the mischief aimed at; it is to prevent people from benefiting by contracts which they have a certain amount of control in allotting. If the contention of council for the prosecutor was right this might happen; a guardian might agree to sell the board of which he was a member or to buy from the board or to enter into some other contract which might be performed in a day. If that was so he might become disqualified from being a member; but before the board of guardians could declare his office vacant the contract would be at an end and he might repeat that operation day by day."

R. v. Rowlands, 75 L. J. K. B. 501.

The statute under consideration in R. v. Rowlands provided machinery for declaring the office vacant differing from that provided in ss. 160 to 178 infra. This does not affect the principle for in that case the disqualification was at an end before the machinery provided was set in motion.

In Fletcher v. Hudson, 51 L. J. Q. B. 48 (C.A.).

The language of the statute was: "Any member who is concerned in any . . . contract . . . shall cease to be a member and his seat shall become vacant." This was held to be equivalent to the language of the st. considered in the Rowlands case, supra, and it was held that when the contract was at an end the defendant could not continue to act as member of the council.

Any Other Officer.—The words of the old statute Con. Stat. U. C. C. 54, s. 73, are: "No officer of any municipality shall be qualified to be a member of the council of the corporation," that is, an officer was disqualified from being a member of the council of the corporation of which he was an officer.

Under the present section any of the officers mentioned are disqualified from being members of the council of any municipal corporation.

R. ex rel. Boyes v. Detlor, 4 P. R. 195.

Road commissioner paid by commission some unpaid at the time of election held disqualified.

R. ex rel. McMullen v. DeLisle, 8 L. J. 291.

Road commissioner for 1861 was not ineligible to be elected.

R. ex rel. Armon v. Caste, 8 L. J. 290.

But now see s. 53, s.-s. 2 (e).

A mayor is not an officer within the meaning of this sub-section so that the mayor for 1858 was held eligible for mayor for 1859.

In re Sawers v. Srevenson, 5 L. J. 42.

Overseer of highways disqualified.

R. ex rel. Richmond v. Tegart, 7 L. J. 128.

At the Time of Election.—The election commences on nomination day. The following day is but an adjournment of the election.

A candidate who paid the arrear of taxes for which he was liable after the nomination and before the election was disqualified as a candidate.

R. ex rel. Adamson v. Boyd, 4 P. R. at 213.

School Board.—A member of a School Board whose term is immediately about to end and will end before his term as a member of a council will begin, if he is elected must nevertheless resign as a member of the School Board before nomination as a member of a council, and if he does not his election will be set aside.

R. ex rel. Jamieson v. Cook, 9 O. L. R. 466; Rex ex rel. Zimmerman v. Steele, 5 O. L. R. 565; R. ex rel. O'Donnell v. Broomfield, 5 O. L. R. 596; R. ex rel. Robinson v. McCarty, 5 O. L. R. 638.

Note changes in the Act since the cases in 5 O. L. R. were decided. (These cases might be omitted).

See s.-s. 4 as to effect of resignation of member

R. ex rel. Adamson v. Boyd, 4 P. R. 204; R. ex rel. Rolls v. Beard, 3 P. R. 357.

The term of members of Rural Districts expire on the date of the annual meeting at which their successors are appointed.

Pub. School Act, R. S. O. 1914, c. 266, s. 50.

Urban School Boards.—Election may be first Wednesday or at the same time as municipal elections.

R. S. O. 1914, c. 266, ss. 60 and 61.

Separate School Boards—Board of Education—Member of High School Board.—Note when terms of members of these Boards expire.

License.—Transfer bona fide on eve of election defendant entitled to hold seat. R. ex rel. Crozier v. Taylor, 6 L. J. 60.

Sale of interest but no change of possession defendant disqualified.

R. ex rel. Flanagan v. McMahon, 7 L. J. 155.

A transfer of a license though assented to by the License Commissioners is a void and feeble proceeding except in the cases authorized by law (see Liquor License Act, R. S. O. c. 215, s. 21), and the would-be transferror is disqualified.

R. ex rel. Brine v. Booth, 3 O. R. at 147.

The Court can review the action of the commissioners in sanctioning the transfer for the purpose of ascertaining whether the case is within the disqualifying clause or not, ibid.

See Clancy v. Conway, 46 U. C. R. 85.

An unlicensed person may be liable to penalties for breach of the Liquor License Act yet he is not disqualified under this clause.

R. ex rel. Clancy v. Conway, 46 U. C. R. 85.

An Interest in.—The Public Health Act, 1875, s. 193, provides:—

Officers or servants appointed or employed under this Act by the local authority shall not in any wise be governed or interested in any bargain or contract made with such authority. . . . "

Contracts between the local authority and contractors stipulated that the defendant, the town surveyor of the local authority, should take out the quantities for the works and that the contractors should pay him a percentage. The work was not part of the ordinary duties of the surveyor. Held, that the surveyor was interested in the contracts within the meaning of the section.

Whitely v. Barley, 57 L. J. Q. B. 143.

Lord Esher said: "It has been argued that an officer or servant of a local authority cannot be interested in a contract with the authority unless he can sue in his own name. I do not agree with that argument. I think the question in these cases is not whether the officer or servant can recover the money in his own name, but whether he is really concerned or interested

in the bargain or contract. The question is whether he could get anything otherwise than by the existence of the contracts." Ibid.

Interested in.—A municipal official who without concert or previous arrangement supplies materials to an undertaker who uses them in the extension of a contract with a municipal body is not "directly or indirectly or , . . *knowingly* engaged or interested in" such contract.

Lord Loreburn said: "But their lordships do not think that he is liable merely for supplying materials to the contractor who chooses to buy them from him without any sort of understanding or arrangement that he should do so.

Morton v. Taylor, 75 L. J. P. C. 79. (Appeal from N. S. W.)

N.B. The word *knowingly*.

Interest.—When does the interest cease?

In Cox v. Truscott, supra, it was held that the mere existence of a debt for goods supplied does not constitute a disqualifying interest.

This discretion has been criticized adversely.

O'Carroll v. Hastings, 1905, 2 I. R. 590.

This question does not arise under the Ontario Act in view of s. 53, s.-s. 1 (p).

A person advanced money to a contractor and took an assignment as security for repayment of the advance. He was held to be interested in the contract within the meaning of Metropolis Local Management Act, 1855, s. 54 (1) which provided "In case any member . . . in any manner be concerned or interested in any contract . . . he shall cease to be such member. . . ."

Hannings v. Williamson, 52 L. J. Q. B. 416.

Directly or Indirectly.—The insertion or omission of these words does not make a substantial difference.

See Todd v. Robinson, 54 L. J. Q. B. 47.

Contract.—The mayor and some councillors as members of a citizens' league had entered into a contract with the corporation under an indemnity given by the league as to part of the costs incurred in upholding the local option by-law of the town up to $100. The mayor was liable for $19.66 of the amount. He was held disqualified

The principle "de minimis non curat lex" has no application in supra case.

Nell v. Longbottom, 1894, 1 Q. B. 767.

A contract may be a very small one. That however is a matter into which a Court cannot enter as the legislature has not entrusted to it any dispensing power and probably considered that the maxim of obsta principiis should apply to cases of this kind. Ibid.

A person who is discharged in equity from a contract is not disqualified merely because he has not obtained a formal discharge.

R. ex rel. Hill v. Bretts, 4 P. R. 113.

An agent of an insurance company which insured city buildings paid by salary and commissions for effecting insurance on city buildings both before and after the election is not disqualified.

R. ex rel. Bugg v. Smith, 1 C. L. J. 129.

A baker had a contract to supply bread to the city. After the baker was elected alderman his hired man obtained the contract and supplied bread which he purchased from the baker to the city and the bread was conveyed to the city in the baker's delivery rigs. The evidence shewed that in fact the hired man purchased the bread as any other customer might. The baker was held not disqualified but neither party was allowed costs.

R. ex rel. Piddington v. Riddell, 4 P. R. 80.

A tender to supply goods to a corporation may merely be an offer which can be withdrawn at any time so that after withdrawal there is no existing contract.

On the other hand an accepted tender may be a binding contract which would disqualify unless the corporation released the tenderer. In

either case if there is a balance owing by the corporation in respect of goods supplied the tenderer is disqualified.

R. ex rel. McGuire v. Birkett, 21 O. R. 162.

Note, constitutional question raised in this case as to right of Provincial Legislature to create a court to try controverted municipal elections.

Note, as affecting relators' right to seat resolutions of council re disqualification.

The Public Health Act, 1875, Schedule ii. provides by rule 64 that any member of a local board who "in any manner is concerned in any bargain or contract entered into by such board," shall cease to be such member.

The defendant a member of a local board did part of the work for a contractor which the latter had contracted with the board to do:—Held, that the defendant ceased to be a member of the board.

Lindley, L.J. said: Now the words "In any manner concerned in any bargain or contract" are more or less lax and cases may easily be put in which a person might be said to be concerned in a contract who yet was not "concerned" in the contract. Within the meaning of the enactment. In order to interpret words which have no very definite meaning and perhaps might have been employed for that very reason, we must look at the object of the enactment and the object here obviously was to prevent a conflict between interest and duty in the case of members of local boards.

Nutton v. Wilson, 1889, 58 L. J. Q. B. 443.

Quære. Would it be well to give the facts in this case as to the work actually done—the supplying of a few boards to a contractor?

Trifling amount in value does not avail to relieve from disqualification.

R. v. Rowlands (commission of £1), 1906, 2 K. B. 292, 75 L. J. K. B. 501; Nell v. Longbottom (4d. worth of oil), 1894, 1 Q. B. 767, and many other cases, but earlier cases contra. Lewis v. Carr, 46 L. J. Ex. 314 (a casual supply of candles); Nicholson v. Fields, 7 H. & N. 810.

It is immaterial whether or not the contract is binding on the city and a disclaimer by the candidate is of no avail.

R. ex rel. Moore v. Miller, 11 U. C. R. 465; R. ex rel. Fluett v. Gautier, 5 P. R. 24.

N. was supplying goods to a corporation under an accepted tender to supply goods for a year. During the year and prior to nomination day he applied to a committee of the council to be released from his tender or contract and was released subject to the approval of the council. N. was nominated and subsequently the council ratified the resolution of its committee.

Held that the ratification while relating back to the time of the release by the committee did not put an end to the contract so as to affect the rights of electors and other candidates, and N. was held disqualified.

The Statute provided, "A person shall be disqualified for being elected and for being a councillor if and while he . . . has directly or indirectly . . . any share or interest in any contract. . . .

Ford v. Newth, 1901, 70 L. J. K. B. 459.

Tender Amounting to Contract.—The observations of Channel, J., in the D. C. in Ford v. North, supra, are suggestive.

Dealing with the question as to whether the tender and the operations under it amounted to a contract:

"As to the first point whether at any time prior to the supposed determination of it there had been a contract I entertain no doubt at all. I quite agree that it depends upon the words of the documents used in a particular case and that there might be documents somewhat similar to those in question which would not amount to a contract, that there might be what is called a unilateral contract only; or on the other hand the documents might simply shew that which becomes a contract only when an order for particular goods needed. All that might exist in the documents. On the other hand it seems to me that applying one's knowledge of business to what we know was the intention of the parties in such a case as this. A very little indeed in such documents would be quite sufficient to turn the transaction into a contract."

Contract by Agent.—When made by agent without knowledge of principal is principal disqualified?

If the corporation can hold the principal, yes, if not, no.

See the Queensland case, Miles v. McIlwraith, 52 L. J. P. C. 17.

Assignment of benefits of a contract if a liability remains with the candidate will not remove disqualification.

Cox v. Ambrose, 55 J. P. 23.

A by-law granting an exemption may embody a contract as a contract to build a mill and get exemption from taxes, in which case a person interested in the contract is disqualified.

R. ex rel. Lee v. Gilmour, 8 P. R. 514.

Also a by-law may grant an exemption on certain conditions being complied with, there being no obligation on the grantee to comply with the conditions. A person interested in the exemption in such a case is not disqualified.

R. ex rel. Harding v. Bennet, 27 O. R. 314.

Arrangement to set off taxes against claim disqualifies.

R. ex rel. Fluett v. Gautier, 5 P. R. 24.

Sureties for corporation officers are disqualified.

R. ex rel. Haner v. Roberts: R. ex rel. Taylor v. Stevens, 7 P. R. 315; R. ex rel. McLean v. Watson, 1 C. L. J. 71; R. ex rel. Coleman v. O'Hare, 2 P. R. 18.

Continuing surety.

R. ex rel. Flanagan v. McMahon, 7 L. J. 155; R. ex rel. Ford v. McRae, 5 P. R. 309.

Look up: R. ex rel. Forsyth v. Dalsen, 7 L. J. 71.

A dispute as to amount due corporation by a treasurer who had resigned is a contract in the legal sense of the term and disqualifies.

R. ex rel. Bland v. Figg, 6 L. J. 44.

Contract for lease disqualifies.

R. ex rel. Stock v. Davis, 3 L. J. 128.

Conditional assignment of lease in attempt to remove disqualification, defendant disqualified.

R. ex rel. Ross v. Rastal, 2 C. L. J. 160.

"The word contract in this section must be construed in its widest sense so as to include contracts of record as well as small contracts and contracts under seal."

R. ex rel. MacNamara v. Heffernan, 7 O. L. R. 289.

Where a judgment is a final judgment the law implies a promise or contract by the defendant or party against whom the judgment is to pay the amount . . . where there is a promise or contract by implication of law it is of the same force as an actual promise or contract.

Re Kerr v. Smith, 24 O. R. at 475.

To a Contractor.—In Barnacle v. Clark, Darling, J., in the Div. Court said:—

"We ought not to be hypercritical in dealing with the language of the section because the object of the provision is to put all persons who are members of a School Board beyond the suspicion of being interested in contracts with the Board."

See Le Feuvre v. Lankester, 3 E. & B. 530; Tompkins v. Jolliffe, 51 J. P. 247.

The mere letting of a house at a fixed sum to a contractor for work under a local authority has been held to disqualify.

Towsey v. White, 5 B. & C. 125.

To a Contractor for Work.—A sub-contractor in the case provided for by the ss. becomes disqualified immediately upon the sub-contract taking effect.

Ryan v. Willoughby, 27 A. R. 135.

Supplying goods to a contractor. To supply goods does not disqualify.

R. ex rel. Piddington v. Riddell, 4 P. R. 80.

S. 34 of the Education Act, 1870, provides that no member of a School Board "shall in any way share or be concerned in the profits of any bargain or contract with or any work done under the authority of such School Board."

The defendant sold sand to a contractor in the ordinary course of business. Held that he was within the section.

Barnacle v. Clark, 69 L. J. Q. B. 15.

N.B.—The first part of (p) is sufficiently wide to include the latter part after "or." Has the addition of the words after "or" restricted the language of the first part of (p)?

E.g.:—Suppose a contractor supplies material only, not work. A person who sells material to such contractor is interested in the contract under Barnacle v. Clark.

(2) S.-s. 1 shall not apply to a person by reason only:

(*a*) Of his being a shareholder in an incorporated company having dealings or a contract with the corporation, or

Shareholder.—The House of Lords has held that a shareholder of a company has an interest in the contracts of the company.

Dimes v. Grand Junction Canal Company, 3 H. L. Cas. 759.

Under the Public Health Act (I), 1875), s. 193, where there is no saving clause similar to this a shareholder in a gas company which supplied gas to a local board was disqualified from holding office under the local board.

Todd v. Robinson, 54 L. J. Q. B. 47.

The adding of an exemption of this kind by an amendment amounts to an assumption that without express exemption a shareholder would be interested.

Per Brett, M.R., Todd v. Robinson, supra.

For Ontario cases of disqualification before this ss. was enacted see R. ex rel. Coleman v. O'Hare, 2 P. R. 18.

A person becomes a shareholder: (1) on the issue of letters patent or certificate of incorporation or the passing of a Private Act. Refer to Company's Act, and (2) on allotment by directors.

This sub-section protects persons who are merely shareholders but if they are officers or agents of the company they have a peculiar interest in its contracts.

For discussion of nature of shareholders' interest in a contract of the company, see London v. London, 70 L. J. Ch. 334.

(*b*) Of his being a lessee of the corporation for a term of twenty-one years or upwards of any property of the corporation, or

(*c*) That part of his property is exempt wholly or in part from taxation, whether such exemption is founded on an agreement with the corporation or on a by-law of the council, or

See R. ex rel. O'Shea v. Letherby, 16 O. L. R. 581, and notes to ss. 395 (f) and 396 (e) below.

(*d*) Of his being the proprietor of or otherwise interested in a newspaper or other periodical publication in which official advertisements or notices which appear in other newspapers or periodical

publications are published by the council or for which the council is a subscriber or which is furnished to any department or officer of a corporation if the same are paid for at the usual rates, and he has not agreed with the corporation to do the whole or the principal part of its printing. 3 Edw. VII. c. 19, s. 80 (2), *part amended;* 4 Edw. VII. c. 22, s. 37, *part amended,* or

(*e*) Of his having been appointed and paid for his services as commissioner, superintendent or overseer of any highway or of any work undertaken wholly or in part at the expense of the corporation. 3 Edw. VII. c. 19, s. 537, part 1 (*a*) *amended.*

(*f*) Of his being a consumer or taker of anything supplied by the corporation or any commission under the Public Utilities Act or of his having entered into a contract with the corporation or commission for the supply of it to him. *New.* 3 & 4 Geo. V. c. 43, s. 53 (2).

(*g*) Of his being part owner or joint owner of vacant land (other than the land in respect of which he qualifies) in respect of which taxes are in arrears, where the council of the corporation has by resolution declared that clause (s) of subsection 1 shall not apply so as to disqualify a joint owner or part owner of any such vacant land until after the first day of June, 1921. 9 Geo. V. c. 46, s. 1.

(3) A person being such a shareholder shall not vote on any question affecting the company or being such a lessee shall not vote on any question affecting his lease or his rights or liabilities thereunder, or being so exempt from taxation shall not vote on any question affecting the property so exempt, or being such a proprietor of or otherwise interested in a newspaper or other periodical publication shall not vote on any question affecting his dealings with the corporation. 3 Edw. VII. c. 19, s. 80

(2), *part;* 4 Edw. VII. c. 22, s. 37, *part amended;* 3 & 4 Geo. V. c. 43, s. 53 (3).

(4) The filing of the resignation mentioned in clause (j) of sub-section 1, shall render vacant the seat of the member. 10 Edw. VII. c. 85, s. 2, *part;* 3 & 4 Geo. V. c. 43, s. 53 (4).

53*a*.—(1) To remove doubts it is declared that the words "officer," "employee," or "servant" in clause *e* of sub-section 1 of section 53 of *The Municipal Act,* shall be deemed to include a commissioner or a member of any commissioner or other body, appointed by the council of a municipal corporation for the management and control of a public utility as defined by *The Public Utilities Act* or of an electric railway or steam railway, and except where otherwise expressly provided, no such commissioner or member shall be eligible to be elected a member of the council or be entitled to sit or vote therein.

(2) Sub-section 1 shall have effect notwithstanding that the establishment of any such commission or other body is authorized by a special Act of the Legislature. 8 Geo. V. c. 32, s. 3; 9 Geo. V. c. 46, s. 2.

[N.B.—Section 53*a*, as given above, is effective from 26th March, 1918.]

54. If a member of a council in his own name or in that of another and alone or jointly with another enters into a contract with or makes a purchase from or a sale to the corporation, the contract, purchase or sale as against the corporation shall be void. 3 Edw. VII. c. 19, s. 83, *amended.* 3 & 4 Geo. V. c. 43, s. 54.

Exemptions.

55. The following shall be exempt from being elected as members of a council and from being appointed to any municipal office:

(*a*) Persons of the age of sixty years and upwards;

(*b*) Members and officers of the Senate, or of the House of Commons of Canada, or of the Assembly;

(*c*) Coroners;

(*d*) Clergymen and ministers of every denomination;

(*e*) Members of the Law Society of Upper Canada, whether barristers or students;

(*f*) Officers of Courts of Justice;

(*g*) Physicians and Surgeons;

(*h*) Professors, masters and teachers, and the officers and servants of a university, college or school in Ontario;

(*i*) Millers;

(*j*) Officers and members of a fire brigade or of an authorized fire company. 3 Edw. VII. c. 19, s. 84, *amended.* 3 & 4 Geo. V. c. 43, s. 55.

PART III.

Municipal Elections.

Who to be Entered on Voters' List.

56.—(1) Every person shall be entitled to be entered on the voters' list prepared under Part I. or II. of the Ontario Voters' Lists Act, who is:—

(*a*) A male, a widow or an unmarried woman;

(*b*) Of the full age of twenty-one years;

(*c*) A British subject by birth or naturalization;

(*d*) Not disqualified under this Act or otherwise by law prohibited from voting; and

(*e*) Rated, or entitled to be rated, or in the case of a male whose wife is or was entitled to be rated to the amount hereinafter mentioned on the last revised assessment roll of the local municipality for land held in his or her own right, or so rated or entitled to be so rated for income, or who is entered or was entitled to be entered on such roll as a farmer's son. 3 Edw. VII. c. 19, s. 86 (1) *part amended.*

(2) The rating for land shall be in respect of a freehold or leasehold, legal or equitable or partly of each to an amount not less than

(*a*) In villages and townships, $100;

(*b*) In towns having a population not exceeding 3,000, $200;

(*c*) In towns having a population exceeding 3,000, $200;

(*d*) In cities, $400. 3 Edw. VII. c. 19, s. 87.

(3) The rating for income shall be in respect of income from a trade, office, calling or profession of not less than $400 which has been received during the twelve months next preceding the final revision of the assessment roll or the twelve months next preceding the last day for making complaint to the Judge under the Ontario Voters' Lists Act. 3 Edw. VII. c. 19, s. 86 (1), *part amended.*

(4) If both the owner and the occupant are severally but not jointly rated, each shall be deemed to be rated. 3 Edw. VII. c. 19, s. 92, *amended.*

(5) Where land is owned or occupied jointly by two or more persons who are rated at an amount sufficient, if equally divided between them, to give a qualification to all, each shall be deemed to be rated within the meaning of this section, otherwise none of them shall be deemed to be so rated. 3 Edw. VII. c. 19, s. 93, *amended.*

(6) A person not entitled under the Assessment Act to be entered on the last revised assessment roll as a farmer's son, shall be entitled to be entered on the voters' list if he has the other qualifications of a farmer's son as prescribed by that Act and has resided on the farm of his father or mother for the twelve months next preceding the date of the final revision of the assessment roll or for the twelve months next preceding the last day for making complaint to the Judge under the Ontario Voters' Lists Act.

(7) Occasional or temporary absence from the farm for a time or times not exceeding in the whole six of the twelve months shall not disentitle a farmer's son to be entered on the voters' list. 3 Edw. VII. c. 19, s. 86 (1) *part amended;* 3 & 4 Geo. V. c. 43, s. 56.

This section applies to the qualification of electors, not of candidates: R. ex rel. Milligan v. Harrison, 11 O. W. R. 554, 678; 16 O. L. R. 475.

The Voters' List.—Part I. of the Ontario Voters' List Act, c. 6, R. S. O. 1914, contains directions for the preparing of municipal voters' lists for townships and villages, and except as varied by Part II. of the Act and by the Manhood Suffrage Registration Act, R. S. O. 1914, c. 7, applies also to cities and towns.

Part II. of the Ontario Voters' List Act applies to every city in which a by-law is passed for taking the assessment prior to thirtieth day of September.

Part III. of the Act provides for the preparing of municipal lists in territories without municipal organization. Part I. requires the clerk of each municipality immediately after the final revision of the assessment roll to make correct alphabetical lists of all persons appearing by the roll to be voters. Part II. requires the list to be prepared immediately after the return of the roll without waiting for its revision.

In determining what names appearing on the assessment roll are to be put on the voters' list, the clerk is to be governed by s. 56.

Questions as to the proper lists to be used in connection with any election or any voting on a by-law are discussed below. The remarks which follow deal solely with qualifications to be municipal voters enumerated in s. 56.

As to s.-s. 1 (*a*), (*b*) and (*c*), see notes to s. 52 (1*b*) and (1*c*).

Not Disqualified or Prohibited from Voting.—The principal disqualifications and prohibitions are as follows:—

(*a*) The clerk, by s. 60;

(*b*) Every person found guilty under ss. 187, 188 and 189—the names of these persons shall not be entered on the voters' lists.

(*c*) Defaulters in payment of taxes, by s. 59.

(*d*) Counsel, agent, solicitor or clerk of candidate, by s. 61.

There is apparently no provision forbidding the clerk to enter on the lists the name of a prisoner in gaol or patient in a hospital for the insane or a person maintained as an inmate in a house of refuge or house of industry, as is provided in s. 15 of the Ontario Elections Act, R. S. O. 1914, c. 8.

Entitled to be Rated.—The duty of the clerk, under s. 6 of the Ontario Voters' Lists Act, is to enter in the voters' lists only the names appearing by the assessment roll to be voters, but a person entitled to be rated may apply to the Judge, under s. 15 (2) of the last mentioned Act, and if entered by the Judge shall be entered also on the assessment roll without any request on his part. The same remarks apply to persons "entitled to be entered" as farmers' sons.

Rated, of course, means appearing on the assessment roll.

The rating of a husband in respect of his wife's property is not a joint rating in any sense. Sub-section 5 applies only to the qualification of electors, not to the qualification of candidates: Per Meredith, C.J., R. ex rel. Milligan v. Harrison, 1908, 16 O. L. R. at 479. See the Assessment Act, R. S. O. 1914, c. 195, s. 37 (11).

Rating for Land.—See s. 52 (1*f*).

Population.—See s. 2 (*m*) and s. 52 (*e*) and (*f*).

Income from a Trade, Office, Calling or Profession.—Note that income, as defined in the Assessment Act, R. S. O. 1914, s. 195, s. 1 (*a*), includes more than income as limited in s. 56. For example, profits received from money at interest or from stocks or profit or gain from sources other than those mentioned in s.-s. 4, while assessable, do not entitle a person to be entered in the voters' list. The last provision in s.-s. 3 enables a person entitled to vote to be entered on the voters' list under the provisions of s. 4 (2) of the Voters' Lists Act.

Severally but not Jointly Rated.—Land owned by a resident and occupied by any person other than the owner must be assessed against both. They are severally rated. See the Assessment Act, s. 37, s.-ss. 3 and 4. On the other hand land owned by more persons than one must be assessed against all. They are jointly rated.

Land Owned or Occupied Jointly.—Apparently the question of joint ownership or ownership in common is, by the language of s.-s. 5, involved. It would seem to have been better to have adopted similar language to that of s.-s. 4, thus "two or more persons jointly rated, etc." The Assessment Act, s. 37 (9), provides for the joint rating of "several owners of undivided shares." Apparently for the purpose of the Assessment Act the question of joint ownership or ownership in common is not material. Possibly the effect of the qualifying clause "who are rated" is to make the distinction unimportant for the purposes of s.-s. 5.

Joint assessment; qualification considered: R. ex rel. O'Shea v. Letherby, 11 O. W. R. 929; 16 O. L. R. 581.

Farmers' Sons.—Section 25 of the Assessment Act make the right to be entered as a farmer's son on the assessment roll depend on the (1) residence on the farm for twelve months next preceding the date fixed for beginning to make the roll, and (2) residence on the farm at the said date. Sub-section 6 gives two later dates of reference for determining the qualifications. See ss. 57 and 58.

Temporary Absence.—Sub-section 7 is identical with s.-s. 6 of s. 25 of the Assessment Act referring to the assessment roll. It is needed because s.-s. 6 is confined to the roll. Determination of residence; *animus revertendi*: Re Sturmer and Beaverton, 2 O. W. N. 1227; 19 O. W. R. 430; 24 O. L. R. 65.

"**Owner**" includes a locatee: Pattison v. Emo, 28 O. L. R. 228.

Partnership.—See R. ex rel. Harding v. Bennett, 27 O. R. 314.

Revision of Voters' List.—See the Ontario Voters' Lists Act. The list when finally revised is to be certified, under ss. 21 or 22, as the case may be. After being certified, it may still be changed by striking off the names of persons who have died since the list was certified: s. 23. Then s. 24 provides:—

> "The certified list shall, under the Ontario Election Act, or the Municipal Act, be final and conclusive evidence that all persons named therein, and no others, were qualified to vote at any election at which such list was, or was the proper list to be used; except
>
> 1. Persons guilty of corrupt practices at or in respect of the election in question, or since the list was certified by the Judge;
>
> 2. Persons who, subsequently to the list was certified, are not or have not been resident within the municipality to which the list relates, or within the electoral district for which the election is held, and who by reason thereof are, under the provisions of the Ontario Election Act, or the Municipal Act, disentitled to vote;
>
> 3. Persons who, under ss. 12 to 15 of the Ontario Election Act, are disqualified and incompetent to vote: 7 Edw. VII., c. 4, s. 24; 2 Geo. V., c. 4, s. 3."

As to revision of voters' lists, see Rawdon Voters' List, 1903, 6 O. L. R. 613; Norfolk Voters' List, 1908, 15 O. L. R. 108; South Fredericksburgh Voters' List, 1908, 15 O. L. R. 308; Adolphustown Voters' List, 1908, 17 O. L. R. 312.

Right to Vote.

57. Subject to ss. 59, 60 and 61, every person whose name is entered on the proper voters' list *shall be entitled to vote* at a municipal election except that in the case of a tenant he shall not be entitled to vote unless he is a *resident* of the municipality at the date of and has resided therein for one month next before the election and in the

case of an income voter and of a farmer's son, he is a resident of the municipality at the date of the election. 3 Edw. VII. c. 19, ss. 86 (1) and 89 a, part amended; 3 & 4 Geo. V. c. 43, s. 57.

The decision in Re Ryan and Alliston, although dealing with a list for voting on a by-law, is in reality a decision as to the effect of the provisions of s. 57 by reason of the provisions of s. 268.

58. Except as to the disqualification arising from his not residing in the municipality at the time of the election in the case of an income or farmer's son voter or from his not residing in the municipality for one month next before the election and at the time of the election in the case of a tenant, or from the non-payment of taxes in the case of a voter whose name appears on the *defaulters' list*, no question as to the qualification of any person whose name is entered on the proper list of voters shall be raised at an election. *New.* See 3 Edw. VII. c. 19, s. 89, *last part.* 3 & 4 Geo. V. c. 43, s. 58.

A person's name was properly entered on the list as a tenant, but after a final revision of the list he ceased to be a tenant or occupy the property, but continued to reside in the municipality, and was a freeholder to an extent entitling him to vote. At an election he demanded a ballot and was willing to take the oath as a freeholder. Held, entitled, and a refusal to allow him to vote was a breach of duty of the returning officer: Wilson v. Madnes, 28 O. R. 419; 26 A. R. 398.

[*Note.—Old s. 89, first part covered by s. 57, last part covered by s. 58.*]

59.—(1) No person whose name appears on the defaulters' list provided for by s. 95 shall be entitled to vote in respect of income in any municipality, or in respect of real property in a municipality, the council of which has passed a by-law under paragraph 9 of s. 399, unless at the time of tendering his vote he produces and leaves with the deputy returning officer a certificate from the treasurer, or the collector, shewing that the taxes, in respect of which the default was made, have since been paid.

(2) The deputy-returning officer shall file the certificate, and note the same on the defaulters' list. 3 Edw. VII. c. 19, s. 88, *amended;* 3 & 4 Geo. V. c. 43, s. 59.

Finality of Voters' List.—Bearing in mind the fact that a municipal election is a different thing from a voting on a by-law and that the finality of voters' lists for municipal elections depends upon different though similar statutory provisions, the following remarks by Clute, J., in Re Mitchell and Campbellford, 1908, 16 O. L. R. 578, are of value:—

"When once the Municipal Act applies and the voters' lists are brought in as the lists to be used to designate the persons who are entitled to vote, such lists are not to be disassociated from the quality of finality which the Act gives them, and which was the chief cause of their being. They have, so to speak, the quality of finality as an integral part of them. They indicate the persons entitled to vote in such manner that their qualification cannot be further inquired into. They are not lists under the Act, if stripped of this essential quality. See In re Port Arthur and Rainy River Prov. Election, Preston v. Kennedy, 1907, 14 O. L. R. 345; Re Saltfleet Local Option By-law, 1908, 16 O. L. R. 293; R. ex rel. McKenzie v. Martin, 1897, 28 O. R. 523; In re Armour and the Township of Onondaga, 1907, 14 O. L. R. 606, 608.

"I am not able to follow Mabee, J., in Re Cleary and the Township of Nepean, 1907, 14 O. L. R. 392."

In re Cleary and Nepean, 1907, 14 O. L. R. 392, Mabee, J., dealing with the contention that the lists were final and that the Court on a motion to quash a by-law could not enter into the consideration of the question as to whether the persons voted who had a right to vote, discussed the cases as follows:—

"In Re Leahy and Village of Lakefield, 1906, 8 O. W. R. 743, it is said (p. 744): 'Five tenants voted who had no right to vote, because they had not been resident within the municipality for one month before polling day. That is not controverted, and, no doubt, these five tenants improperly voted, and if a sufficient number of such tenants to have affected the result had voted, although it is impossible to tell which way they voted, it would have been necessary to set aside the by-law. However, if all the five votes were struck off, that would result only to reduce the majority to 36.'

"In Re Young and Township of Binbrook, 1899, 31 O. R. 108, the Court went behind the voters' lists, and took into consideration some 80 persons entitled to vote, and whose names had been left off the list by the clerk upon the assumption that they were not entitled to vote.

"In Re Dillon and Village of Cardinal, 1905, 10 O. L. R. 371, affidavits were received as to illegal votes cast, and the same was done in In re Salter and Township of Beckwith, 1902, 4 O. L. R. 51.

"In the Dillon case Mr. Justice Magee says (p. 375): 'A majority obtained by illegal votes does not present itself as not being an illegality such as the statute contemplates as a ground for quashing.' If this be right, the voters' lists are not final, and the Court must consider the legality of the votes that are questioned. See also Re Gerow and Township of Pickering, 1906, 12 O. L. R. 545, and Re Sinclair and Town of Owen Sound, 1906, *ib.* 488.

"Of course, it was not argued that these ladies had the right to vote.

"I am bound by the foregoing cases, and am precluded, I think, from holding that it is not open to an applicant to quash a by-law to shew that illegal votes were cast."

Re Mitchell and Campbellford, *supra*, was approved by the Divisional Court in Re McGrath and Durham, 1908, 17 O. L. R. 514, in which will be found a most complete history of the legislation and review of the cases by Riddell, J. Among the earlier cases dealing with municipal elections, as distinguished from voting on by-laws, may be mentioned: R. ex rel. St. Louis v. Reaume, 1895, 26 O. R. 460, where Boyd, C., said: "The whole system is based on the finality of the voters' list as settled and certified by the Judge." In R. ex rel. McKenzie v. Martin, 1897, 27 O. R. 523, Rose, J., adopted the same view.

The whole question as to the finality of the lists both at a municipal election and at a voting on a by-law was thus discussed by Meredith, C.J., in Re Orangeville Local Option By-law, 1910, 20 O. L. R. 476.

"It was held by Riddell, J., in Re Armour and Township of Onondaga, 1907, 14 O. L. R. 606, following R. ex rel. McKenzie v. Martin, 1897, 28 O.R. 523, that he had no power upon a motion to quash to examine 'into the propriety of the various names being on the voters' list,' and, if there was no power to do this on such a motion *a fortiori* the County Court Judge has no such power upon a scrutiny of the ballot papers.

"If there was ever any doubt upon the point, it has been removed by s. 24 of the Voters' Lists Act, 1907, which makes the certified list final and conclusive evidence that all persons named in it, and no others, except such as come within the exceptions mentioned in the section which are applicable to a municipal election, 'were qualified to vote at any election at which such list was, or was the proper list to be, used.'

"It is not open to doubt that the words 'any election' apply to the taking of the vote of the electors upon a by-law which requires their assent before it is competent to the Council finally to pass it and, as I understand the Saltfleet case, the Divisional Court was of that opinion.

"What, then, are the exceptions? They are enumerated in paragraphs 1, 2 and 3 of s. 24, and are as follows:" See *supra*.

His Lordship then read the section, which will be found above, and proceeded:—

"The only one of these three paragraphs which, in my opinion, is applicable to a municipal election, is paragraph 1.

"Paragraph 2 is applicable to voting at elections under the Ontario Election Act, and to that only. This is manifest from the concluding words, 'and who by reason thereof are, under the provisions of the Ontario Election Act, disentitled to vote.'

"Paragraph 3 is also applicable only to elections under the Ontario Election Act. That I should have thought clear from the language used, but, if it were open to a different construction, a consideration of the effect of treating it as applicable to a municipal election makes it clear that that was not intended.

"The Ontario Election Act mentioned in the section is R. S. O. 1897, c. 9; and ss. 4 to 7 of it disentitle to vote:—

(1) Judges and certain officials;

(2) Persons not named in the proper voters' list;

(3) Returning officers, election clerks, and certain other persons employed at the election, in reference to it, or for the purpose of furthering it;

(4) Women;

(5) Prisoners, patients in lunatic asylums, and persons maintained wholly or in part as inmates receiving charitable support or care in certain institutions.

"Many of the persons disentitled to vote under the Ontario Election Act are not disentitled to vote at municipal elections, as will be seen by referring to Part II., Title II., 'Division II.—Disqualification,' of the Municipal Act.

"Many officials disentitled to vote under the Ontario Election Act are not disentitled to vote at municipal elections; and some that are disentitled to vote at municipal elections may vote at elections under the Ontario Election Act. Some women may vote at a municipal election, but none at an election for the Legislative Assembly.

"The persons mentioned under the fifth head, and some of those mentioned under the fourth head, are not disentitled to vote at municipal elections, and there are other differences which it is not necessary to mention. . . .

"I do not wish to be understood as expressing the opinion that, upon a proceeding to unseat a candidate who has been declared

elected, or on a motion to quash a by-law, it would not be open to the Court to inquire whether a person whose name was entered on the voters' list had not, by something which had subsequently occurred, lost his right to vote, and, if that was found to be the case, to disallow the vote. I reserve my opinion as to such a case until it is presented for decision.

"I am here again met with the decision in the Saltfleet case, that upon a scrutiny of the ballot papers, under s. 371, a 'subsequent change of residence, which would disqualify, may be investigated, under sub-clause 2, but not a subsequent change of status:' per the Chancellor, at p. 302.

"I have already indicated my reasons for differing from that view as to the effect of s. 24 of the Voters' Lists Act, 1907, as applicable to a scrutiny of ballot papers under the Municipal Act, but my duty is to follow the Saltfleet case and not to give effect to my own opinion."

His Lordship then discussed the opinion of the County Court Judge under review on appeal in the case before him, to the effect that where a person whose name is entered on the voters' list, at any time subsequent to its having been certified, is not a resident within the municipality, the list as to him is not final and conclusive, but his right to be entered upon it may be questioned, and, if it appears that he has not that right his vote may be disallowed, even in a case such as that of a freeholder where residence in the municipality is not required to entitle him to vote, and then proceeded:—

"Such a view is, in my opinion, entirely opposed to the policy on which the Voters' Lists Act is based, which is, that the list is to be final and conclusive as to the right of every person whose name is entered on it to vote, unless, by something happening subsequently, such as change of residence, he has lost that right (par. 2), or unless he has been guilty of corrupt practices at the election at which he voted or since the list was certified by the Judge (par. 1), or unless he is a person incompetent or disqualified from voting under ss. 4 to 7 of the Ontario Election Act, par. 3 and par. 2 being, in my opinion, applicable only to elections under that Act.

"To attribute to the Legislature the intention of opening the door to an attack on the voters' list simply because a person whose name is entered on it, whose right to vote is challenged, may have ceased temporarily, it may be, to reside in the municipality, where his ceasing to do so did not affect his right to vote, is not, I venture to think, very complimentary to the good sense of that body.

"A reference to the sections of the Ontario Election Act, R. S. O. 1897, c. 9, which deal with residence as affecting the right to vote (ss. 8 to 11), shews clearly, I think, the cases which par. 2 was intended to provide for, and that that want of good sense is not fairly chargeable to the Legislature."

Finality, etc.—The question again was considered by Riddell, J., in Re Ellis and Renfrew, 1910, 21 O. L. R. Riddell, J., affirmed, 2 O. W. N. 27 D. C., reaffirmed, 1911, 23 O. L. R. 427; the same conclusion being reached as was arrived at by Meredith, C.J., in Re Orangeville Local Option By-law, *supra*. It came up again in Re Dale and Blanchard, 1910, 21 O. L. R. 497, 23 O. L. R. 69 A. C., where Mulock, C.J., followed Re Mitchell and Campbellford, *supra*. The Divisional Court held that the list used was not conclusive, on the ground that it was a list prepared by the clerk for voting on a money by-law, and had not the finality of a voters' list duly certified. The Court of Appeal upheld the decision of the Divisional Court.

The question of the finality of voters' lists came up again in McPherson v. Mehring (referred to as the West Lorne Scrutiny), reported in 23 O. L. R. 598; Middleton, J., reversed, 25 O. L. R. 267 D. C., restored, 26 O. L. R. 339 C. A., and confirmed, 1913, 47 S. C. R. 451; the final decision being that on a scrutiny at any rate a Judge may go behind the voters' list and inquire if a tenant whose name is placed thereon has the residential qualification entitling him to vote.

Summary.—The finality of the voters' list comes into consideration on the following occasions:—

A (1) At a municipal election;
(2) On a recount;
(3) On proceedings to unseat;

B (1) At a voting on a by-law;
(2) On a scrutiny;
(3) On a motion to quash a by-law;

C On prosecutions under the Act.

Proper Voters' List.—The use of a wrong list is fatal to an election: R. ex rel. Black v. Campbell, 1909, 18 O. L. R. 269. The proper list to be used is prescribed by s. 91 to be the last list certified by the Judge, under the Ontario Voters' Lists Act, with supplementary lists under ss. 93 and 94. See cases discussed under s. 91. Apparently the list to be used must be a list which has been certified before the time at which nomination takes place. The electorate should know beforehand who the authorized electors are: East Durham case, 1890, 1 Ont. El. Cas. at 493, and s. 23 of the Voters' Lists Act appears to put it beyond doubt. (See remarks of Anglin, J., in R. ex rel. Black v. Campbell).

In re Ryan and Alliston, 1910, 21 O. L. R. 582; 22 O. L. R. 200, there was a motion to quash a by-law upon the ground amongst others that there was no lawful or sufficient list, because the notice of the holding of the Court for the revision of the list was not published as required. The list was certified by the Judge. Meredith, C.J., said:—

> "But in the nature of the thing it must have been intended that a *de facto* list, certified by the Judge, and especially where an election had been held at which it was used, should be for the purpose of that election the proper list to be used, and not intended that it should be open to some one whose industry had led to the discovery that a complainant who was treated as one having a right to complain had not that right, or that there was some omission as to the publication of the notice required by s.-s. 4 of s. 17 of the Ontario Voters' Lists Act, to attack the election on that ground.
>
> "To give effect to the objections of the applicant would mean that a ministerial officer, the clerk, would be called upon, when an election is to be held, to enter upon an inquiry as to whether there had been a compliance with the law in those respects, in order to determine what was the proper list to be used at the election.
>
> "All this points to the conclusion that the last *de facto* certified voters' list filed in the office of the Clerk of the Peace is all that the clerk of the municipality is to concern himself with, and leads necessarily, I think, to the conclusion that, where an election has been held at which such a list has been used, it was not intended that the election should be open to attack because of some informality or omission on the part of the Judge or of any of the officers intrusted with duties in connection with the list in the performance of their duties under the Act in accordance with its provisions."

This reasoning was followed by the Divisional Court. In the Divisional Court, Middleton, J., made the following valuable comment:—

> "The clerk, exercising his ministerial or administrative functions in connection with the election, is bound, by s. 148 of the Municipal Act, to use upon the voting the last list certified by the Judge, and transmitted as there required. The clerk is not to go behind the certificate of the Judge for the purpose of ascertaining whether he has duly discharged his functions. Unless and until the act of the Judge has been quashed or in some way annulled, it is conclusive upon all. Re Schumacher and Town of Chesley determined that a *certiorari* would not lie to bring up and quash a certificate of the Judge because

of suggested error in determining matters over which he had jurisdiction. But where the Judge has no jurisdiction to enter upon the inquiry at all, by reason of the failure to observe the requirements of the statute, his certificate can be quashed. Until this is done the certificate exists, and must be acted upon—any attack upon it after the voting is too late."

Re Schumacher and Chesley (unreported), was a decision of a Divisional Court (Britton, Teetzel and Riddell, JJ.), on the 4th April, 1910, dismissing an appeal from an order of Meredith, C.J.C.P., in Chambers, refusing a *certiorari*. A motion for prohibition had been therefore made to Meredith, C.J.C.P., and dismissed. See Re Schumacher and Chesley, 1910, 17 O. W. R. 174.

Residence.—In Dalziel v. Grand Trunk, 1876, 6 P. R. 305, Harrison, C.J., discussed the nature of residence in a characteristic judgment, as follows:—

"There is no strict or definite rule for ascertaining in every case what is residence. The word 'residence' may have a very different meaning in different statutes: per Earl, J., in Whitharn v. Thomas, 7 M. & G. 5; and per Robinson, C.J., in Mellish v. Van Norman, 13 U. C. Q. B. 451, 455.

"In general it may be said that a man's residence is where his home is situate—where his family live: R. v. Inhabitants of North Curry, 4 B. & C. 959. An occasional absence from home on business does not make his home less his residence: Whithorn v. Thomas, 7 M. & G. 1; R. ex rel. Taylor v. Caesar, 11 U. C. Q. B. 461. Where a person goes away from a parish for a temporary purpose, leaving a house and lodging behind, he is still in effect residing in the parish: per Blackburn, J., in R. v. Glossop, L. R. 1 Q. B. 229. See further, R. v. Mitchell, 10 East, 511; Re Guilford Union v. St. Olaves' Union, 25 L. T. N. S. 803; R. v. Stourbridge, 34 L. J. M. C. 179; Ford v. Pye, L. R. 9 C. P. 269; Ford v. Hart, *ib.* 273. Reference may also be made to the following cases: Marsh v. Hutchinson, 2 B. & P. 226, note; R. v. Sargent, 5 T. R. 466; R. v. Duke of Richmond, 6 T. R. 560; R. v. Boycott, 14 L. T. N. S. 599; Taylor v. The Overseers of the Parish of St. Mary, Abbott, L. R. 6 C. P. 309; Bond v. The Overseers of the Parish of St. George, Hanover Square, *ib.* 312; Fry's Election case, 10 Am. 698.

"Although the village of Rochesterville is in the Province of Ontario, and the town of Aylmer in the Province of Quebec, the distance between the two places is not great. Rochesterville is on the Ontario side of the Ottawa River and Aylmer not far from the other side of the River on the Quebec side. The distance between the two is no more than a moderate walk. A man might well, therefore, reside in Rochesterville and attend to business in Aylmer. There would be nothing to prevent him, if so disposed, returning to his wife and family in Rochesterville daily. The fact that he only visits his wife and family once a week—that is to say, on Sundays—does not, in my opinion, render him less a resident of Rochesterville.

"The conclusion which I draw from the facts stated in the affidavits is, that while the defendant was, at the time of the issue and service of the writ, employed in Aylmer, he had his residence—in other words—resided in Rochesterville—where his wife and family resided. His contention to the contrary does not alter the facts or the conclusions to be drawn from them: Manning v. Manning, L. R. 2 P. & D. 223.

"The enquiry being as to a matter of fact, and the learned Judge of the County Court having apparently found against defendant on the facts, I might well have left him there and refused the prohibition on that ground alone; but as the question is one of some general importance in the administration of law in the Division Courts of the province, I thought it better to take some trouble about it, and, if possible, dispose of it on the merits.

"I agree with the learned Judge of the County Court in the result at which he arrived, and discharge the summons with costs."

Subsequent change of residence after the voters' list has been certified may result in disqualification in the case of tenant, income and farmer's son voters. Residence for the purpose of determining whether or not such subsequent disqualification has resulted must be determined on the same principles as residence as a qualification was determined in the first instance. The anomalous situation may be presented in cases where there has been change of residence since the voters' list was certified; that the voter does not actually possess the residence qualification required by ss. 57 and 58. In such a case, Riddell, J., thought that on a motion to quash at any rate, the Act prevented an inquiry in the right of such persons to vote, saying:—

> "It is, of course, said that this would result in an anomaly, But we are not a logical people; consistency is too precious a jewel to be lavishly applied in legislation, and the forest of our statutes is full of anomalies:" Re Ellis and Renfrew, 1910, 21 O. L. R. at 83.

In the Court of Appeal, 23 O. L. R. at 435, Garrow, J.A., said:—

> "It would be an odd and wholly illogical conclusion that the person who was actually disqualified when the list was certified, should be in a better position than one who, properly qualified then, subsequently became disqualified—a result which, in my opinion, could not have been intended, and which is certainly not clearly within the language used."

In Re Norfolk Voters' List, 1907, 15 O. L. R. 108, the Court of Appeal refused to determine simple questions such as whether a particular person was in good faith a resident of and domiciled in a particular municipality, which had been submitted by a County Court Judge. Meredith, J.A., referred the County Court Judge to the following among other cases:

Beal v. Ford, 1877, 3 C. P. D. 73, 47 L. J. C. P. 56, the qualification being residence for six months. Beal left the house he had occupied as tenant, and during the last two months he and his family, contrary to the rules, slept in an almshouse as a guest of his mother-in-law. It was contended for Beal that "no quality of residence" was required and that the voter would be entitled to be registered even if he slept under a hedge and lived in public houses "within the required limits," and The Queen v. Sowton was cited as authority for the proposition that when a man came to a place on the first day he was regarded as a stranger, on the second as a guest, and on the third as an inhabitant. For the respondent in Whitehorn v. Thomas, 7 M. & G. 1, was cited as deciding that "sleeping at a place by no means constitutes a residence," and Powell v. Guest, 18 C. B. N. S. 72, and Ford v. Pye, L. R. 9 C. P. 269, 43 L. J. C. P. 21, as authority that residence must amount to home. The Court held that the section in question must be construed apart from authority, as the cases cited did not apply and refusing to hold that sleeping under a hedge would do, held that Beal was qualified.

Ford v. Hart, 1873, L. R. 9 C. P. 273, 43 L. J. C. P. 24. Hart was an officer in the army, usually on duty at a distance from Exeter, of which city he was a freeman. When he had leave of absence he lived at his mother's house within Exeter. During twelve months preceding the date of reference, he had had leave of absence for three months, and during that period resided with his mother. He was held not to have resided within the limits for six calendar months next previous to the date of reference as required.

Bond v. St. George's, 1870, L. R. 6 C. P. 312, 40 L. J. C. P. 47. Bond *bona fide* occupied as sole tenant lodgings in London for the necessary period; the only question being whether he had a sufficient residence therein, the Act requiring twelve months' residence. He had a country house where he lived, and he occupied the lodgings occasionally for several days at a time. He was held to be qualified. From this and similar cases, it would appear that a person can have a residence qualification in more than one municipality.

Beal v. Exeter, 1887, 20 Q. B. D. 300, 57 L. J. Q. B. 128. This was an objection to the name of Robins being retained on the list on the ground that he had not resided within the necessary limits for six months as required. Coleridge, C.J., thus expressed himself:—

"It is impossible to define exhaustively the word 'residence'; in each case the question must be decided by the rules of common sense. The mere power and intention to return will not by themselves constitute a constructive residence, for both might be consistent with a three years' absence from the borough, and no one in such a case would say that residence was established. There may be cases of constructive residence by a wife and children, as for instance where a sailor engaged on the coasting trade, having the power and intention of returning, leaves his wife and children in the house; but I fail to see any such elements of residence in the present case. The voter is a single man residing in his father's house; he goes to London for two months, whence he is unable, consistently with his contract duties, to return; he returns to Exeter, and after a short stay goes away again to London, with the intention, as far as one can see, of remaining there. Under these circumstances, it seems to me impossible to say that he resided at Exeter."

On a motion to quash a by-law, Middleton, J., held good the vote of a farmer's son where the farm was partly in one and partly in another municipality, and the house was not in Newburgh, on the ground that it could not be said that the farmer and his family resided in any one part of the farm. The farmer's son's name appeared in the list and his residence had not changed. See *supra*. Re Fitzmartin and Newburgh, 1911, 24 O. L. R. 102. This was upheld by the Divisional Court. (In the same case Karr, a married man, who was not living at home because, as it was rumoured, he was separated from his wife, Middleton, J., said:—

"The thoughts or imaginations of the village clerk are not evidence upon which a vote can be disallowed. They are not evidence at all. The witness must state facts within his own knowledge; and the tattle of a village is hearsay of the worst possible kind. The man's wife is there; his house is there; and it is not shewn that his absence is not of a temporary nature, not amounting to an abandonment of his home as a place of residence. '*Ubi uxor, ibi domus*,' may well be applied."

On appeal, Riddell, J., said:—

"All that is sworn to is: (1) that Karr was a section-man; (2) he was not in Newburgh on the 2nd December; (3) he voted on the 2nd January; (4) as a tenant; and (5) that (on the 22nd April) he had not been in Newburgh 'for some time'; (6) his family living in Newburgh; (7) as some time, indefinitely called 'that time,' he was 'up east some place.' There are several 'thinks' and 'I have heards,' but nothing else that can be dignified by the name of evidence.

"The appeal should be dismissed with costs."

And discussed the authorities in Re Sturmer and Beaverton, 1911, 24 O. L. R. at 68, as follows:—

"The question is, has this man Jones lost his residence? He is a railway employee. He was sent to relieve another employee who was temporarily disqualified, and left Beaverton some time before the 10th December. On that date his wife and child followed him, and continued to live with him at Whitby, in a room rented there. Some few articles of furniture were taken, but he continued to maintain his house in Beaverton, having left the bulk of his furniture there, and manifestly regarded his abiding in Whitby as temporary only. Some poultry was left in Beaverton, and, by an arrangement with a friend, was cared for during his absence.

"Re Seymour Voters' List, 1899, 2 Ont. Elec. Cas. 69, a case upon a statute, requiring continuous residence, is a sufficient answer to this objection. A series of cases not there cited lead to the same conclusion.

"The question is, what is the meaning of the word 'resides'? I take it that the word, when there is nothing to shew that it is used in a more extended sense, denotes the place where an individual eats,

drinks, and sleeps, or where his family or his servants eat, drink, and sleep: Bayley, J., in The King v. Inhabitants of North Curry (1825), 4 B. & C. 953.

"In Powell v. Guest, 1864, 18 C. B. N. S. 72, the doctrine laid down in Elliott on Registration is approved: 'In order to constitute residence, a party must possess at the least a sleeping apartment, but that an interrupted abiding at such dwelling is not requisite. Absence, no matter how long, if there be liberty of returning at any time, and no abandonment of the intention of returning whenever it may suit the party's pleasure or convenience so to do, will not prevent a constructive legal residence. But, if he has debarred himself of the liberty of returning to such dwelling, by letting it for a period, however short, or has abandoned his intention of returning, he cannot any longer be said to have even a legal residence there.'

"The commission of crime justifying imprisonment is held to be a voluntary abandonment of the residence, but imprisonment for debt is not, because the debtor can at any time return on paying his debt. Nor is imprisonment pending a trial any abandonment of residence: Charlton v. Morris, 1895, 2 I. R. 541 C. A.

"A poor law case Guardians of Holborn v. Guardians of Chertsey, 1884, 54 L. J. M. C. 53, is also of value. Hawkins, J., states the law thus: 'Mere bodily presence or actual dwelling in a parish, though *prima facie*, is not absolutely sufficient to satisfy the statute; more is required. The evidence must be such as to satisfy the tribunal before which the question arises, that the place of it was the home and fixed place of abode of the person whose settlement is disputed. If a person having a home of his own of which he is the head, or being a member of his father's family and having his fixed home as of right at his father's house, quits it for a mere temporary purpose, intending on leaving and during all his absence to return to it as soon as the object of his absence is accomplished and then to live in it as before—such mere temporary physical absence does not operate as a break in his residence . . .; though physically absent his residence continues. A man who goes from his home on a journey or a visit, intending to return when his journey or his visit is over, though dwelling away from it for a time, cannot be said to be resident at the place where he is a mere visitor. On the other hand, if a person having a fixed home, whether as the head of it or as being a member of a family, and whether emancipated or not quits it with the intention not to return, or to return only upon the happening of some particular uncertain event, he cannot during his absence be said to reside in the home he has quitted. Whether the *animus revertendi* existed is always a question of fact, not of law.

"The Northallerton Case, 1869, 1 O'M. & H. 167, 170, 171, is also of value, Mr. Justice Willes upholding the right to vote, based upon residence in these cases, upon slight evidence."

This was upheld on appeal. Note Boyd, C.'s, discussion of Jones' case at p. 74.

If a voter's name appears in the voters' list, the only questions which can be raised at an election as to his right to vote are those specified in this section.

The right to be on the roll cannot be enquired into. That is a matter of status and was a proper subject for investigation and correction before the final statement of the list, but a subsequent change of residence or other matter of disqualification may be investigated on (1) proceedings to unseat, (2) a scrutiny, (3) motion to quash, (4) prosecutions for penalties, and may be a ground at an election or a voting on a by-law for raising an objection under s. 103 and causing the person tendering the vote to be sworn. If he takes the oath, he must be permitted to vote.

As to income voters, the prohibition is not dependent on the passing of a by-law under s. 399 (9). This is plain, from s. 95, which requires a list of persons entered in respect of income only who are in default to be provided for the purposes of this section.

The question of the defaulters' right to vote can be raised at the election. This follows from s. 58. If the name is in the defaulters' list, the deputy returning officer should refuse the vote, unless the certificate

mentioned is produced. S. 103 indicates, however, that it is not the duty of the deputy returning officer to look in the defaulters' list unless objection is made. If it is made he must refer to the defaulters' list. There is no provision for swearing with respect to this matter. The defaulters' list is not given any finality excepting so far as it gets this character from s. 59, but the deputy returning officer has no discretion and must refuse the vote unless the certificate is produced and left. Probably s. 59 makes the defaulters' list conclusive as to disqualification.

Scrutiny.—A judge holding a scrutiny under this Act may go behind the list to inquire if a tenant, whose name is on the list, has the residential qualifications entitling him to vote: West Lorne Scrutiny, 23 O. L. R. 598; 25 O. L. R. 267; 26 O. L. R. 339; 47 S. C. R. 451.

There is jurisdiction under this Act to investigate the voter's qualification, so long as it does not conflict with the finality of the lists certified under the Act. The judge has jurisdiction to investigate as to whether or not, in a given case, the right to vote, finally and absolutely certified by the list, was subsequently so exercised as to constitute the ballot deposited, a legal vote: Aurora Scrutiny, 28 O. L. R. 475.

60. The Clerk of the municipality shall not be entitled to vote except to give a *casting vote* as provided by s. 127. 3 Edw. VII. c. 19, s. 179 (2), *amended;* 3 & 4 Geo. V. c. 43, s. 60.

For a discussion of the various changes in the law as to the right of the clerk to vote, see Re Schumacher and Chesley, 1910, 21 O. L. R. 522.

As to right of clerk to vote in local option contests. see notes s. 270 below.

Casting vote at municipal elections, s. 127.

61.—(1) No person shall be entitled to vote who, at any time, before or during the election, has been employed as counsel, agent, solicitor or clerk or in any other capacity by a candidate or by any other person at or in reference to, or for the purpose of forwarding the election, and who has received or expects to receive, either before, during or after the election, from any candidate or from any other person, for acting in such capacity, any money, fee, office, place or employment, or any promise, pledge or security therefor.

(2) S.-s. 1 shall not apply to a person who performs any official duty in connection with the election and who receives the fees therefor to which he is entitled. *New. See* 5 Edw. VII. c. 22, s. 8; 8 Edw. VII. c. 3, s. 13 (2-3); 3 & 4 Geo. V. c. 43, s. 61.

Employment of the kinds referred to is impliedly authorized by this section. By the provisions of s. 173 (3) a vote given by a person disqualified under this section must be deducted from the votes cast for the candidate on behalf of whom the voter was employed.

As to paying canvassers and agents see Part V. *infra*, p. 90, and R. ex rel. Sabourin v. Berthiaume, 1913, 4 O. W. N. 1201, 24 O. W. R. 559, 11 D. L. R. 68 and R. ex rel. Fitzgerald v. Stapleford, 1913, 29 O. L. R. at 136.

In view of the extreme generality of s.-s. (1), it is necessary to make provision enabling deputy returning officers, poll clerks, constables or others who are within s.-s. (1) to vote.

See Election Act R. S. O. 1914, c. 8, s. 13.

Paying a voter to act as scrutineer is not *per se* a corrupt practice: R. ex rel. Fitzgerald v. Stapleford, 29 O. L. R. 133.

62. Where territory has been annexed to an urban municipality, or a town with additional territory erected into a city, or a village with additional territory erected into a town, or a new town or village erected, and an election takes place before a voters' list including the names of the persons entitled to vote in such territory, or for the new town or village, is certified by the Judge, all persons who would have been qualified as municipal electors if such addition had not been made or the new town or village erected, shall be entitled to vote in the city, town or village at such election. 3 Edw. VII. c. 19, s. 91; 5 Edw. VII. c. 25, s. 2, *amended;* 3 & 4 Geo. V. c. 43, s. 62.

This section refers to voting at a municipal election. As to voting on a by-law see s. 270.

In effect the last certified lists in which the names appear are to be taken as the proper lists.

As to the preparation of a list in the cases mentioned in this see s. 93.

In R. ex rel. Taberner v. Wilson 1888, 12 P. R. 546, the territory was separated from a township after Nomination Day but before the day of voting in the township. It was held that the persons in the separated area were debarred from voting in the township under s. 89 of the then Act now superseded by s. 66.

Nomination Meeting.

63. Subject to s.-s. 4 of s. 64 and to s. 73 a meeting of the electors shall take place for the nomination of candidates for mayor, controllers, water commissioners, and sewerage commissioners, in cities and towns, and of reeve or reeve and deputy reeve or deputy reeves in towns, at the *hall* of the municipality annually on the last Monday in December, at ten o'clock in the forenoon. 3 Edw. VII. c. 19, s. 118 (1); 6 Edw. VII. c. 35, s. 7, *amended;* 3 & 4 Geo. V. c. 43, s. 63.

When an Election Commences.—It has been repeatedly held that an election commences with the day of nomination. The polling day is

but an adjournment of the election. A candidate must therefore be qualified "to be elected" on nomination day. R. ex rel. Rollo v. Beard, 1865, 3 P. R. 357; R. ex rel. Adamson v. Boyd, 1868, 4 P. R. 204; R. ex rel. Clancy v. McIntosh, 1881, 46 U. C. R. 105; R. ex rel. Taverner v. Wilson, 1888, 12 P. R. 546; R. ex rel. Zimmerman v. Steele, 1903, 5 O. L. R. 565; R. ex rel. O'Donnell v. Broomfield, 1903, 5 O. L. R. 603; Harford v. Lynskey, 1899, 1 Q. B. 852; 68 L. J. Q. B. 599.

64.—(1) Subject to s.-ss. 3 to 6, and to s. 73, a meeting of the electors shall take place for the nomination of candidates for aldermen in cities and councillors in towns, to be elected by general vote, and for reeves, deputy reeves and councillors in villages and townships, annually at noon, on the last Monday in December, at the hall of the municipality, or at such place therein as may from time to time be fixed by by-law.

(2) Where the election of aldermen or councillors is by wards the meeting shall be held annually at noon on the last Monday in December at such places in each ward as may from time to time be fixed by by-law, but the council of a town divided into wards may provide that the meeting for the nomination of candidates for councillors for the wards shall be held at the same time and place as the nomination for mayor. 3 Edw. VII. c. 19, ss. 118 (2), 119; 6 Edw. VII. c. 35, s. 8, *amended.*

[*Note.—Old s. 119a struck out, being covered by s. 73.*]

(3) The council of a city may by by-law fixing the places for the nomination of candidates for aldermen, provide that the hour of nomination shall be half-past seven o'clock in the afternoon.

(4) The council of a town or village may by by-law provide that the meeting for the nomination of all candidates may be held at half-past seven o'clock in the afternoon, and any such by-law shall remain in force from year to year until it is repealed. 3 Edw. VII. c. 19, s. 120; 6 Edw. VII. c. 35, s. 9, *amended;* 9 Geo. V. c. 46, s. 3.

(5) The council of a township may by by-law provide that the meeting for the nomination of all candidates shall be held at one o'clock in the afternoon. 3 Edw. VII. c. 19, s. 122; 6 Edw. VII. c. 35, s. 10.

(6) Where a township adjoins an urban municipality, that municipality may be designated as the place of meeting for the nomination of all candidates. 3 Edw. VII. c. 19, s. 123; 6 Edw. VII. c. 35, s. 11; 3 & 4 Geo. V. c. 43, s. 64.

[*Note.—Old s. 125, providing that the county council might fix the 3rd Monday preceding the polling day as nomination day in townships, struck out, as the object of the section when enacted was probably to prevent nomination for county and local councils being held on the same day. The section is now no longer required.*]

65. The nomination meeting shall be held on the day fixed for it by or under the authority of this Act, except where it is Christmas Day, and in that case the meeting shall be held on the preceding Friday. 3 Edw. VII. c. 19, s. 124; 6 Edw. VII. c. 35, s. 12, *amended;* 3 & 4 Geo. V. c. 43, s. 65.

66. Where the incorporation of a new municipality takes effect on the 31st day of December as provided by section 31, the nomination and all proceedings incidental thereto and to the holding of the election on the 1st Monday of the January following may be had and taken as if the incorporation had taken effect. *New.* 3 & 4 Geo. V. c. 43, s. 66.

Sec. 66.—This section in part corresponds with s. 96 of R. S. O. 1897, c. 223, originally s. 89 of 55 V., c. 42, discussed in R. ex rel. Taverner v. Wilson, 1888, 6 P. R. 546 on the point formerly included in the section of the effect of the addition of territory to a municipality so far as an election pending the addition is concerned.

The annexation of territory to an urban municipality does not result in the incorporation of a new municipality. See s. 62.

See notes to s. 193. The council is not the corporation as it is under some acts. If for any reason, elections are not held or the election of all members is declared invalid under s. 175, then this section will apply.

Members of Council.—This expression includes a Mayor, Controller, Reeve and Deputy Reeve as well as Aldermen and Councillors with the assent of the electors. See s. 263.

This provision recognizes that the nomination meeting is part of the election. A township nomination meeting can be held in an adjoining urban municipality when designated by by-law.

This would apply to a nomination meeting which is part of the election and may result in a complete election.

67. The returning officer shall give at least six days' notice of the nomination meeting. 3 Edw. VII. c. 19, s. 127; 3 & 4 Geo. V. c. 43, s. 67.

Sec. 67.—In calculating "at least six days" both terminal days must be excluded. See article on "Time."

Howes v. Turner, 1876, 1 C. P. D. 670; 45 L. J. C. P. 550 was a case under s.-s. 1 of 38 and 39 V. c. 40 (Imp.) dealing with notice of nomination, which read as follows: "Nine days at least before any such election, the Town Clerk shall prepare, sign and publish a notice, etc."

The Clerk issued a notice only six days before the election. It was held that the notice was so defective as to mislead one of the candidates and probably the constituency and as consequently there could be no free election, the election was void.

Ten O'clock.—Time. See the definition of Time Act, R. S. O. 1904, c. 132.

Errors as to the time and place of holding nomination meetings.—In R. ex rel. Warr v. Walsh, 1903, 5 O. L. R. 268, Meredith, C.J.C.P., expressed the opinion, with the reservation that he had not fully considered the matter as it was not necessary in the view he took to consider it, that errors as to time and place of holding where no injustice has been done to any elector are not fatal to an election was that it probably could be saved under s. 204 (now 150).

Refusal to notice a Nomination.—In Haverfordwest Election case, Davis v. Kensington, 1874, L. R. 9 C. P. 723, 43 L. J. C. P. 370, the returning officer refused to notice a nomination for a wrong reason as it turned out, and returned the names of the other candidates duly elected and the election was held void.

68.—(1) At all nomination meetings, the candidates for each office shall be proposed and seconded *seriatim,* and every nomination shall be *in writing,* shall state the name, residence and occupation of the candidate, and shall be signed by his proposer and seconder, and filed with the returning officer within one hour from the time fixed for holding the meeting. 3 Edw. VII. c. 19, s. 128. (1) *Amended.*

(2) Failure to comply with the provisions of s.-s. 1 shall not invalidate the nomination if it is received and acted on by the returning officer. *New. Without obligation.*

(3) If no more candidates are nominated for an office than are to be elected, the returning officer, after the lapse of one hour from the time fixed for holding the meeting, shall declare such candidate duly elected.

(4) If more candidates are nominated for an office than are to be elected, the returning officer shall adjourn

the proceedings until the first Monday in January next thereafter, when, unless there is an election by reason of the resignation of any candidate or candidates nominated, as in the next succeeding section provided, polls shall be opened in each ward or polling subdivision at such place or places as have been fixed by by-law. 3 Edw. VII. c. 19, s. 128 (2-3), *amended;* 3 & 4 Geo. V. c. 43, s. 68.

[*Note.—S. 128 (4) covered by new s. 101.*]

69.—(1) The returning officer shall, on the day of the nomination, post up in the office of the clerk the names of the persons nominated for the respective offices.

(2) At the nomination meeting or at any time before nine o'clock in the afternoon of the following day, or, if that day is a holiday, before noon of the succeeding day, any person nominated for one or more offices may resign, or may elect for which office he is to remain nominated; and in default he shall be deemed to be nominated for the office for which he was first nominated.

(3) Where he resigns after the nomination meeting the resignation shall be in writing, signed by him and attested by a witness, and shall be delivered to the clerk within the time hereinbefore mentioned. 3 Edw. VII. c. 19, s. 129 (1-3), *amended.*

Form of withdrawal by candidate after nomination, Biggar, p. 154; also form of election where candidate nominated for two or more offices, and elects for which he will run.

(4) In an urban municipality every candidate for any municipal office, including that of water commissioner, and sewerage commissioner, shall on nomination day, or before nine o'clock in the afternoon of the following day, or if that day is a holiday before noon of the succeeding day, file in the office of the clerk a *declaration, Form 2.* 3 Edw. VII. c. 19, s. 129 (3*a*), *first part*; 4 Edw. VII. c. 22, s. 4; 6 Edw. VII. c. 35, s. 14; 9 Edw. VII. c. 73, s. 4; 1 Geo. V. c. 57, s. 2, *amended.*

Resignation or Withdrawal by Candidate.—A candidate may resign as such and no consent from proposer or seconder is required.

If a candidate is nominated for more than one office he must elect within the time limit or the first nomination only will stand.

Duty of Returning Officer as to Nominations. — He should record all nominations shewing candidate's proposer and seconder in a book or record as received and the time when received, as this may become material, s. 69 (2), and there is no reason the electors present should not be allowed to inspect the record or the original nominations for the purpose of ascertaining whether or not objections can be validly made. In addition nominations should be announced as received. Anything which tended to conceal the fact of a nomination having been made or by whom made might bring the returning officer within the rule in R. ex rel. Corbett v. Jull, *supra*. The record should also contain a note of any election made by a candidate who has been nominated for more than one office or who has resigned. As such election or resignation can be made verbally at the nomination meeting, the returning officer should be particular with regard to them. A resignation of election if not made by a candidate in person or in writing signed by him, should not be accepted. S. 69 (3) indicates the care to be taken with resignations in order to be certain that they are authentic. In any event if there is any doubt, the returning officer will be wise to keep the name on the list until the time mentioned in s. 69 (4) has elapsed without the filing of a declaration. He certainly should do this if the resignation under s. 69 (3) is not attested as required. On the other hand an election by a candidate need not be in writing or attested but it should be made by the candidate in person, and the returning officer would be wise to require a writing, though he cannot insist on it. The record should be kept throughout the period within which resignation or election is permitted. After the period elapses the remaining names if the number exceeds the number to be elected, must be printed on the ballot papers, s. 86. There is no provision for resignation, retirement or withdrawal: s. 70 seems to contemplate a retirement by candidates. This must refer to a retirement after nomination and before the result of the polling is declared, otherwise it would not be a retirement by a candidate. It is significant that the word "retire" is used in s. 70 while the word "resign" is used in s. 69. In the absence of any authority in the Act enabling the returning officer to take notice of retirements or resignations after the period mentioned in s. 69 has elapsed, it is submitted that s. 70 refers to resignations under s. 69 which have the effect of leaving offices without candidates or without candidates to the number to be elected. Where, therefore, a candidate retires after the period mentioned in s. 69 or dies, there is no provision for withdrawing his name or countermanding the poll which became necessary at the termination of the period named in s. 69. If such candidate is elected and he persists in refusing to act, it is the duty of the council to declare the seat vacant, s. 152, and the candidate becomes liable to the penalty provided in s. 244.

If a candidate dies before election, a difficult situation arises which is unprovided for. This case is provided for in the Ballot Act, 1872, 35 and 36 V., c. 33 (Imp.), s. 1 which requires the returning officer to countermand a poll in such a case and if he does not do so, a peremptory mandamus so to do will be granted. See R. v. Stewart, [1898] 1 Q. B. 552; 67 L. J. Q. B. 421.

In Pothard v. Clarke, 1879, 5 C. P. D. 253; 49 L. J. C. P. 474, a misstatement of the number of the seconder on the list contrary to statutory provisions, was held fatal to a nomination paper, Grove, J., saying: "I can see many reasons why it should be intended that these requirements are to be strictly followed," and Lopes, J., concurred.

On the other hand in Martin v. Gorrill, 1889, 23 Q. B. D. 139; 58 L. J. Q. B. 329, the omission of the name of the electoral division in a nomination paper, was held not to vitiate it.

In R. v. Deighton, 1844, 5 Q. B. 896, giving a candidate's place of business instead of his residence as required by the statute in that case was held fatal.

In Hobbs v. Morey, [1904] 1 K. B. 74; 73 L. J. K. B. 47, a person was nominated who was in fact disqualified to be elected and to be a councillor though this did not appear from the nomination paper. He obtained a majority of the votes. The unsuccessful candidate filed a petition claiming the seat. Kennedy, J., held this nomination a "valid nomination" within the English Rules "because formally valid on the face of it" and although it constituted a nomination of a person in fact disqualified for

being elected, the election had to proceed and the matter could only be reviewed on a petition.

Duty of Returning Officer with respect to Nomination Papers.—The requirements of s.-s. 1 as to nomination papers at a time when there was no provision corresponding to s.-s. 2 were held by Boyd, C., in R. ex rel. Walton v. Freeborn, 1901, 2 O. L. R. at 168 to be directory but not for that reason to be wilfully slighted or disregarded. In that case the returning officer after the nomination meeting came to the conclusion that all nomination papers which did not contain the full names of the candidates were to be regarded as nullities and he accordingly declared certain candidates elected by acclamation. Boyd, C., ordering a new election, discussed the facts as follows:

> "When at the time attention is called to the omission in the particulars required, or objection is raised by the presiding officer to the reception of informal papers,—if those interested refuse to amend, it may well be the duty of the officer to enforce the law and not accept such paper, and inform the meeting that the person nominated was not legally a candidate. But here everything was treated as regular. The candidates were called forward to address the meeting, and the ratepayers present representing the constituency returned to their homes satisfied that the choice of officers for the year would be determined by the ballot at the poll. This state of affairs should therefore be restored as far as possible, and the judgment directing that the election be held is affirmed with costs."

In the early case of R. ex rel. Corbett v. Jull, 1869, 5 P. R. 41, the presiding officer tricked the electors present into thinking they had ample time to make further nominations and before they made a desired nomination suddenly declared nominations closed. A new election was ordered and the returning officer was ordered to pay costs.

In Todd v. Mager, 1912, 22 M. R. 136 C. A., the returning officer after nomination assumed to reject a nomination because the candidate was as he claimed disqualified and he declared the other candidate elected: it was held that his action was clearly illegal and that he had no power whatever to decide such a question, following Pritchard v. Bangor, 1888, 13 App. Cas. 241; 57 L. J. Q. B. 313.

The Third Schedule Part ii. of the Municipal Corporations Act, 1882, 45 and 46 V., c. 50 (Imp.), contains 18 rules as to the nomination of councillors. The decisions under these rules have been frequently applied in Canada. The rules provide for objections being made to the validity of nominations and that the mayor is to decide upon the objections, and any decision of his disallowing an objection is made final. Notwithstanding this provision it has been held that he cannot disallow an objection which it is not within his jurisdiction to entertain under 67 (2). The returning officer is clothed with the duty of dealing with objections, and question arises as under the English rules as to what objections are within his cognisance.

In Pritchard v. Bangor, *supra*, in the House of Lords, Lord Watson said:—

> "The function assigned to the mayor of the borough is to receive nominations, and to determine which of these nominations shall be treated, for the purposes of municipal action, as 'valid nominations'—that is the statutory expression. I do not think that the Legislature ever empowered him to deal, or intended that he should deal, with every kind of objection which might be raised to a nomination. I do not think that jurisdiction is given him to dispose of such an objection as is alleged in the present case. The schedule to the Act of 1882, which contains rules, rather points to his disposing of formal objections arising upon the face of the nomination paper, the duty of enquiring probably as to whether the paper is in shape. If no objection is made, or if objections are stated and repelled by the mayor, then the nomination becomes a valid nomination. I do not mean to suggest that it is final and conclusive upon questions of disqualification, or other similar objections which may be taken to it, but I think it was intended to be conclusive to this effect, that the nomination paper

so sustained as valid, should form the basis of the election, and that the nominee in that paper should be treated as a person for whom votes could be given for the purposes of the election before the alderman of the ward." 57 L. J. Q. B. 313.

In Harford v. Lynskey, 1899, 1 Q. B. 852, 68 L. J. Q. B. 599, Wright, J., said:—

"We do not understand it to be laid down in the Bangor case that a nomination cannot ever be rejected except for informality in the form or presentation of it. If the nomination paper is on the face of it a mere abuse of the right of nomination, or an obvious unreality, as, for instance, if it purported to nominate a woman or a deceased sovereign, there can be no doubt that it ought to be rejected, and no petition could be maintained in respect of its rejection."

The returning officer should not call the attention of candidates generally to objections to a nomination paper: R. v. Taylor, 1895, 59 J. P. 97.

There is no provision requiring that a candidate for a ward shall be nominated by an elector of that ward.

A nomination should specify precisely the office and term for which the candidate is nominated, or it may be validly objected to: See Smart v. Sprague, 1917, 11 W. W. R. 1537.

Apparently if a nomination paper is rejected because a proposer or seconder is not qualified, a new proposer or seconder should not sign it except in the presence of and with the assent of the other: Harmon v. Park, 1881, 7 Q. B. D. 369.

The returning officer should satisfy himself that the proposer and seconder are electors qualified to nominate by reference to the proper list of electors, and also that in all respects the nomination complies with s. 68 (1), and if it does not he should at once reject it and call the attention of the proposer and seconder to the rejection and the ground of it. He cannot reserve his objection till the hour is up. The hour is fixed for the purpose of enabling objections to be made and dealt with, and apparently in the light of s. 68 (2) any nomination, if received and acted on without objection during the hour, is not to be held invalid because of non-compliance with s. 68 (1). Without a provision such as s. 68 (2) the requirements of s. 68 (1) would probably be deemed imperative. In Two Mountains Election Case (Dom.), 1913, 47 S. C. R. 185, a nomination paper which did not give the candidate's residence and description as required was held to have been validly rejected by the returning officer. Davies, J., considered the English municipal cases to outline principles which could control Courts in deciding upon statutes relating to elections.

Duty of Returning Officer with Respect to Declarations of Qualification.—The requirement as to declarations of qualification was first enacted in 1900. It imposes a new duty on candidates not previously required and should therefore be strictly construed: Re Ingersoll, Gray v. Ingersoll, 1888, 16 O. R. 194, followed by R. ex rel. Armstrong v. Garratt, 1907, 14 O. L. R. at 397.

In R. ex rel. Martin v. Watson, 1906, 11 O. L. R. 336, the declaration was untrue because the deponent was not qualified upon the property specified therein, but was qualified in respect of other property. A motion to unseat him was dismissed, Teetzel, J., saying:—

"The first declaration being on its face sufficient in form, and having in view its limited purpose, and the respondent being in fact duly qualified for the election and having been elected, I think it is too late, after the election, to contend that the misstatement regarding the qualifying property mentioned in the first declaration is a ground for setting aside the election, which is otherwise free from objection."

In R. ex rel. Cavers v. Kelly, 1906, 7 O. W. R. 280, 600, the declarations of successful candidates were not made before one of the persons

specified in old s. 315 (now as amended s. 243), and the Master in Chambers held them unobjectionable, applying old s. 204 (now 150). See also R. ex rel. Milligan v. Harrison, 11 O. W. R. 554; 16 O. L. R. 475.

In R. ex rel. Armstrong v. Garratt, 1907, 14 O. L. R. 395, a declaration was made some time prior to nomination day by a prospective candidate, and was filed by a supporter as required by the Act. On a motion to set aside his election, it was pointed out that the Act was silent as to when the declaration was to be made. The Court refused to read the section so strictly as to hold that the requirement was that the declaration should be both made and filed after the nomination and within the time limited for filing. MacBeth, C.C.J., made the following valuable observations which were approved on appeal:—

> "It seems to be clear that his (the presiding officer's) duties under this section ought to be held as far as possible to be ministerial rather than judicial. . . . If the declaration tendered on behalf of a candidate be made after the final revision of the assessment roll upon which the candidate must be qualified, if it avers the possession of the necessary property, specifying the property, and if such averment be corroborated by the last revised assessment roll, I think the city clerk should file the declaration and place the candidate's name on the ballot paper. . . . and if the city clerk has any doubt he should certainly decide in favour of the certificate. I may add that I am by no means sure that his action in this respect is open to question in these proceedings."

Section 129 (3*a*) of Consolidated Municipal Act, 1903, required a statutory declaration where s. 69 (4) simply requires a declaration. For discussion of the supposed difference, see R. ex rel. Milligan v. Harrison, 1908, 16 O. L. R. at 477.

The omission from the declaration of the statements that the candidate is not a citizen or subject of any foreign country, and in respect of the estate upon which he qualifies is fatal and cannot be cured by s. 150, and such candidates though elected must be deemed to have resigned: The Master in Chambers, R. ex rel. O'Shea v. Letherby, 1908, 16 O. L. R. 582.

Note the power to rectify declarations required under s. 193 discussed in the above case.

Sec. 69 (1).—This provision has been held to be directory only: R. ex rel. Walker v. Mitchell, 1868, 4 P. R. 218, where a name was omitted from a list of candidates by accident and not inserted till after polling had commenced, whereby a candidate lost at least five votes, but not sufficient to affect the result.

FORM 2.

DECLARATION OF QUALIFICATION BY CANDIDATE.

I, *A. B.*, declare that

1. I am a British subject by birth (*or* naturalization), and not a citizen or subject of any foreign country.

2. I have to my own use and benefit in my own right (or my wife has, *as the case may be*) as owner (*or* tenant, *as the case may be*), such estate as qualifies me for the office of (*naming the office*) for which I am a candidate (*a*), (*d*).

3. Such estate is (*state the nature of the estate as a legal estate of freehold or otherwise, as the case may be*) in (*designate the land by its local description or otherwise*).

4. The land is assessed in my own name (*or* in the name of my wife, *as the case may be*) on the last revised assessment roll of this municipality at the sum of $ (*b*) which exceeds by at least $ the amount of all liens, charges and encumbrances thereon (*c*).

5. I am not liable for any arrears of taxes to the corporation of this municipality.

6. There are no arrears of taxes against the land in respect of which I qualify.

Declared before me at the day of 19 } A. B.

(*a*) *Where the candidate qualifies under s.-s. 2 of s. 52, substitute for paragraphs 2 and 4 the following*:

2. I had to my own use and benefit (*or* my wife had *as the case may be*), as owner (*or* tenant, *as the case may be*), at the time of the return of the last assessment roll of this municipality such an estate in land rated on that assessment roll in my own name or in the name of my wife *as the case may be*, as would have qualified me for the office of (*naming it*).

4. I have (*or* my wife has, *as the case may be*), an estate in land (*describing it*) assessed on the last revised assessment roll of this municipality for $———, which exceeds by at least $——— the amount of all liens, charges and encumbrances thereof, and is sufficient to qualify me for such office if I (*or* my wife, *as the case may be*), had been assessed for it.

(*b*) Where the candidate qualifies on a leasehold estate omit the remainder of this paragraph.

(*c*) *Where the candidate qualifies under clause* (*e*) *of s.-s. 1 of s. 52, substitute for paragraph 4 the following*:—

4. The land is assessed in my own name (*or* in the name of my wife, *as the case may be*) on the last revised assessment roll of this municipality for at least $2,000, and I am in actual occupation of such land.

(*d*) In the case of a person elected as a member of a township council substitute for the words "for which I am a candidate" the words "to which I was elected" and change paragraphs 2, 5 and 6 so as to refer to the time of the election.

3 & 4 Geo. V. c. 43, Form 2, *amended;* 7 Geo. V. c. 42, s. 24.

(5) Where a candidate is unable on account of illness or absence from the municipality to make the declaration or to file it within the time prescribed by s.-s. 4, and he appears by the last revised assessment roll to be qualified to be elected, the declaration of any person who has and states in the declaration that he has knowledge of the facts, that the inability exists and the nature of it and that he has reason to believe and does believe that the candidate possesses the qualification prescribed for the office for which he has been nominated and that if elected he will accept the office may be filed in lieu of the declaration of the candidate. *New.*

(6) If one or other of such declarations is not filed within the time mentioned in s.-s. 4, the candidate in default shall be deemed to have resigned, and his name shall be removed from the list of candidates and shall not be printed on the ballot paper. 3 Edw. VII. c. 19, s. 129 (3*a*), *last part amended.*

(7) If by reason of resignations the number of candidates remaining for any office does not exceed the number to be elected the returning officer, whether the event happens on or after nomination day, shall declare the remaining candidate or candidates duly elected. 3 Edw. VII. c. 19, s. 129 (4), *amended.*

(8) On the day following the nomination day, the returning officer for each ward shall certify to the clerk the result of the meeting. *New.* 3 & 4 Geo. V. c. 43, s. 69 (1-8).

70.—(1) Where the candidates, or any of them, retire, and by reason of such retirement or where from any other cause the requisite number of persons is not elected, the members elected, if they equal or exceed one-half of the council when complete, or a majority of such members, shall order a new election to be held to fill the vacancies. 3 Edw. VII. c. 19, s. 130.

(2) Where less than half the members of the council are elected, the clerk shall cause a new election to be held; and until such election is held, and the council is elected, the council of the preceding year shall continue in office. 3 Edw. VII. c. 19, s. 131.

(3) The new election shall be held as soon as practicable. 3 Edw. VII. c. 19, s. 131*a*; 3 & 4 Geo. V. c. 43, s. 70 (1-3).

Sec. 70.—A warrant to hold such an election is not expressly required as is the case in s. 156. Nevertheless there should be some authority to the returning officer, deputy returning officers and poll clerks to evidence their appointment and their authority to act and the time and place where the election is to be held. According to Meredith, C.J., in R. ex rel. Bawkes v. Letherby, 1808, 17 O. L. R. 309, the Act itself is sufficient authority for the holding of the election and it is only in the case of subsequent vacancies that the electors are to be brought together by the issue of a warrant.

Sec. 70—From any Other Cause.—For example, where the election of all is adjudged invalid or all are declared to have forfeited their seats in proceedings under Part IV., see s. 175, and possibly in the case of death after nomination and before election. The section refers to a failure to elect not to vacancies arising subsequent to election.

Sec. 70—The Clerk shall Cause a New Election to be Held.—That is, he should call a new nomination meeting giving notice as required by s. 67. If a poll is necessary, it should be held on the 9th day following, or if that is a Sunday, on the 10th day following, in order

to give at least the time which the Legislature has deemed necessary between nomination and polling.

71. Except in the case of the first election provided for by ss. 24 and 27 and subject to s. 73 the electors of every local municipality shall elect, annually on the first Monday in January, although it is a holiday, the members of council, the water commissioners, and the sewerage commissioners who are to be elected, except such as have been elected at the nomination. 3 Edw. VII. c. 19, s. 95, *first part amended.* 3 & 4 Geo. V. c. 43, s. 71.

For postponement in case of epidemics: See Public Health Act, R. S. O. 1914, c. 218, s. 116.

72.—(1) The members of a council shall hold office until their successors are elected and the new council is organized. 3 Edw. VII. c. 19, s. 95, *last part.*

(2) The members of a board of water commissioners and sewerage commissioners shall hold office until their successors are elected and the new board is organized. *New.* 3 & 4 Geo. V. c. 43, s. 72 (1-2).

73. The council of a local municipality may, by by-law passed not later in the year than the 15th day of November, provide that the meeting of electors for the nomination of candidates for Mayor, Controllers, Aldermen, Reeves, Deputy Reeves, Councillors, and in urban municipalities the Public School Board and the Board of Education shall be held on the 23rd day of December, except where that day is a Saturday or a Sunday, and in that case on the preceding Friday, and that the polling shall take place on the 1st day of January next thereafter, except where that day is a Sunday, and in that case on the following day, and the by-law shall remain in force from year to year until repealed. 3 Edw. VII, c. 19, s. 95*a;* 5 Edw. VII. c. 22, s. 2, *amended;* 3 & 4 Geo. V. c. 43, s. 73; 4 Geo. V. c. 33, s. 4; 5 Geo. V. c. 34, s. 12; 9 Geo. V. c. 46, s. 4.

74. The council of a local municipality may by by-law passed with the assent of the municipal electors, extend

the term of office of the members of the council to be thereafter elected to two years, and may with the like assent repeal such by-law. 6 Edw. VII. c. 34, s. 4, *amended;* 3 & 4 Geo. V. c. 43, s. 74.

[*Note.—Old s. 96 as to first election in new municipality struck out as covered by new ss. 31 and 66; old s. 97 as to polling places struck out as covered by new s. 79; old s. 98 as to place of holding first election where junior township separated from a union, struck out as covered by new s. 31*].

75. Subject to s.-s. 6 of s. 64 the election shall be held in the municipality. 3 Edw. VII. c. 19, s. 104; 3 & 4 Geo. V. c. 43, s. 75.

76. An election shall not be held in a tavern or in a house of public entertainment licensed to sell spirituous or fermented liquors. 3 Edw. VII. c. 19, s. 105; 3 & 4 Geo. V. c. 43, s. 76.

Procedure when Disqualified Person is Nominated.—If the disqualification is patent in that it appears by reference to the list and the nomination paper, objection should be made to the returning officer; if he disallows the objection or if the disqualification is by reason of some fact, such as interest in a contract with the corporation, the proper course, if a candidate wishes to claim the seat, is to notify publicly at the nomination meeting and at the election that votes given to the disqualified candidate will be thrown away. As to necessity for notice that votes are being thrown away, see Hobbs v. Morey, *supra*, and, among earlier cases, R. v. Hawkins, 1808, 10 East 211; R. v. Bridge, 1813, 1 M. & S. 76; Claridge v. Evelyn, 1821, 5 Rondall 81; Gosling v. Veley, 1847, 7 Q. B. 406; R. v. Tewksbury, 1868, L. R. 3 Q. B. 629; 37 L. J. Q. B. 288.

In Beresford-Hope v. Lady Sandhurst, 1889, 23 Q. B. D. 79, 58 L. J. Q. B. 316 (C.A.), where a woman was nominated and declared elected a member of a county council, Coleridge, C.J., on appeal, said:—

> "The incapacity of the candidate who received the majority of the votes, which was one of status, must have been known to every one who voted for her, because there existed a fact—namely, her sex—to which the law annexed that incapacity; and it has been laid down in the case of Drinkwater v. Deakin, 1874, L. R. 5 C. P. 626, 43 L. J. C. P. 355, that if the fact which creates the incapacity exists, and is known to exist, the votes given for the candidate are thrown away."

In Ontario, R. ex rel. Hervey v. Scott, 1851, 2 C. L. Ch. 88; R. ex rel. Dexter v. Gowan, 1853, 1 P. R. 104; R. ex rel. Coleman v. O'Hare, 1855, 2 P. R. 18; R. ex rel. Tinning v. Edgar, 1867, 4 P. R. 36; R. ex rel. Adamson v. Boyd, 1868, 4 P. R. 204; R. ex rel. Ford v. McRae, 1870, 5 P. R. 309; R. ex rel. McGuire v. Birkett, 1891, 21 O. R. 162, where the effect of the notice was offset by a resolution of council and the relator was not given the seat, it was held that by going to the polls after giving notice of disqualification, a candidate waives his right to the seat: R. ex rel. Forward

v. Detlor, 1868, 4 P. R. 198, but the English cases cited above did not support this view.

Notice of Disqualification.—In R. ex rel. Zimmerman v. Steele, 1903, 5 O. L. R. 565, notices were posted up at five out of twelve polling places. Falconbridge, C.J.K.B., held this not sufficient, refused to give the seat to the relator and ordered a new election.

No notice was given in R. ex rel. O'Donnell v. Broomfield, 1903, 5 O. L. R. 596; in R. ex rel. Robinson v. McCarty, 1903, 5 O. L. R. 638, the Master seemed to think that notice of disqualification ought to have been given at the nomination meeting so that the electors might have an opportunity of nominating another candidate.

The notice should be signed by a responsible party and give the ground of disqualification and be given publicly by publication in newspapers and by posting up and if known at the time of nomination, notice should be given then.

FORM OF NOTICE.

City of Toronto Election of Mayor for Year 1917.

NOTICE TO ELECTORS.

John Smith, who has been nominated as a candidate for mayor of the City of Toronto for the year 1917, is disqualified to be elected and to sit by reason of the fact that . . . (state ground).

All electors are warned that if they vote for the said John Smith, as mayor, their votes will be thrown away.

(Sgd.) A. B.,
Candidate for Mayor.

Compelling Returning Officer to Enter Name on List of Nominations.—If a returning officer in breach of his duty or improperly allows an invalid objection and omits a candidate's name from the list of candidates, a peremptory mandamus will be granted on motion to compel him to include the name.

If, however, he has declared a candidate elected, the election is at an end, and he is *functus officio*, and the only proceedings which can be taken are by s. 186, under Part IV.

R. v. Casey, 1914, L. R. 2 Ir. 243. In the Ballot Act as applied to municipal elections, there is a provision that the returning officer, upon the death of a candidate, shall countermand the poll. A prerogative writ of mandamus was granted peremptorily staying the election: R. v. Stewart, [1898] 1 Q. B. 552; 67 L. J. Q. B. 421.

In Mather v. Brown, 1875, C. P. D. 596, 45 L. J. C. P. 547, an initial was held not sufficient where the Act required "name and other names." Coleridge, C.J., said:—

> "The objection is a technical one, but as it has been properly taken and at a time when it could be cured, it is valid. In construing these Acts, a duty with which this Court is entrusted, we are bound to keep strictly to the Acts themselves; they are a political compromise between the parties and the Legislature, and we who are entrusted with jurisdiction, feel it safer to keep strictly within them, and therefore, though I give this decision with reluctance, I give it without hesitation."

In R. v. Casey, [1914] 2 Ir. R. 243, K. B. D., a candidate for election as rural district councillor, described himself in his nomination paper as Michael B. Walsh, the name in which he appeared in the register of voters and which he always assumed and signed in transactions requiring his signature. His mother's name was Barry, and he had added the initial "B" to the Christian name Michael to distinguish him from others in the district named Michael Walsh. The deputy returning officer rejected the nomination paper on the ground that it did not comply with

the rule which required the surname and other names to be set out in full. It was held that, under the circumstances, the name of the candidate was properly stated in accordance with the rule, and that a peremptory writ of mandamus should issue to the deputy returning officer directing him to include the prosecutor's name in the list of candidates validly nominated. Compare with Mather v. Brown, *supra*.

77.—(1) The council of every local municipality in which the election is by wards, or polling sub-divisions, shall from time to time appoint:—

(*a*) The places for holding the nominations for each ward;

(*b*) A returning officer to hold the nominations for each ward;

(*c*) The places at which polls shall be opened if a poll is required;

(*d*) A deputy returning officer and a poll clerk for each polling sub-division. 3 Edw. VII. c. 19, s. 106 (1), *amended*.

(2) In a city having a population of not less than 100,000 the returning officers, deputy returning officers, and poll clerks shall be appointed on the recommendation of the clerk, and such appointments shall be made at least one month before polling day, and as far as practicable the deputy returning officers and poll clerks shall be appointed for polling places in the sub-divisions in which they reside. 5 Edw. VII. c. 22, s. 4; 6 Edw. VII. c. 34, s. 5, *amended*.

(3) If a poll clerk signifies to the returning officer in writing that he will not act, the returning officer shall appoint another person to act in his place.

(4) If a poll clerk does not attend at the opening of the poll the deputy returning officer shall appoint another person to act in his place. 8 Edw. VII. c. 48, s. 3, *amended*.

(5) The clerk shall be the returning officer for the whole municipality; and if a poll is required, the deputy-returning officers shall make to him the returns for their

respective wards or polling sub-divisions. 3 Edw. VII. c. 19, s. 106 (2); 3 & 4 Geo. V. c. 43, s. 77 (1-5).

Sec. 77 (1).—Disregard of these prescribed formalities commented upon: Re Rickey and Marlborough, 14 O. L. R. 587, at p. 590.

Sub-sec. (1d).—That a deputy returning officer is a strong advocate for the passing of a by-law is not a disqualifying circumstance: Re North Gower L. O., 24 O. W. R. 489; 25 O. W. R. 224; 5 O. W. N. 249, and see Re Duncan and Midland, 16 O. L. R. 132.

Sub-sec. (3).—See Le Boutillier v. Harper, 1 Q. L. R. 4.

78.—(1) In a local municipality which is not divided into polling sub-divisions, the clerk, or such person as the council may appoint to act in the absence of the clerk through illness or otherwise, shall be the returning officer for the nomination of candidates. 3 Edw. VII. c. 19, s. 107, *amended;* 9 Geo. V. c. 46, s. 5.

(2) The council shall from time to time appoint the place at which the poll shall be opened if a poll is required. *New.* 3 & 4 Geo. V. c. 43, s. 78 (1-2).

79.—(1) Where a by-law to appoint the place for holding any meeting required to be held for the nomination of candidates is necessary and the council fails to pass it the meeting shall be held at the place at which the nomination for the next preceding election was held.

(2) Where the council fails to appoint all or any of the places at which a poll is to be opened if a poll is required, as to such of them as are not appointed, the polls shall be opened at the place or places at which the polling took place at the next preceding election. *New. See* 3 Edw. VII. c. 19, s. 97; 3 & 4 Geo. V. c. 43, s. 79 (1-2).

80.—(1) Where the returning officer for any ward does not attend at the time and place appointed by the clerk to receive his instructions and nomination papers, or where a deputy returning officer does not attend at the time and place at which he is required by the clerk to attend to receive his voters' lists, and other election papers, the clerk shall appoint another person to act in his place.

(2) If at the time and place appointed for holding a nomination the returning officer does not attend to hold the nomination within fifteen minutes after the time appointed or if no returning officer has been appointed, the electors present at the place for holding the nomination may choose from amongst themselves a returning officer to hold the nomination.

(3) If at the time and place appointed for holding the poll the deputy returning officer does not attend within one hour after the time appointed, the clerk shall appoint another person to act in his place and shall furnish him with a ballot box, voters' lists and other election papers.

(4) In a city having a population of not less than 100,000 the electors shall not choose a deputy returning officer unless a poll clerk has not been appointed or if appointed is not present, but the poll clerk shall act as deputy returning officer and he shall appoint some other person to be poll clerk. 3 Edw. VII. c. 19, s. 108 (1-2); 5 Edw. VII. c. 22, s. 5, *amended.*

(5) If, during the polling, the returning officer or the deputy returning officer at a polling place becomes unable, through illness or other cause, to perform his duties, the poll clerk shall act in his place and shall perform all the duties of a returning officer or deputy returning officer, and may appoint some other person to act as poll clerk. 3 Edw. VII. c. 19, s. 108 (3), *amended;* 3 & 4 Geo. V. c. 43, s. 80 (1-5).

81.—(1) A returning officer and a deputy returning officer from the time he takes the oath of office until the day after the close of the election or of the voting on a by-law shall be a conservator of the peace and shall have all the powers of a Justice of the Peace. *New. See* 8 Edw. VII. c. 3, s. 153.

(2) A returning officer, a deputy returning officer or a Justice of the Peace may arrest or, by a verbal order, cause to be arrested and placed in the custody of a constable or of any other person, a person who disturbs the

peace and good order, and may cause such person to be imprisoned under an order signed by him until an hour not later than the closing of the nomination, polling or voting as the case may be, and all constables and persons present when required shall assist the returning officer, deputy returning officer or Justice of the Peace in the performance of his duties under this sub-section. *New. See* 8 Edw. VII. c. 3, ss. 154, 156; 3 & 4 Geo. V. c. 43, s. 81 (1-2).

Ontario Elections Act, R. S. O. 1914, c. 8, ss. 153, 154, 156.

82. A returning officer, a deputy returning officer, or a Justice of the Peace may appoint and swear in as many special constables to assist in the preservation of the peace and order as he may deem necessary; and any person liable to serve as constable, and required by a returning officer, a deputy returning officer, or a justice, to be sworn in as a special constable, if he refuses to be sworn in or to serve, shall incur a penalty of $20. 3 Edw. VII. c. 19, s. 110, *amended.* 3 & 4 Geo. V. c. 43, s. 82.

Appointment of Places for Nomination Meetings, Polling Places and Election Officers.—Part XIX of the Act provides that polling subdivisions and polling places are to be provided by by-law, and in that connection s. 394 provides that if the building appointed cannot be obtained or is found unsuitable, the clerk may select the nearest suitable building. The provisions of Part XIX. cover the case mentioned in s. 77 (1c). It would therefore appear that the power of appointment given to the council by s. 77 should be exercised by by-law, although it is significant that in s. 64 it is expressly stated that arrangements for the holding of the nomination meetings therein mentioned shall be made by by-law. This view is confirmed by the provisions of s. 249 (1), which require the powers of the council to be exercised by by-law. These remarks apply also to s. 78 (2). In case the council fails to act, s. 79 applies so far as nomination meetings are concerned. If deputy returning officers fail to act, the clerk must appoint substitutes under s. 80, and if poll clerks fail to act, the deputy returning officers under s. 77 (4) must appoint substitutes. The matters to be dealt with by the council under s. 77 (1) and s. 78 (2) are important and should not be dealt with informally or by resolution. It is of the utmost importance that experienced and capable persons be appointed, who are fully qualified to exercise both the judicial and ministerial functions which are to be exercised by election officers under the Act. This is probably the reason for requiring that appointment shall be made on the recommendation of the clerk. It should also be borne in mind that deputy returning officers are Conservators of the Peace, and have all the powers of Justices of the Peace, s. 81 (1), and that, in cases of emergency, they may cause persons to be arrested by verbal order and imprisoned, s. 81 (2), and that they may require persons to serve as constables, s. 82. Moreover, in cities having a population of not less than 100,000, poll clerks may be required to act as deputy returning officers and have the power to appoint substitute poll clerks: s. 80 (4) and (5).

NOTE,—There appears to be no provision to meet the case where the council has not appointed a place for nomination meeting and where the

place at which the nomination for the preceding election was held, is not available.

A Conservator of the Peace with all the Powers of a Justice of the Peace.—The office of Justice of the Peace originated in the early office of Conservator of the Peace. "The general duty of the Conservators of the Peace by the common law, is to employ their own, and to command the help of others, to arrest and pacify all such who, within their jurisdiction and limits, shall go about to break the peace:" 3 Burn's Justice, 4.

In England, the ancient office of Conservator of the Peace was entrusted to certain persons appointed by the King, and to others elected by the people. The authority of such Conservators varied according to the nature of their office. Judges of the Common Pleas were Conservators of the Peace within the limits of their Courts, while Judges of the King's Bench were Conservators of the Peace for the whole kingdom. It is submitted that returning officers and deputy returning officers are, by s. 1, not made Justices of the Peace for the time being, but are simply entrusted with the duty of preserving the peace within and about polling places, and for this specific purpose have all the powers of Justices of the Peace. Sections 81 (2) and 82 probably do not add to the powers given by s. 81 (1). See subject "Justice of the Peace."

Defective Arrangement of Voting Compartments. — If the secrecy of the poll is in fact violated by reason of the defective nature of the compartments for voting or the absence of such compartments, it will be a ground for voiding an election. Secrecy is one of the fundamental principles of the Act: The Drogheda Election Case, 1874, 2 O'M. & H. 203.

In Re Dillon and Cardinal, 1905, 10 O. L. R. 371, the absence of voting compartments was not fatal to a voting on a by-law, but there a constable kept all persons away from the part of the room where the ballots were marked.

Ballot Boxes.

83.—(1) Where a poll is required, the clerk shall procure as many ballot boxes as there are polling sub-divisions.

(2) *The ballot boxes* shall be made of durable material, provided with lock and key, and so constructed that the ballot papers can be deposited therein and cannot be withdrawn without unlocking the box.

(3) Two days at least before polling day the clerk shall deliver a ballot box to every deputy returning officer.

(4) The ballot boxes, when returned to the clerk after the election, shall be preserved by him for use at future elections; and he shall have ready for use, at all times, as many ballot boxes as there are polling sub-divisions.

(5) If the clerk fails to provide ballot boxes he shall incur a penalty of $100 in respect of every ballot box which he fails to provide.

(6) A deputy returning officer who has not been provided with a ballot box within the time prescribed, shall forthwith procure one to be made, and he may make a requisition upon the treasurer for payment of the cost of it, and the treasurer shall pay the same to the deputy returning officer. 3 Edw. VII. c. 19, s. 138, *amended;* 3 & 4 Geo. V. c. 43, s. 83 (1-6).

Ballot boxes may be used for a municipal election and for voting on by-laws at the same time: In re Duncan and Midland, 1907, 16 O. L. R. 132 C. A.

In the Hackney Election Case, 1874, 2 O'M. & H. 77, an election was held void because certain ballot boxes were not supplied at all and others were supplied late in the day. See also the Drogheda Case, 1874, 2 O'M. & H. 201.

Form of ballot box: Re Wilson and Wardsville, 2 O. W. N. 914.

Ballot Papers.

84. Where a poll is required, the clerk shall forthwith cause to be printed a sufficient number of ballot papers for the purposes of the election. 3 Edw. VII. c. 19, s. 139 (1). 3 & 4 Geo. V. c. 43, s. 84.

85.—(1) In cities and towns in which the aldermen or councillors are elected by wards, there shall be prepared one set of ballot papers for all the polling sub-divisions containing the names of the candidates for mayor, another set for all the polling sub-divisions containing the names of the candidates for reeve or reeve and deputy reeves, and another set for each ward containing the names of the candidates for aldermen or councillors for the ward. 3 Edw. VII. c. 19, s. 140 (1); 6 Edw. VII. c. 35, s. 15, *amended.*

(2) In *cities and towns* where the aldermen or councillors are elected by general vote, there shall be prepared for all the polling sub-divisions one set of *ballot papers* containing the names of the candidates for mayor or mayor and reeve or mayor, reeve and deputy reeves, and another set containing the names of the candidates for aldermen or councillors. 3 Edw. VII. c. 19, s. 140 (2); 6 Edw. VII. c. 35, s. 16, *amended.*

FORM 3.

Ballot Paper for Cities and Towns.

Form for Mayor.

Election for the Members of the Municipal Council of the City of , Ward No. , Polling Subdivision No. , day of January, 19 .

FOR MAYOR.

ALLAN.

Charles Allan, of King Street, in the City of Toronto, Merchant.

BROWN.

William Brown, of the City of Toronto, Banker.

Form for Reeve and Deputy Reeve in Towns.

Election for the Members of the Municipal Council of the Town of , Ward No. , Polling Subdivision No. , day of January, 19 .

FOR DEPUTY-REEVE.

CLITHEROE.

Albert Clitheroe, of the Town of Galt, Baker.

HUGHES.

David Hughes, of the Town of Galt, Tinsmith.

FOR REEVE.

FARQUHARSON.

Robin Farquharson, of the Town of Galt, Builder.

MacPHERSON.

Roderick MacPherson, of the Town of Galt, Printer.

6 Edw. VII. c. 35, s. 35, Sched. Form 1. 3 & 4 Geo. V. c. 43, Form 3.

Form for Aldermen or Councillors.

Election for the Members of the Municipal Council of the City of , Ward No. , Polling Subdivision No. , day of January, 19 .

FOR ALDERMAN (or COUNCILLOR).

ARGO.

James Argo, of the City of Toronto, Gentleman.

BAKER.

Samuel Baker, of the City of Toronto Baker.

DUNCAN.

Robert Duncan, of the City of Toronto, Printer.

3 & 4 Geo. V. c. 43, Form 4.

[In the case of cities and towns where the Aldermen or Councillors are elected by general vote the form above given is to be adopted to suit the case.]

FORM 5.

BALLOT PAPER FOR TOWNSHIPS.

Election of Members of the Municipal Council of the Township of in the County of

FOR REEVE.

ALLSOPP.

Albert Allsopp, of the Township of York, Brewer.

BURTON.

Henry Burton, of the Township of York, Farmer.

FOR FIRST DEPUTY-REEVE.

BANKS.

John Banks, of the Township of York, Blacksmith.

CALDWELL.

Henry Caldwell, of the Township of York, Market Gardener.

FOR SECOND DEPUTY-REEVE.

CONNOR.

Patrick Connor, of the Township of York, Cattle Dealer.

DAVIDSON.

Thomas Davidson, of the Township of York, Milkman.

FOR THIRD DEPUTY-REEVE.

EDWARDS.

Daniel Edwards, of the Township of York, Miller.

FERGUSON.

George Ferguson, of the Township of York, Nurseryman.

FOR COUNCILLORS.

BRITTON.

James Britton, of the Township of York, Farmer.

LLOYD.

David Lloyd, of the Township of York, Farmer.

MACDONALD.

Philip Macdonald, of the Township of York, Agent.

O'LEARY.

Dennis O'Leary, of the Township of York, Farmer.

6 Edw. VII. c. 35, s. 35, Sched. Form 2. 3 & 4 Geo. V. c. 43, Form 5.

Note.—Where the election is to fill a vacancy, the ballot papers are to contain only so much of the form as is required; and the counterfoils shall bear, instead of the words appearing on the form, the words "Election of ....., to fill a vacancy in the office of ....., Ward No....., Polling sub-division No....., day of...., 19..."

Where controllers, or commissioners, or members of the Board of Education are to be elected, the ballot papers are to be similar in form.

(4) There shall also be separate sets of ballot papers for controllers, water commissioners, street railway commissioners and sewerage commissioners. *New.*

(3) In *villages and townships* there shall be prepared one *set of ballot papers* containing the names of the candidates for reeve and deputy reeves and for councillors. 3 Edw. VII. c. 19, s. 140 (3); 6 Edw. VII. c. 35, s. 17, *amended.*

(4) There shall also be separate sets of ballot papers for controllers, water commissioners, street railway commissioners and sewerage commissioners. *New.* 3 & 4 Geo. V. c. 43, s. 85 (1-4).

FORM 4.

BALLOT PAPER FOR VILLAGES.

Election of Members of the Municipal Council of the of
in the County of , Polling Subdivision No.
day of January, 19 .

FOR REEVE.

BROWN.

John Brown, of the Village of Weston, Merchant.

ROBINSON.

George Robinson, of the Village of Weston, Physician.

FOR COUNCILLORS.

BULL.

John Bull, of the Village of Weston, Butcher.

JONES.

Morgan Jones, of the Village of Weston, Grocer.

McALLISTER.

Allister McAllister, of the Village of Weston, Tailor.

O'CONNELL.

Patrick O'Connell, of the Village of Weston, Milkman.

3 Edw. VII. c. 19, Sched. A., *part.*

86. The ballot papers shall be according to Forms 3, 4, or 5, and shall contain the names of the candidates arranged alphabetically in the order of their surnames, or if there are two or more candidates for the same office with the same sur-name, in the order of their Christian names. 3 Edw. VII. c. 19, s. 141 (9); 7 Edw. VII. c. 40, s. 3, *amended.* 3 & 4 Geo. V. c. 43, s. 86.

[*Ss. 142, 143 repealed by 6 Edw. VII. c. 35, s. 34.*]

Candidate's Name Appearing Twice on Ballot Paper.—This occurred in Northcote v. Pulsford, 1875, L. R. 10 C. P. 476, 44 L. J. C. P. 217, where Northcote was nominated twice and his name appeared twice on the ballot paper; he, being described in the first instance as of Bontford Street, Barnstaple, gentleman, and in the second instance as of South Street, Bishop's Tawton, land agent. 71 voters marked opposite the name where it first appeared, 301 voters marked opposite the name where it next appeared, and the remaining candidates received the following votes respectively: 8, 14, 339 (Pulsford) 372 and 508. The two highest

and Pulsford were declared elected; Northcote filing a petition, claiming to be entitled to be declared elected instead of Pulsford, and his contention was upheld on the ground that the mistake was in the use of the form and did not affect the result of the election and was accordingly cured by s. 13 of the Ballot Act. See notes to s. 150, *supra*.

Deviations from Forms.—Deviations not affecting the substance are within the curative effect of provisions of s. 150, *infra*, if the result has not been affected. The word "shall," in s. 86 at any rate, is not imperative but directory. Section 28 (*d*) of the Interpretation Act provides "where forms are prescribed, deviations therefrom not affecting the substance or calculated to mislead, shall not vitiate them." For discussion, see Re Giles and Almonte, 1910, 21 O. L. R. 362 D. C., but note the doubts of Middleton, J. It may be that the papers used are not ballot papers at all, and that a Judge on a recount or on proceedings under Part IV. would be unable to recognize any of them as ballot papers. For example, if the papers by inadvertence omitted to state the election in connection with which the ballot papers were to be used, see notes to ss. 116, 129, 271 and 279 and Part XI.

Literal compliance with the statute is not essential, but there must be at least substantial compliance, and the ballot used must be the substantial equivalent of the one prescribed by statute It is fatal to contend that the one used was as good or better than the statutory form: Murdock v. Kilgour, 1914, 7 O. W. N. 165, 19 D. L. R. 878.

Omission of Candidate's Name from Ballot Paper.—In R. ex rel. Walker v. Mitchell, 1868, 4 P. R. 218, candidate's name was omitted from the list which was submitted to the electors at a poll, at a time when there was open voting. The omitted name was added at about 2 o'clock in the afternoon. Wilson, J., upheld the election on the ground that it did not appear that the result would have been different if the name had been properly entered on the list. In R. ex rel. Harris v. Bradburn, 1876, 6 P. R. 308, certain names were omitted from the ballot papers which should have been included. Harrison, C.J., found that the omission of the name was not shewn to have in any manner affected the result of the election, as the candidate whose name was omitted, had desired to have his name removed and the relator's application was dismissed on that and other grounds.

Improper Inclusion of Name of Candidate who has Resigned.—In Wilson v. Ingham, 1895, 64 L. J. Q. B. 775, the ballot paper by mistake included the name of "M," who had withdrawn as permitted by the rules. There were four councillors to be elected, and in all six names appeared on the ballot. The four highest candidates received 243, 235, 132 and 129 votes respectively. The next candidate received 128 votes and "M" received 34 votes. The four highest were declared elected. It was held that the election was not protected by the curative provisions of s. 13 of the Ballot Act, 1872. Compare s. 150, *supra*. The election of the two lowest candidates was declared void. Wilson, J., said: "It is impossible to say that the result of the election was not affected by the name of the candidate who had withdrawn, being placed upon the ballot paper." The placing of the name of the person who is not a candidate upon the paper is a violation of the Ballot Act, and it cannot be said that it did not affect the result of the election, but note that s. 150, *supra*, now places the onus on a relator to shew that the result was affected by the mistake, and that no voter can be asked or is allowed to state for whom he voted, and it would be impossible, if such a mistake was made under the Ontario Act, to shew that the result was not affected.

Materials Necessary to Mark.—It was held that the use of a pencil in marking a ballot was not essential to the validity of the vote, "because the use of a pencil was not positively enjoined by the statute, and because the only positive and direct enactment on the subject is to the effect merely that the clerk shall furnish materials necessary but which are not specified: Wigtown Election Case, 2 O'M. & H. 226.

"A good cross with any pencil, or with any ink, not peculiar, seems unobjectionable: Wigtown Election Case, 2 O'M. & H. 226.

Mark made with pen and ink, instead of pencil, allowed as good vote: H. E. C. 725.

87. Before opening the poll, the clerk shall deliver to every deputy returning officer the ballot papers for use in the polling subdivision for which he has been appointed and shall furnish him with materials necessary to enable voters to mark their ballot papers, and such materials shall be kept at the polling place by the deputy returning officer for the use of voters. 3 Edw. VII. c. 19, s. 44, *amended.* 3 & 4 Geo. V. c. 43, s. 87.

In re Shaw and Portage la Prairie, 1910, 20 M. R. 469, 14 W. L. R. 542, a poll at a voting on a by-law was not opened until 10 o'clock and another until 11 o'clock, the proper hour being 9 o'clock, it not being shewn that the result was affected, and it appearing that the opening was prevented by weather conditions, Mathers, C.J.K.B., held the irregularity not to be fatal, but in Re Hatch and Oakland, 1910, 19 M. R. 692, the same Judge held the deliberate closing of a poll from 12.10 to 1.20 was fatal though there was no evidence that any person was deprived of his vote by reason of the closing of the poll, although there was evidence that a sufficient number of voters to change the result might have been deprived of their franchise. (Note the curative section of the Manitoba Act which is to the same effect as s. 150 before amendment.)

Irregular closing, late opening: Limerick Election Case, 1833, P. & D. 373; Horwich, 1851, 1 P. R. & D. 314; The Drogheda Case, 1874, 2 O'M. & H. 201; East Clare, 1892, 4 O'M. & H. 162; Gribben v. Kirker, 1873, Ir. R. 7 C. L. 30; Islington, 1901, 5 O'M. & H. 120.

88. Every polling place shall be furnished with a compartment in which the voters can mark their ballot papers screened from observation, and if it is not provided by the corporation the deputy returning officer shall furnish it, and the cost of it shall be repaid to him as provided by s.-s. 6 of s. 83. 3 Edw. VII. c. 19, s. 145, *amended.* 3 & 4 Geo. V. c. 43, s. 88.

Voting Compartments.—In re Quigley and Bastard, 1911, 24 O. L. R. 622 C. A. A voting compartment in a harness shop consisted of three horse blankets pinned together, and the owner of the shop remained in it all day and could hear how illiterate voters directed their ballots to be marked. Another voting compartment was simply a platform 10 feet by 40 feet and 2 feet high, part of a hall 40 feet by 60 feet. The body of the hall was allowed to be filled by voters without restriction, and many came near to the deputy returning officer's table and could hear the manner in which illiterate voters directed their ballots to be marked. Riddell, J., in the Court of Appeal, discussing these polling places, said:—

> "These irregularities are, in themselves, as it seems to me, sufficient to justify the judgment appealed from.
>
> "It is plain that 'the Act has been framed with great care to provide for the compulsory secrecy of the ballot and the amplest opportunity for each voter to express his judgment:' Re Hickey and Town of Orillia, 17 O. L. R. 317, at p. 340; and that 'in an election involving a social question, complete secrecy is of the very greatest importance:' 17 O. L. R. at p. 342. In the case of illiterates, it is true that they must disclose to certain persons how they vote, but these persons are oath-bound not to disclose this, and the secrecy is as great as is practicable—there is no justification for compelling the illiterate to disclose to any one not so bound how he desires to vote. It may be—it is not proved that it is not—the case that every one of the illiterates was adverse to the by-law, and voted for it because he

knew that the manner in which he voted might become public. The onus of supporting a by-law under s. 204 is upon those setting up that section, and they must shew that the irregularity did not affect the result of the election: 17 O. L. R. at p. 342."

The by-law was accordingly quashed, but now note that s. 204 referred to has been amended, casting the onus on the applicants. It is submitted that secrecy is one of the principles of the Act, and its absence is not a mere irregularity. See notes to s. 150.

Directions to Voters.

89. The clerk shall cause to be printed in conspicuous type a sufficient number of the *directions for the guidance of voters, Form 6,* for the purposes of the election, and shall deliver to every deputy returning officer as many of the printed directions, but not less than five, as the clerk may deem sufficient. 3 Edw. VII. c. 19, s. 146, *amended.* 3 & 4 Geo. V. c. 43, s. 89.

FORM 6.

DIRECTIONS FOR THE GUIDANCE OF VOTERS IN VOTING.

The voter will go into one of the compartments, and with the pencil provided in the compartment, place a cross, thus **X** on the right hand side, opposite the name or names of the candidate or candidates for whom he votes or at any other place within the division which contains the name or names of such candidate or candidates.

The voter will fold up the ballot paper so as to show the name or initials of the Deputy Returning Officer (*or* Returning Officer, *as the case may be*) signed on the back, and leaving the compartment will, without showing the front of the paper to any person, deliver such ballot paper so folded to the Deputy Returning Officer (*or* Returning Officer, *as the case may be*) and forthwith quit the polling place.

If the voter inadvertently spoils a ballot paper, he may return it to the Deputy Returning Officer (*or* Returning Officer, *as the case may be*) who will if satisfied of such inadvertence, give him another ballot paper.

If the voter votes for more candidates for any office than he is entitled to vote for, his ballot paper will be void as far as relates to that office, and will not be counted for any of the candidates for that office.

If the voter places any mark on his ballot paper by which he may afterwards be identified, or if the ballot paper has been torn, defaced, or otherwise dealt with by the voter so that he can thereby be identified, it will be void, and will not be counted.

If the voter takes a ballot paper out of the polling place, or deposits in the ballot box any other paper than the one given to him by the Officer, he will be subject to imprisonment for any term not exceeding 6 months, with or without hard labour. 3 Edw. VII., c. 19, *Sched. B, part.*

In the following forms of ballot paper, given for illustration, the candidates are, for Mayor, Jacob Thompson and Robert Walker; for Reeve, George Jones and John Smith; for Deputy Reeve, Thomas Brown and William Davis; for Councillors, John Bull, Morgan Jones, Allister McAllister and Patrick O'Connell; and the elector has marked the first ballot paper in favour of Jacob Thompson for Mayor, the second ballot paper in favour of George Jones for Reeve, the third ballot paper in favour of William Davis for Deputy Reeve, and the fourth ballot paper in favour of John Bull and Patrick O'Connell for Councillors.

Election for the Members of the Municipal Council of the Ward No. day of January, 19 .

FOR MAYOR

THOMPSON

Jacob Thompson, of the Town of Barrie, Merchant. X

WALKER

Robert Walker, of the Town of Barrie, Physician.

Election for the Members of the Municipal Council of the Ward No. day of January, 19 .

FOR REEVE

JONES

George Jones, of the Town of Barrie, Barrister. X

SMITH

John Smith, of the Town of Barrie, Banker.

Election for the Members of the Municipal Council of the Ward No. day of January, 19 .

FOR DEPUTY REEVE

BROWN

Thomas Brown, of the Town of Barrie, Grocer.

DAVIS

William Davis, of the Town of Barrie, Jeweller. X

Election for the Members of the Municipal Council of the Ward No. Polling Sub-division No. day of January, 19 .

FOR COUNCILLORS

BULL

John Bull, of the Town of Barrie, Butcher. X

JONES

Morgan Jones, of the Town of Barrie, Grocer.

McALLISTER

Allister McAllister, of the Town of Barrie, Tailor.

O'CONNELL

Patrick O'Connell, of the Town of Barrie, Milkman. X

3 & 4 Geo. V. c. 43, Form 6.

Directions to Voters.—In Re Salter and Beckwith, 1902, 4 O. L. R. 51, the failure to post up directions for the guidance of voters on a by-law was discussed by Britton, J., as follows:—

"The objection that directions to voters, according to Schedule 'L,' as required by the Municipal Act, R. S. O. 1897, c. 223, ss. 142, 352, were not furnished to the deputy returning officers is important. It is not pretended that this was done. Mr. Maclaren contends, 1st, that no harm was done, because if there had been, it would be evidenced by spoiled ballots. I hardly think that is the test. Voters are entitled to the information and direction which the statute provides, and ballots may have been wrongly marked and counted, although in no way spoiled.

"2nd, that this is a mistake cured by s. 204. I cannot say this omission did not affect the result. It perhaps did not. I cannot say, and ought not to be called upon to say, in the absence of any record by the council of what they did or intended to do in regard to conducting the voting on this by-law in accordance with the principles laid down in the Act, how the result was affected."

The by-law was quashed on the above and another ground. It is submitted that s. 150, which has with an amendment, replaced s. 204, referred to by Britton J., would not lead to a different result.

Failure to post up the directions to voters is a mere irregularity. See notes to s. 150.

Secs. 89 and 90.—The provisions of these sections are directory. In West Gwillimbury v. Simcoe, 20 Grant 211, a by-law case, the failure to post up the clauses referring to bribery, was not considered a ground for quashing. This decision was applied to a municipal election in Re Brandon, 1911, 20 M. R. 705.

For notes on form 6, see s. 106.

90. Every deputy returning officer, before opening the poll, or immediately after he has received the printed directions from the clerk, if the same were not received before opening the poll, shall cause them to be placarded outside the polling place, and in every compartment of the polling place, and shall see that they remain so placarded until the close of the polling. 3 Edw. VII. c. 19, s. 147, *amended.*

Voters' Lists, Poll Books.

91. The *proper list of voters* to be used at an election shall be the first and second parts of the last voters' list certified by the Judge and delivered or transmitted to the Clerk of the Peace, under the Ontario Voters' Lists Act, with the supplementary list, if any, under s. 93 or the list provided for by s. 94. 3 Edw. VII. c. 19, s. 148, *amended.* 3 & 4 Geo. V. c. 43, s. 91, *amended.* 5 Geo. V. c. 34, s. 13.

Sec. 91—The Proper List.—See s. 57 as to the finality of the proper list. Unless a proper list is used, the whole election will be void. In R. ex rel. Black v. Campbell, 1909, 18 O. L. R. 269, Anglin, J., said:—

"In my opinion, the list used was not the proper list, and the election held upon it cannot be supported.

"It was argued that the use of the wrong list is merely a non-compliance with the provisions of the Act as to the taking of the poll or an irregularity which should be held to be cured by the provisions of s. 204. In my opinion this case does not come within s. 204 (as amended s. 150). The foundation of a contested election under the Municipal Act is the voters' list. As provided by s. 165, his right to vote depends upon the elector's name being entered upon the voters' list. If an election is held upon a list which is not a voters' list or is not the proper voters' list to be used, it is not, in my opinion, an election conducted in accordance with the principles laid down in the Act.

"But if s. 204 did apply, it would be, I think, impossible to say that 'it appears' to the Court 'that such non-compliance, mistake or irregularity did not affect the result of the election.' It was argued that the applicant must shew that the irregularity did not affect the result of the election. This would involve treating the statute as if it read, 'if it does not appear . . . that such non-compliance, mistake or irregularity did affect the result of the election.' Although some of the cases appear to lend colour to this view of the provisions of s. 204, I can find no justification for so altering its plain language. The burden is upon the applicant to establish the non-compliance, mistake or irregularity; but when that is shewn the burden rests upon the person upholding the election to make 'it appear . . . that such non-compliance, mistake or irregularity did not affect the result of the election:' Re Hickey and Town of Orillia, 1908, 17 O. L. R. 317, 330-1."

Section 150 now casts on the applicant the onus of showing both the irregularity and that it affected the result. The last mentioned case was decided under s. 148, which provided that the proper list should be the list certified by the Judge and transmitted to the Clerk of the Peace under the Voters' Lists Act, and the list used had been certified but not transmitted at the commencement of the nomination meeting though it had been transmitted before the polling commenced. It was argued that between the day of nomination and the day of election, each elector should be able to ascertain by enquiry at the office of the Clerk of the Peace or the clerk of the municipality or from the County Judge, each of whom is supposed to have a certified copy of the voters' list in his possession, whether or not his name is upon the list of voters to be used at the election. In this connection, Anglin, J., said:—

"I incline to think that this contention is sound, and that it is quite probable that the proper list to be used at the election is the last list of voters which has been certified by the Judge and delivered or transmitted to the Clerk of the Peace prior to the time of nomination. Section 23 of the statute (Voters' Lists Act) appears to put it almost beyond doubt that the list to be used must be completed before nomination day, because, even in the case of a person dying after revision, the Judge is permitted to strike his name from the certified list only 'before the day of nomination.' It would appear from this provision that it was intended that the list to be used at the election should be complete and not subject to alteration after the time of nomination.

"The statute in terms enacts that the list to be used shall be 'the last list of voters certified by the Judge and delivered or transmitted to the Clerk of the Peace.' This language is plain and unequivocal. The conjunction 'and' may be contrasted with the conjunction 'or' to be found in the third line of s. 151, now as amended s. 94, the amendment consisted in striking out before the word 'certified,' in the second line, the words 'filed with the Clerk of the Peace or.' I think it incontrovertible that even though a list has been validly certified by the Judge, if it has not been delivered or transmitted to the Clerk of the Peace, at all events before the opening of the poll on polling day, it cannot be 'the proper list of voters to be used at the election.' Section 151 (amended s. 94), in my opinion, has no bearing upon the matter, because there was a list of voters certified by the Judge and transmitted to the Clerk of the Peace for the preceding

year, and this list was, in my opinion, the last list of voters so certified and delivered, and, therefore, the proper list of voters to be used at the election."

It is to be noted that a ministerial act, for example, the certifying of a list can probably be done on Sunday, but if on that day the Judge discharged judicial functions with regard to the list, what he did would be void: Per Anglin, J., in R. ex rel. Black v. Campbell, *supra*, at p. 272, also see extracts from Re Ryan and Alliston, *supra*.

Carr v. North Bay, 1913, 28 O. L. R. 623, was an action for a declaration that a by-law was not legally submitted to the electors on the ground amongst others that as the voting was in 1912, the list for that year should have been used although it was not at the time of voting in existence. Boyd, C., reached the same conclusion as Anglin, J., in R. ex rel. Black v. Campbell, *supra*.

'**Proper List.**'—See, also, Re West Lorne, 19 O. W. R. 231, 967; 20 O. W. R. 738; 2 O. W. N. 1038; 3 O. W. N. 25, 422; 23 O. L. R. 598; 25 O. L. R. 267, 277; 26 O. L. R. 339; 47 S. C. R. 451.

Proper List of Voters in Local Option Contests.—See s. 268, below.

92. For the first election in a new municipality for which there is no assessment roll, the clerk, instead of a voters' list, shall provide every deputy returning officer with a *poll book, Form 7,* and the deputy returning officer or the poll clerk shall enter in it in the proper column, the name of every person who tenders his vote, and, at the request of any candidate or voter, shall note opposite the name of such person, the property in respect of which he claims to be entitled to vote. 3 Edw. VII. c. 19, s. 149. 3 & 4 Geo. V. c. 43, s. 92.

FORM 7.

FORM IN WHICH POLL BOOK TO BE FURNISHED TO DEPUTY RETURNING OFFICERS IS TO BE PREPARED.

Column for mark indicating that the voter has voted.	NAMES OF THE VOTERS.	Description of Property in respect of which the voter is entitled to vote.	Freeholder, Tenant, Farmer's Son or Income Voter.	Residence of Voter.	Occupation.	Objections.	Sworn or affirmed.	Refused to swear or affirm.	Mayor and Reeve.	Deputy Reeves.	Councillors.	REMARKS.

NOTE.—In Cities, the column above headed "Mayor and Reeve" is to be headed "Mayor"; and the column above headed "Councillors" is to be headed "Aldermen." In Townships and Villages, the column above headed "Mayor and Reeve" is to be headed "Reeve." Where Controllers or Commissioners or Members of a Board of Education are to be elected, columns for these are to be added with appropriate headings.

3 Edw. VII. c. 19, *Sched.* C, *amended.* 3 & 4 Geo. V. c. 43, Form 7.

93.—(1) Where a district as defined by s. 9 has been annexed to an urban municipality, or a town with additional territory erected into a city, or a village with additional territory into a town, or a new town or village is erected, and an election takes place before a voters' list including the names of the persons entitled to vote in such territory or for the new town or village is certified by the Judge, the clerk of the municipality to which the territory was added, and in the case of a new town or village the returning officer shall prepare from the last certified voters' list of the municipality from which such territory, town or village was or became detached, a supplementary list of voters containing the names of and the other particulars relating to the persons who would have been entitled to vote in such territory if it had not been so detached.

Duty of clerk as to the certificate of the Judge certifying list: Re Ryan and Alliston, 16 O. W. R. 794; 21 O. L. R. 582.

(2) The supplementary list shall be signed by the clerk and attested by his declaration, and he shall deliver to every deputy returning officer a copy of so much of such list as relates to his polling sub-division. 3 Edw. VII. c. 19, s. 150, *amended*. 3 & 4 Geo. V. c. 43, s. 93 (1-2).

94. In a municipality for which there is an assessment roll, but for which there is no voters' list certified by the Judge, the clerk shall, before the poll is opened, prepare and deliver to the deputy returning officer for every polling sub-division, a list signed by him and attested by his declaration, containing the names, arranged alphabetically, of all persons appearing by the then last revised assessment roll to be entitled to vote in that polling sub-division. 3 Edw. VII. c. 19, s. 151, *amended*. 3 & 4 Geo. V. c. 43, s. 94.

List of Defaulters in Payment of Taxes.

95.—(1) On or before the last Monday in December the treasurer of each local municipality, if the collector's roll has been returned to him, or the collector, if the roll

has not been so returned, shall prepare and verify by his declaration and shall deliver to the clerk an alphabetical list of—

(*a*) All persons entered on the first and second parts of the voters' list in respect of income only, who have not paid the taxes on such income on or before the 14th day of December next preceding the election; and,

(*b*) In municipalities the councils of which have passed by-laws under paragraph 9 of s. 399, all persons entered on the first and second parts of the voters' list, who have not paid all municipal taxes due by them on or before the 14th day of December next preceding the election.

(2) Where a municipality is divided into polling sub-divisions, such a defaulters' list shall be made for each polling sub-division.

(3) The person who prepares the defaulters' list shall furnish to all persons applying for the same, certified copies of it and of the declaration, in the same manner as and for the same compensation for which copies of the voters' list are to be furnished. 3 Edw. VII. c. 19, s. 137. 3 & 4 Geo. V. c. 43, s. 95.

96.—(1) The clerk, before the poll is opened, shall at a time and place appointed by him deliver to the deputy returning officer for every polling sub-division a list, either printed or written, or partly printed and partly written, certified to be a correct list of voters for the polling sub-division, together with a blank poll book, Form 7, and also a copy of the proper defaulters' list prepared under s. 95 for the polling sub-division. 3 Edw. VII. c. 19, s. 152, *amended.*

(2) The list of voters may be prepared by the clerk or may be procured from the Clerk of the Peace; and in the latter case the Clerk of the Peace shall be entitled to six cents for every ten voters whose names are on the

list. 3 Edw. VII. c. 19, s. 153, *amended.* 3 & 4 Geo. V. c. 43, s. 96 (1-2).

Poll Books.—Entries in poll books are not given any probative force. See s. 103.

Certificates as to the Assessment Roll.

97.—(1) The clerk, before the poll is opened, shall deliver to every returning officer a certificate, Form 8, of

(*a*) The date of the final revision of the assessment roll, and

(*b*) The last day for making complaints to the judge with respect to the voters' list to be used at the election.

FORM 8.

CERTIFICATE AS TO ASSESSMENT ROLL AND VOTERS' LIST.

Election to the municipal council of the
of 19

I, *A. B.*, clerk of the municipality of in the county of hereby certify that the assessment roll for this municipality upon which the voters' list to be used at this election is based was finally revised on the day of , 19 , and that the last day for making complaint to the Judge with respect to the list was the day of 19 .

Dated this day of , 19 .

A. B.,
[Seal.] Clerk.

3 Edw. VII., c. 19, Sched. D.

(2) The clerk shall also give to any person applying for it a like certificate upon payment of twenty-five cents.

(3) For every contravention of s.-s. 2 the clerk shall incur a penalty of $200. 3 Edw. VII. c. 19, s. 156 (1-2), *amended.* 3 & 4 Geo. V. c. 43, s. 97 (1-3).

Certificates to the Assessment Roll.—These are required to enable the deputy returning officer to put to tenant, income and farmer's son voters, the oath: form 9. See s. 104.

In Municipalities not divided into Wards.

98. In municipalities not divided into polling sub-divisions, the clerk shall perform the duties which in other cases are performed by deputy returning officers, and shall provide himself with the necessary ballot papers, the materials for marking ballot papers, the printed directions for the guidance of voters, copies of the voters' list, poll book and defaulters' list, and a certificate of the date of the final revision of the assessment roll, and the last day for making complaints to the judge with respect to the voters' list; and he shall perform the like duties with respect to the whole municipality as are imposed upon a deputy returning officer for a polling sub-division. 3 Edw. VII. c. 19, s. 157, *amended.* 3 & 4 Geo. V. c. 43, s. 98.

Where and how often electors may vote.

99.—(1) An elector shall be entitled to vote,

(*a*) *Once only* for mayor, reeve, first deputy reeve, second deputy reeve, third deputy reeve, water commissioner and sewerage commissioner;—

(*b*) Where the election is by general vote once only for as many candidates for any office as there are offices to be filled and once only for each of them.

(2) Where the election is by general vote and an elector is qualified to vote in more than one ward or polling sub-division he shall vote only in that in which he resides if qualified to vote there, or if not qualified to vote there or if he is not a resident of the municipality, he may elect at which of such wards or polling sub-divisions he will vote and shall vote there only. 3 Edw. VII. c. 19, s. 158 (1). 6 Edw. VII. c. 35, s. 19, *amended.*

(3) Where the aldermen or councillors are elected by wards an elector if qualified to vote therein may vote in each ward for as many candidates as there are offices to be filled and once only for each of them. 3 Edw. VII. c.

19, s. 158 (3); 6 Edw. VII. c. 35, s. 20, *amended.* 3 & 4 Geo. V. c. 43, s. 99 (1-3).

Voting Twice.—In R. ex rel. Tolmie v. Campbell, 1902, 4 O. L. R. 25, Britton, J., said:—

> "The whole question as to the validity of election of reeve is narrowed to that of electors voting more than once for reeve at the last election.
>
> "1st. As to electors other than the respondent himself. Apparently there was in that township a somewhat widespread impression that electors whose names were on the list for more than one polling place, could vote for reeve at each such polling place. As a matter of actual proof, no more than four are shewn to have voted more than once for reeve, but a larger number received ballot papers, and counsel for the relator asks me to presume, as against the respondent, that every elector who received a second ballot paper, after having voted, actually deposited it for reeve.
>
> "I can not do this. Section 162 of the Municipal Act prescribes a penalty for voting twice, and s.-s. 3 of that section makes the act of receiving a ballot paper within the polling booth *prima facie* evidence of the elector having there and then voted. This is applicable in a proceeding for the penalty, and it is only *prima facie* evidence against the elector. It is not evidence in a proceeding of this kind. Responsibility can not be fastened upon the respondent for it unless done by his procurement or with his consent. Double voting, as complained of, is not made a corrupt practice, so that its commission, even by an agent of the respondent, would not *ipso facto* void the election. As the case stands, I can not say that the respondent has not a majority of the legal votes. I can not carry the case of double voting, as the law is, further than to say that every person who did vote more than once is liable to the penalty, and upon scrutiny his second vote would be struck off. Under the English Corrupt Practices Act, 1883, it was sought to invalidate an election and the vote by attempting to make the voting twice 'personation.' It was held in the Stepney Case, 1886, 4 O'M. & H. 44, by Mr. Justice Denman, that 'the first vote was not void, and that the voter was not guilty of any offence unless the second vote was given corruptly. If the second vote was given innocently, under the honest belief that he was voting with a right, he could not be guilty of personation.'
>
> "In this case, under s. 162, the voter would be liable for the penalty, but in other respects the argument applies. No doubt some of those who voted twice did so believing they had the right to do so. The frequent amendments to the Municipal Act may have caused confusion in the minds of people as to what they may or may not do."

Voting in more than one ward at a municipal election by general vote was an indictable offence under former s. 158 (*a*) 1 Edw. VII. c. 26, s. 9, and mandamus lay to a Police Magistrate having territorial jurisdiction to compel him to consider and deal with an application for an information for such an offence: In re R. v. Meehan. 3 O. L. R. 567; see now, s. 138 (*g*), which prescribes a penalty; see also notes s. 269, below.

Voting more than once contrary to the provisions of s. 99, may be an indictable offence by reason of the fact that the section contains a prohibition, creating a new offence, and does not provide a particular mode of enforcing the prohibition which it prescribes. This consequence seems to follow from the prohibitions of the Criminal Code, s. 138, which declare that

> "Every man is guilty of an indictable offence, and liable to one year's imprisonment who, without lawful excuse, disobeys any Act of the Parliament of Canada, by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some

penalty is imposed or other mode of punishment is expressly provided by law ;"

and where a magistrate refused to take or receive an information for the offence without hearing the facts and exercising a discretion, he was compelled by mandamus to exercise his jurisdiction and compelled to consider and deal with an application for an information for the offence: In re R. v. Meehan, 1902, 3 O. L. R. 567. The application for mandamus should be made to a Judge sitting in single Court: In re R. v. Meehan, *supra*, p. 575. It is to be noted the consequence above mentioned was held to follow, notwithstanding the provisions of s. 193 (*f*), R. S. O. 1897, c. 223, but note that by s. 138 (*g*), which is the amended form of s. 193 (*f*), it is made an offence for a person to vote oftener than he is entitled to and a specific penalty is prescribed.

Keeping Poll Open After Prescribed Time.—The precise time for closing is immediately the clock has struck the first stroke of the hour. As to determining which course should be followed in the case of voters who have entered the polling station, but not voted before the hour of closing, in Gribbin v. Kirker, Ir. R. 7 C. L. 30, an election under the Municipal Corporations Act was declared void on the ground that votes were received after the hour for closing the poll, though the outer door of the house where the poll took place was closed at the hour and no votes were afterwards received, except from electors who were inside before the door was closed. In this case votes were received for some time after the hour fixed for closing.

Voters who have received ballot papers before the hour of closing ought to be permitted to mark them, even after that time, provided that no undue delay occurs, but ballots should not be given out after the hour for closing, even to voters who may have entered the polling station before that hour: Re Birmingham Council, L. J. R. 1883.

No election, however, can be declared invalid by reason of non-compliance with the rules, if it appears that the election was conducted according to the principles of the Ballot Act, and that non-compliance has not affected the result. (See s. 150).

It is probable that a deputy returning officer could be prosecuted criminally for wilful breach of the duties imposed on him by ss. 101-102. See R. v. Meehan, 1902, 3 O. L. R. 567; R. v. Durocher, 1913, 28 O. L. R. 499.

This section is designed to render impossible the offences enumerated in s. 138 (*c*), (*f*), (*i*) and (*k*).

[*Sec. 160 repealed by 6 Edw. VII. c. 35, s. 34.*]

100.—(1) The clerk, at the request of an elector, who has been appointed deputy returning officer, poll clerk, or agent of a candidate, for any polling place other than the one at which he is entitled to vote, shall give to such elector a certificate that he is entitled to vote at the polling place where he is to be stationed during polling day; and the certificate shall state the property or other qualification in respect of which he is entitled to vote.

(2) On the production of the certificate such elector shall have the right to vote at the polling place at which he is stationed instead of at the polling place at which

he would otherwise be entitled to vote; and the deputy returning officer shall attach the certificate to the voters' list.

(3) The certificate shall not entitle the elector to vote at such polling place unless he has been actually engaged as deputy returning officer, poll clerk, or agent during polling day, or to vote for aldermen in cities, or for councillors in municipalities divided into wards, except in the ward where he would otherwise be entitled to vote.

(4) If a deputy returning officer votes at the polling place for which he has been appointed, the poll clerk, or in his absence any elector entitled to be present, may administer to the deputy returning officer the oath required by law to be taken by voters. 3 Edw. VII. c. 19, s. 163, *amended*. 3 & 4 Geo. V. c. 43, s. 100 (1-4).

Voting on Certificate.—In Re McGrath and Durham, 1908, 17 O. L. R. 514, five persons whose names were not on the voters' list, but who possessed the qualification entitling them to be placed on the list, obtained certificates from the municipal clerk as being entitled to vote because the clerk assumed to judge that they had been inadvertently left off the list. The only excuse offered by him for this was that it was in pursuance of a custom that had prevailed for some time, and a certain voter, though on the list in one division, voted in a division on the list for which his name did not appear, and it was conceded that the vote should be struck off on a motion to quash.

In Re Schumacher and Chesley, 1910, 21 O. L. R. 522, a scrutineer called Durst, voted upon certificates and upon a motion to quash it was objected that there was no evidence that he produced his appointment at the opening of the poll, and that this was a condition precedent to his right to be present and to vote upon a certificate. Meredith, C.J.C.P., said:

> "I should have held that, in the absence of evidence to the contrary, it must be assumed that, having been allowed to vote by the returning officer, the appointment was presented to him at the proper time; but there is the evidence, which I have allowed to be put in by the respondents, an affidavit of Durst, that he had possession of the appointment, and that it was produced to the deputy returning officer before the opening of the poll and left with him. I therefore disallow the objection to Durst's vote."

At the same election a deputy returning officer called Neelin, voted on certificate, and it was objected to his vote and the vote discussed above, that the certificates were not in the form prescribed by the statute in that they did not mention the property in respect of which the named persons to whom they were given, were entered upon the voters' list. Meredith, C.J.C.P., said:—

> "I do not think that I ought to hold that a mistake of that kind is sufficient to annul the vote. Both of them were undoubtedly good voters, and had a right to vote upon the by-law; and I am not prepared to hold that a mistake of the officer in the form of the certificate . . . and the failure to insert something which, perhaps, is

not of very much use in the certificate, vitiates the votes. I have, therefore, come to the conclusion that the objections taken to them are not maintainable."

In the D. C. in the same case, Riddell, J., discussed the case as follows:—

"Durst lived in polling subdivision No. 2, having property in both No. 1 and No. 2. An appointment was drawn up for him to act as scrutineer in polling subdivision No. 2, but a change was made in pencil to No. 1, and then the mayor signed the appointment— this change was made at the request of one . . . The clerk swears that he gave this to Durst at his request; and Durst swears that he received it and a certificate from the clerk and delivered both to the deputy returning officer in polling booth for polling subdivision No. 1, on the morning of the election. This is sufficient proof. The appointment is regular—the certificate signed by the clerk (returning officer) reads: 'This is to certify that W. G. Durst, a scrutineer in polling subdivision No. 1, is qualified to vote in polling subdivision No. 2, on lot 16 west main, and this certificate entitles him to vote in polling subdivision No. 1.' This certificate contains all the Act requires, unless the omission of the words 'for or against the by-law' after the word 'vote' makes the certificate incomplete—and that could not be contended. It will be seen that the Act does not require the interest of the voter in the property to be stated: 3 Edw. VII., c. 19, s. 347 (1). Upon the production of this certificate, Durst was entitled to vote: s. 347 (2). In view of the express statement of Durst, it is too much to ask us to hold that the appointment was in fact left on file in the clerk's office, as he at one point in his examination thinks.

"Neelin was the deputy returning officer in polling subdivision No. 2. His certificate read: 'Is a duly qualified tenant in polling subdivision No. 1, and is, therefore, entitled to vote in No. 2.' Here, not the property, but the 'other qualification,' is given in No. 2.' Here, Neelin is a tenant—and the rest of the certificate shews that that means a tenant qualified to vote. He is 'a person claiming to vote as a tenant,' whose case is provided for by s. 113—the oath does not specify the property, and I can see no difficulty, in case of suspicion, in requiring the voter to take an oath. I am of opinion that this objection fails."

101.—(1) The poll shall be opened at every polling place at nine o'clock in the forenoon and shall be kept open until five o'clock in the afternoon of the same day.

(2) The council of a city may by by-law passed before the 15th day of November in any year extend the time for keeping open the poll until seven o'clock in the afternoon. 3 Edw. VII. c. 19, s. 128 (4), *amended.*

(3) The votes shall be given by ballot. 3 Edw. VII. c. 19, s. 136. 3 & 4 Geo. V. c. 43, s. 101 (1-3).

102. The deputy returning officer shall, immediately before opening the poll, shew the ballot box to such persons as are present in the polling place, so that they

may see if it is empty, and he shall then lock the box and place his seal upon it in such a manner as to prevent its being opened without breaking the seal, and he shall keep the box on a desk, counter or table or otherwise so that it is raised above the floor in full view of all present, and shall keep the box so locked and sealed. 3 Edw. VII. c. 19, s. 164, *amended*. 3 & 4 Geo. V. c. 43, s. 102.

103.—(1) Where a person tenders his vote, the deputy returning officer shall proceed as follows:

(*a*) Except where there is no voters' list he shall ascertain that the name of such person or a name apparently intended for it is entered on the voters' list for the polling sub-division.

(*b*) He shall record, or cause to be recorded by the poll clerk, in the proper columns of the poll book the name, qualification, residence and occupation of such person.

(*c*) Where the vote is objected to by any candidate or his agent, the deputy returning officer shall enter or cause to be entered the objection in the poll book, by writing opposite the name of such person in the proper column the words "*Objected to,*" and the name of the candidate by or on behalf of whom the objection was made.

(*d*) If such person takes the prescribed oath, the deputy returning officer shall enter or cause to be entered opposite such person's name, in the proper column of the poll book the word "*Sworn,*" or "*Affirmed,*" according to the fact.

(*e*) Where such person has been required to take the oath and refuses to do so, the deputy returning officer shall enter or cause to be entered opposite the name of such person, in the proper column of the poll book, the words, "*Refused to be Sworn,*" or "*Refused to Affirm,*" according to the fact.

(*f*) After the proper entries have been made in the poll book the deputy returning officer shall place or cause to be placed a check or mark opposite the name of the voter in the voters' list to indicate that he has voted, and *shall then put his initials* on the back of the ballot paper.

(*g*) The ballot paper shall then be delivered to such person.

(*h*) The deputy returning officer may, and upon request shall, either personally or through the poll clerk, explain to the voter, as concisely as possible, the mode of voting.

(2) The vote of a person who has *refused to take the oath* shall not be received, and if the deputy returning officer receives such vote, or cause it to be received, he shall incur a penalty of $200. 3 Edw. VII. c. 19, s. 165, *amended.* 3 & 4 Geo. V. c. 43, s. 103 (1-2).

See Wilson v. Manes, 28 O. R. 419; 26 A. R. 398.

104.—(1) The only oath to be required of a person claiming to *vote shall be according to Form 9.*

FORM 9.

OATH TO BE ADMINISTERED TO A VOTER.

You swear (*a*)

1. That you are the person named or intended to be named by the name of in the list (*or* supplementary list) of voters (*b*) now shown to you.

2. That you are a natural born (*or* naturalized) subject of His Majesty, and of the full age of twenty-one years.

3. That you are not a citizen or subject of any foreign country.

Repealed by 8 Geo. V. c. 32, s. 15.

5. That (*c*)

6. (*In the case of a municipality not divided into wards*) That you have not voted before at this election at this or any other polling place.

7. (*Where the municipality is divided into wards and the election vote is not by general vote*) That you have not voted before at this election at this or any other polling place in this ward, (*or if the election is by general vote*) that you reside in this polling subdivision (*or* are not entitled to vote in the polling subdivision in which you reside *or* are not resident within the municipality, *as the case may be*), and that you have not voted before or elsewhere at this election, and will not vote elsewhere at this election (*d*).

8. That you have not directly or indirectly received any reward or gift, nor do you expect to receive any, for the vote which you tender.

9. That you have not received anything, nor has anything been promised you, directly or indirectly, either to induce you to vote at this election, or for loss of time, travelling expenses, hire of team, or any other service connected with this election.

(*a*) If the voter is a person who may by law affirm in civil cases, substitute for "swear," "solemnly affirm."

(*b*) In the case of a new municipality in which there has not been any assessment roll, instead of referring to the list of voters, the oath is to state the land in respect of which the person claims to vote.

(*c*) *In the case of a person claiming to vote in respect of a freehold estate, insert here*, "At the date of this election you are in your own right, or your wife is, a freeholder within this polling subdivision (*or, where the ward is not divided into polling subdivisions*, "within this ward"); (*or, in the case of a person claiming to vote in respect of a leasehold estate*, insert here "That you were (*or* your wife was) actually and truly in good faith possessed to your (*or* her) own use and benefit as tenant of the land in respect of which your name is entered on such list. That you are (*or* your wife is) a tenant within this municipality, and that you have been a resident within it for one month next before this election;" (*or, in the case of a new municipality for which there is no assessment roll, instead of the words* "have been a resident within it for one month next before the election," *insert* "You are a resident of this municipality."

(*Or if the person claims to vote in respect of income, insert here*): That on the day of 19 (*the day certified by the clerk as the date of the final revision of the assessment roll upon which the voters' list is based, or, at the option of the voter, the day certified by the clerk as the last day for making complaint to the Judge with respect to such list*) You were, and thenceforth have been continuously, and still are, a resident of this municipality, and that at that date and for the twelve months previously you were in receipt of an income from your trade, office, calling or profession of not less than four hundred dollars; (*or*, in the case of a person claiming to vote as a farmer's son, insert here) That on the day of 19 , (*the day certified by the clerk as the date of the final revision of the assessment roll upon which the voters' list is based, or, at the option of the voter, the day certified by the clerk as the last day for making complaint to the Judge with respect to such list*) *A. B.* (naming him or her) was actually, truly and in good faith possessed to his (*or* her) own use and benefit as owner (*or* as tenant under a lease the term of which was not less than five years), as you verily believe, of the land in respect of which your name is entered on the voters' list; that you are a son (*or* a stepson) of the said A. B., and that you resided on the said land for twelve months next before the said day, and were not absent during that period except temporarily, and for not more than six months in all, and that you are still a resident of this municipality. *Where the voter or his wife is a leaseholder, and the voting is on a by-law under s. 51 of the Local Improvement Act*, add

That you have (or your wife has), by the lease under which you (or she) holds, contracted to pay all municipal taxes, including local improvement rates.

(d) *If the by-law is for creating a debt substitute for paragraph 7.*

(*In the case of the municipality divided into wards, if the by-law is one for creating a debt*: 7. That you have not voted before on the by-law at this or any other polling place in this ward; (*or in the case of any other by-law*): 7. That you reside in this polling sub-division or are not entitled to vote in the polling sub-division in which you reside, or are not resident within the municipality (as the case may be), and that you have not voted before elsewhere, and will not vote elsewhere on the by-law.

(*Where the voter or his wife is a leaseholder, and the voting is on a by-law for creating a debt, add the following paragraph*:—

11. That the lease under which you hold (or your wife holds) extends for the period for which the debt or liability to be created by the by-law is to run, and you have (or your wife has) contracted by the lease to pay

all municipal taxes in respect of the land other than special assessments for local improvements.

Where the voting is on a by-law substitute for the words "at this election" *the words* "on the by-law": *and where the voting is on a question, substitute for the words* "at this election" *the words* "on the question."

3-4 Geo. V. c. 43, Form 9.

NOTE.—*Where the voter is the nominee of a corporation the oath shall state the fact, and that the voter has not voted before on the by-law* "*at this or any other polling place,*" *adding if the municipality is divided into wards* "*in this ward,*" *and shall also contain paragraphs 1, 8, 9 and 10.*

(2) The voter shall be entitled to select any one of the forms of oath, whatever may be the description either in the voters' list or assessment roll of the qualification or character in which he is entered upon it. 3 Edw. VII. c. 19, s. 116, *amended.*

(3) The oath may be administered by the returning officer or deputy returning officer if he thinks fit, and shall be administered at the request of any candidate or his agent, and no inquiry shall be made of a voter, except with respect to the matters required to be stated in the oath or to ascertain if he is the person intended to be designated on the voters' list, or the assessment roll, as the case may be. 3 Edw. VII. c. 19, s. 117, *amended.* 3 & 4 Geo. V. c. 43, s. 104 (1-3).

"Person Intended to be Named."—See Re Schumacher and Chesley, 21 O. L. R. 522; Wilson v. Manes, 28 O. R. 419; 26 A. R. 398.

OATH TO BE ADMINISTERED TO A VOTER.

Clause 1 has reference to the duty cast on the deputy returning officer under s. 103 (1*a*). The deputy returning officer may decide that there is no name in the list intended or apparently intended for the voter's, in which case he can decline to give a ballot. If he decides to give a ballot, an objection can still be made and the voter may take the oath and become entitled to a ballot. In case the deputy returning officer decides that there is no name on the list intended, or apparently intended, for the voter's, neither the voter nor any candidate or agent has the right to object. The only objections authorized are those to the vote. No objections against the action of the deputy returning officer in refusing the vote are authorized, but if the voter was actually entitled to vote and was refused a ballot by the deputy returning officer, the latter might lay himself open to certain liabilities. See *infra*, p. 231. This clause deals with the preliminary question of whether on the list or not. If not on the list the voter has no status.

Clause 2 has reference to the qualifications mentioned in 56 (1*b*) and (1*c*). The language of s. 58 would appear to indicate that the status of a person whose name appeared on the voters' list could not be questioned except in the respects mentioned in s. 58, and the matters mentioned in clause 2 are not within the mentioned classes. It would therefore appear that the list has no finality, so far at least as the matters involved in clause 2 are concerned, for the question can be raised by way of objection,

and if the voter is in fact disqualified and refuses to take the oath, he cannot obtain a ballot.

Clause 3. The finality of the list is further impaired in cases where British subjects by birth or naturalization, whose names appear on the list, have become citizens or subjects of a foreign country.

Clause 4. The finality of the list is in like manner impaired where a woman appears on the list as a widow or unmarried woman when in fact she is married or marries after the list is certified.

Clause 5. This clause contains four alternative provisions applicable to municipal elections, and referring respectively to (1) a freeholder, or the husband of a freeholder; (2) a tenant or the husband of a tenant; (3) an income voter; (4) a farmer's son. This clause enables the disqualifications arising from non-residence in the case of income, farmer's son and tenant voters to be raised by objection, and also enables any person whose name appears in the list whether as freeholder, tenant, farmer's son or income voter to be objected to, if not in fact qualified, although when objection is made if such person is qualified in any of the above characters, he will be able to take the oath and obtain a ballot. The voters' list is therefore not final with respect to any of the matters of qualifications mentioned in 56 (1c) as explained by 56 (2).

Clauses 6 and 7 are alternatives and are designed to prevent voting more than once contrary to the provisions of ss. 99 and 100.

Clauses 8, 9 and 10. These clauses are intended to test whether or not the voter has committed a breach of ss. 187-8-9. The disqualifications imposed by Part V. only become effective after conviction. These clauses enable a corrupt voter to be prevented from voting or if he takes the oath and votes, he exposes himself to a charge of perjury as well as to penalties provided in Part V., and the same remarks apply to anyone corruptly inducing persons to vote or refrain from voting. From the foregoing it would appear that the only finality that the proper voters' list has is as to the question of name. The presence of the name is essential and if the name is not there, the person is entirely finally prevented from voting. On the other hand notwithstanding the presence of the name on the voters' list, every qualification entitling it to be there can be called into question by objection, and if the voter is in fact disqualified, he can be prevented from voting.

Section 103 does not require the deputy returning officer on the tender of a vote to search in the defaulters' list. It would appar that it is the duty of the deputy returning officer to hand out a ballot if the voter's name appears on the list unless objection is made by a candidate or his agent and it is submitted that objection may be made that the voter's name is in the defaulters' list, and when objection is made, the deputy returning officer should look at the defaulters' list, and if the name appears there, the deputy returning officer should refuse a ballot unless the certificate referred to in s. 59 is produced and filed.

Worthless Form of Oath.—By mistake deputy returning officers were not furnished with the amended form of oath prescribed by the Act, but with the unamended form formerly used. This was made one of the grounds of attack upon the by-law. In re Duncan and Midland, 1907, 16 O. L. R. 132, C. A., Riddell, J., in the D. C. said:

> "No one can be deprived of his vote because the proper oath has not been administered to him. It might be different if it were shewn that the voters were citizens or subjects of a foreign power."

The voter shall be entitled to select any one of the forms of oath whatever may be the description either in the voters' list or the assessment roll of the qualification or character in which he is entered upon it.

How Objections Should be Made. — Section 103 (1c) provides for a case where a vote is objected to. It is submitted that all the candidate or his agent can do is to object to the vote and that when this is done Form 9 must be administered in toto. It is submitted that it is improper to specify particular objections or to enter into any discussion as

to qualification. Such discussion can be entered into on a motion to declare a seat vacant under Part IV., or in connection with proceedings to enforce penalties.

The language of s. 103 nowhere definitely states that a person whose vote is objected to must be required to take the prescribed oath. The section states what the deputy returning officer is to do when such person takes the prescribed oath, s.-s. (1*d*), and also states what is to be done when such person refuses to do so. Sub-sections (1*e*) and (2). Section 104 (3) gives the returning officer or deputy a discretion to administer the oath if he sees fit, and makes it an imperative duty for him to administer the oath at the request of any candidate or his agent. Enquiries of the voter are to be confined to the matter stated in the oath, and to matters necessary to identify the voter as a person named or intended to be named in the list. These enquiries should be made by the deputy returning officer.

Voting after Refusal of Oath.—A vote so given is an illegal vote as much as if cast by a personator or if inserted in the ballot box fraudulently, and has been held to be a ground for setting aside an election if the relator would otherwise have had a majority. R. ex rel. Dillon v. McNeil, 1855, 5 C. P. 137. But now see title *What relator must establish to have election set aside.* Part V.

Taking Oath Entitles Person Named on List to Vote.—Once a voter's name is on the voters' list, he may vote if he can truly take any form of oath. Riddell, J., in Re Armour and Onondaga, 1907, 14 O. L. R. at 608.

All enquiries of an applicant for a ballot paper should be made by a deputy returning officer personally, and not by scrutineers or other persons rightfully present in the polling place. The latter have no right whatever to question the applicant. The first enquiry of the deputy returning officer will be for the applicant's name and other particulars necessary to enable the name to be quickly found in the voters' list. The deputy returning officer should repeat the name and particulars aloud and record or cause the poll clerk to record the same in the poll book as required by s. 130 (1*b*). The name should be entered in the poll book whether or not the applicant's name is found to be on the list. It is important that the poll book should contain a record of all applicants for ballot papers whether entitled to the same or not. The record may become material in connection with proceedings under s. 138 (*g*).

Having ascertained the name of the applicant, the deputy returning officer should satisfy himself that it or a name intended for it, is in the list and if he finds it there, he should at once without making any further enquiries deliver a ballot paper to the applicant unless his vote is objected to by a candidate or his agent 103 (1*c*). The Act does not authorize the taking of objections at this stage by the deputy returning officer. The only objections authorized are those by candidates or their agents and where such an objection is made, it should be made to the deputy returning officer who must thereupon cause the objection to be entered as required by s. 103 (*c*). The deputy returning officer should then require the person objected to to take the prescribed oath. The objection can only be based on the grounds for disqualification contained in the prescribed oath, and no enquiry is to be made except with respect to the matters required to be stated in the oath or to ascertain if the applicant is the person whose name appears on the voters' list or the assessment roll, s. 104 (3). It is submitted that these enquiries should be made by the deputy returning officer personally and that all a candidate or his agent can do is to state the ground of objection to the deputy returning officer.

105. The deputy returning officer or the poll clerk shall place his *initials* in the appropriate column of the poll book opposite the name of every person who has voted for a candidate for the office named in that column.

3 Edw. VII. c. 19, s. 167; 6 Edw. VII. c. 35, s. 21, *amended.* 3 & 4 Geo. V. c. 43, s. 105.

106.—(1) Upon *receiving the ballot paper* the person receiving it shall—

(*a*) Forthwith proceed into the compartment provided for the purpose, and shall then and there mark his ballot paper by *placing a cross,* on the right hand side, opposite the name of a candidate for whom he desires to vote, or at any other place within the division which contains the name of such candidate;

(*b*) Then fold the paper so as to conceal the names of the candidates, and the marks upon the face of it, and to expose the initials of the deputy returning officer;

(*c*) Then leave the compartment without delay, and without showing the face of the ballot paper to any one, or so displaying it as to make known how he has marked it; and

(*d*) Then deliver the ballot paper so folded to the deputy returning officer.

(2) The deputy returning officer, without unfolding the ballot paper, or in any way disclosing the names of the candidates, or the marks made by the voter, shall verify his own initials, and at once deposit the ballot paper in the ballot box in the presence of all persons entitled to be present and then present in the polling place; and the voter shall forthwith leave the polling place. 3 Edw. VII. c. 19, s. 168 (1), *amended.* 3 & 4 Geo. V. c. 43, s. 106 (1-2).

Voter Depositing Ballot Paper Himself.—In re Duncan and Midland, 1907, 16 O. L. R. 132, an objection was taken that a number of voters, instead of handing their ballots to the deputy returning officer, themselves, put them in the ballot box, and section 170 (now 106) is appealed to. Riddell, J., said:

> "Had the section stopped with the words 'forfeit his right to vote' the argument would have had some weight, but the remainder of the section shews that what was being provided against was the

voter going away without voting or declining to vote. It never could have been intended that a voter who, upon the direction or with the approval of the deputy returning officer, himself in good faith, placed the ballot in the box, instead of handing it to the deputy returning officer, thereby should disenfranchise himself. Section 204 (now 150) cures this defect."

Rule 25 of the first schedule of The Ballot Act is as follows:

"The elector, on receiving the ballot paper, shall forthwith proceed into one of the compartments in the polling station, and there mark his paper, and fold it up so as to conceal his vote, and shall then put his ballot paper, so folded up, into the ballot box; he shall vote without undue delay, and shall quit the polling station as soon as he has put his ballot paper into the ballot box."

The directions for the guidance of voters from the second schedule of The Ballot Act, are as follows:

"The voter may vote for candidate.

"The voter will go into one of the compartments, and, with the pencil provided in the compartment, place a cross on the right hand side, opposite the name of each candidate for whom he votes, thus X.

"The voter will then fold up the ballot paper so as to show the official mark on the back, and leaving the compartment will, without showing the front of the paper to any person, show the official mark on the back to the presiding officer, and then, in the presence of the presiding officer, put the paper into the ballot box, and forthwith quit the polling station.

"If the voter inadvertently spoils a ballot paper, he can return it to the officer, who will, if satisfied of such inadvertence, give him another paper.

"If the voter votes for more than candidate , or places any mark on the paper by which he may be afterwards identified, his ballot paper will be void, and will not be counted.

"If the voter takes a ballot paper out of the polling station, or deposits in the ballot box any other paper than the one given him by the officer, he will be guilty of a misdemeanour, and be subject to imprisonment for any term not exceeding six months, with or without hard labour."

THE ELECTIONS ACT (DOMINION).

R. S. C. 1906, c. 6, s. 162. The elector on receiving the ballot paper, shall forthwith proceed into one of the compartments of the polling station, and there mark his ballot paper, making a cross with a black lead pencil within the white space containing the name of the candidate, or each of the candidates for whom he intends to vote, and shall then fold up the ballot paper so that the initials and stamp on the back of it and the number on the counterfoil can be seen without opening it, and hand it to the deputy returning officer, who shall, without unfolding it, ascertain by examining his initials and the stamp and the number on the counterfoil, that it is the same paper he furnished to the elector, and shall then, in full view of all present, including the elector, remove the counterfoil and destroy it and place the ballot paper in the ballot box, which box shall be placed on the table in full view of all present.

ONTARIO ELECTION ACT.

Section 102 R. S. O. 1914, c. 8. The voter on receiving the ballot paper shall forthwith proceed into one of the compartments of the polling place and shall there mark his ballot paper, making a cross with a black lead pencil within the white space containing the name of the candidate . . . . for whom he intends to vote.

Ballots must be marked within the booth: Quigley v. Bastard, 2 O. W. N. 1047; 19 O. W. R. 176.

The irregularity of a voter putting the ballot directly in the box instead of handing it to the deputy returning officer is cured by s. 150: Re Duncan and Midland, 16 O. L. R. 132.

107. While a voter is in a compartment for the purpose of marking his ballot paper, no other person shall be allowed to enter the compartment, or to be in a position from which he can see how the voter marks his ballot paper. 3 Edw. VII. c. 19, s. 169. 3 & 4 Geo. V. c. 43, s. 107.

More than One at a Time in Voting Compartments.—In re Rickey and Marlborough, 1907, 14 O. L. R. at 590, Mabee J., took the same view, but said:

> "Persons were improperly allowed in the polling booths, and in the ballot compartments, and other omissions not useful to refer to. Personally, I think the Courts should require more strict compliance with the statutory requirements, where by-laws of this character are submitted to a popular vote. If the Legislature lays down a mode of procedure, intended to be followed, I am of opinion that, notwithstanding the saving clause in the statute, a far too lax practice has grown up, and the cases have gone much too far in supporting by-laws, where little if any attention has been given by the local officers to the statutory preliminaries. Of course this has only promoted and encouraged non-observance of the plain provisions that the Legislature intended should be observed. I for one shall be glad when the pendulum commences to swing back, and this disregard of legal formalities by municipal clerks and councils will cease to have the approval of the Court."

In re Duncan and Midland, 1907, 16 O. L. R. 132, where a voter and his mother went into a compartment together, Riddell, J., in the C. A., spoke of the matter as a trifling irregularity.

On the other hand, in Re Quigley and Bastard, 1911, 24 O. L. R. 622, a by-law was quashed for numerous irregularities in connection with the polling, such as, persons being allowed to enter voting compartments with voters.

108. A person who has received a ballot paper shall not take, and the deputy returning officer may prevent him from taking it out of the polling place and if he leaves the polling place without delivering it to the deputy returning officer in the prescribed manner or returns the ballot paper declining to vote he shall thereby forfeit his right to vote, and the deputy returning officer shall make an entry in the poll book, in the column for "*Remarks,*" to the effect that such person received a ballot paper, but took it out of the polling place, or returned it, declining to vote, as the case may be, and in the latter case the deputy returning officer shall immediately

write the word *"Declined"* upon the ballot paper and shall preserve it. 3 Edw. VII. c. 19, s. 170, *amended.* 3 & 4 Geo. V. c. 43, s. 108.

Declined Ballots.—In Re Ellis and Renfrew, 1910, 21 O. L. R., 2 O. W. N., 27 D. C.. 23 O. L. R. 427, C.A., it was established on a motion to quash that a voter coming out of the compartment, threw the ballot on the table, saying "I will have nothing to do with that." The deputy returning officer placed it in the ballot box. There was no satisfactory evidence as to whether the ballot was marked or not. In the C.A., Magee, J.A., thought that the ballot should be disregarded (i.e., not counted in making upon the total of which to take three-fifths). Riddell, J., left the point undecided.

If the voter declines to vote after he has marked his ballot. he is not protected from disclosing how it was marked: Magee, J.A., in Re Ellis and Renfrew, *supra.* It is important to write the word "declined" on such a ballot.

109.—(1) The deputy returning officer on the application of a voter who is incapacitated by blindness or other physical cause from marking his ballot paper, or who makes a *declaration, Form 10,* that he is unable to read, or where the voting is on a Saturday that he is of the Jewish persuasion and objects on religious grounds to mark his ballot paper in the manner prescribed by s. 106, the deputy returning officer shall—

(*a*) In the presence of the poll clerk and the agents of the candidates, cause the vote of such person to be marked on the ballot paper in the manner directed by him and shall place the ballot paper in the ballot box.

(*b*) Make an entry opposite the name of the voter in the proper column of the poll book, that his vote was marked in pursuance of this section, and of the reason why it was so marked.

(2) Where the voter objects on religious grounds to mark his ballot paper, the declaration may be made orally. 3 Edw. VII. c. 19, s. 171, *amended.* 3 & 4 Geo. V. c. 43, s. 109 (1-2).

FORM 10.

DECLARATION OF INABILITY TO READ.

I, *A. B.*, of , being numbered on the voters' list, for polling sub-division No. , in the City (*or as the case may be*) of , being a legally qualified elector for the City (*or, as the case may be*) of declare that I am unable to read (*or* that I am from physical incapacity unable to mark a ballot paper, *or* that I object on religious grounds to mark a ballot paper, *as the case may be*).

(*A. B.*, His X Mark.)

Dated this day of , 19 .

3 Edw. VII. c. 19, *Sched.* E
3 & 4 Geo. V. c. 43, *Form* 9.

NOTE.—*If the person objects on religious grounds to mark a ballot paper, the declaration may be made orally and to the above effect.*

FORM 11.

CERTIFICATE TO BE WRITTEN UPON OR ANNEXED TO THE DECLARATION OF INABILITY TO READ.

I, *C. D.*, deputy returning officer for sub-division No. for the City (*or as the case may be*) of , hereby certify that the above (*or within*) declaration, having been first read to the above (*or* within) named *A. B.*, was signed by him in my presence with his mark.

C. D.

Dated this day of . 19 .

3 Edw. VII. c. 19, *Sched.* F.
3 & 4 Geo. V. c. 43, *Form* 11.

Open Voting.—In Re Duncan & Midland, 1907, 16 O. L. R. 147, Riddell, J., thus discussed an instance of open voting:

> "Some half a dozen voters gave open votes; and in no such case was a declaration of inability to read or physical incapacity for the marking of the ballot made by the voter. This is explained by the deputy returning officer as having been done by consent of scrutineers for and against the by-law; and what happened was that several persons who were unable to read had their ballots marked for them behind the screen, in the presence of both scrutineers. This was wrong; it is only those who made a declaration that they are unable to read who are entitled to have their votes cast in the manner mentioned: s. 171. Some half a dozen are said to have voted in the same way in No. 3. If the number of persons thus voting had been large, it might be necessary to consider how far this defect was cured by s. 204."

In Re Ellis and Renfrew, 1910, 21 O. L. R. 79, Riddell, J., again discussed the question as follows:

> "In addition to these, Mary Tackman's vote is questioned on the hypothesis that she was also an illiterate: the affidavit of Kelly is to this effect, but her own affidavit shews that this is an error. She signs the affidavit, and I see no reason for not accepting her

account of the matter; her vote cannot be struck off. So also in polling sub-division No. 3, Mary Utrunky's vote is attacked, but her own affidavit is to be taken.

"In respect of class 1, the fact is that they, claiming to be illiterates, were not required by the deputy returning officer to make any declaration as to their incapacity, but the deputy returning officer took a ballot and marked it for the voter, but not in the presence of the agents, as, it is contended, is required by s. 171 of the Act. The answer set up to this is that the agents of those opposing the by-law, shewn to be such by the production of a written appointment, made no objection, but acquiesced in the act of the deputy returning officer going into the voting compartment with the voter alone, and then marking for him his ballot, and this without a written declaration from the voter."

"The provisions of sec. 171 seem to make it quite clear that in the case of one claiming to be entitled to vote, but that he is unable to read, the declaration is to be in writing. It will be seen that the section provides for (*a*) those incapacitated by blindness; (*b*) those unable to read; and (where the voting is on Saturday) (*c*) Hebrews. The blind (*a*) need not make a declaration at all: in the case of the Hebrew (*c*) "the declaration may be made orally:" s. 171 (4); but there is no provision for the illiterate making his declaration orally—the declaration is 'at the time of the polling' to be made by the person claiming . . . before the deputy returning officer, who shall attest the same as nearly as may be according to the form given in schedule F. to this Act; and the . . . declaration shall be given to the deputy returning officer at the time of voting:" s. 171 (3).

"The argument for the applicant is that the illiterate is given the right to vote only upon making the declaration; that, consequently, a vote taken as these were is void; and that this is not simply an irregularity. I do not accede to this argument; but it is, in my view, not necessary to decide the question, for reasons that will shortly appear.

"(2) In the case of Robert Timmons, the blind voter, I have pointed out that no declaration was needed; but the irregularity of marking his ballot by the deputy returning officer in presence of the voter alone, instead of in the presence of the agents, as required by s. 171 (1), was committed also in his case. As, however, the right to vote at all cannot be considered to depend upon the manner of voting, this vote could not be struck off in these proceedings, the whole trouble being in the manner of voting.

"We did In re Duncan and Town of Midland, 16 O. L. R. 132, say that in the case of those unable to read having their ballots marked for them without the proper declaration having been made, it might be necessary to consider how far this defect was cured by s. 204 (p. 147); but I do not find that the same remark has ever been made in reference to a blind man. I do not think that I can or should, upon the present inquiry as to numbers, make anything depend upon this irregularity, however much effect it may have in a subsequent investigation of the general manner in which the election was conducted.

"(3) Mrs. . . . and Mrs. . . . are very old women. The former (80 years of age) appeared at the polling booth, stated that she was not able to mark her ballot herself, and the deputy returning officer, without requiring any declaration, allowed her and her daughter (not sworn to secrecy) to go into the voting compartment. The deputy returning officer, before allowing this, explained to all the scrutineers (including the present applicant, who had produced to the deputy returning officer his written appointment to act for those opposed to the by-law) that he would not allow Mrs. . . . . to go into the voting compartment unless they all consented, and 'the scrutineers, including the applicant, stated that they were willing and consented thereto.'

"Mrs. . . . (95 years of age) was, in some way, for the same reason, and upon the same explanation and consent, accompanied by her son-in-law.

"Mrs. . . . and Mrs. . . . both marked their ballots themselves, and both swear that the presence of their relative in the voting compartment did not affect the manner in which they marked their ballots. It nowhere appears that the relatives could or did see the way in which the ballots were marked, or the contrary; and it seems manifest that perfect good faith was observed, and that it was simply the physical feebleness of these elderly ladies which occasioned the presence of their friends.

"In this class again, it is not the right to vote but the manner of voting that is objected to, and the same remarks apply to these cases as to that of the blind man.

"We spoke of such cases in the Midland case, at pp. 147, 148, and thought the irregularities trifling in any event."

And in the C. A. 1911. 23 O. L. R. 433, Garrow, J.A., said:

"Upon the argument, I was impressed with the contention of Mr. Douglas, counsel for the applicant, that it is a statutory condition precedent to the right of an illiterate person to vote, that he should take the declaration required by s. 171. Reflection, however, leads me to the conclusion that the omission is merely an irregularity in the mode of receiving the vote, and so covered by s. 204. It is not the same as the point this Court considered in Re Port Arthur Election, 1906, 12 O. L. R. 453, in which agents and others had been allowed to vote, on certificates improperly obtained, at polling places other than their own. In such a case the agent's name is not upon the voters' list at all, where he proposed to vote. He is, therefore, not a voter there, and, to qualify him properly, it is no hardship upon him to say that he must come prepared with a proper certificate, and, if he does not, it is not the fault of anybody but himself. In the case of an illiterate voter, it is the duty of the deputy returning officer to obtain the necessary declaration as a preliminary to delivering the ballot. And the form of declaration is one of the forms with which he is officially supplied for use at the polling place, and is not something which the voter himself is required or expected to produce.

"It is, of course, the policy of the Act to secure secrecy, and any serious or extensive departure from such policy would undoubtedly not merely affect the individual vote, but would be fatal to the whole election. But in the present instance the violations in the cases of the two very elderly persons who were accompanied to the polling booth by their relatives, are, upon the evidence, of a very harmless nature, having absolutely no general effect, and are only, at the most, irregularities cured by s. 204."

And Magee, J.A., in 23 O. L. R. 437, said:

"Section 168 of the Municipal Act, which, with other sections, is made applicable by s. 351, requires an elector, upon receiving his ballot paper, to go into the voting compartment, mark his ballot, fold it up, and, without displaying to any one how it is marked, deliver it folded to the deputy returning officer, who deposits it in the ballot box; and s. 169 forbids that any one shall enter the compartment while the voter is there. If these sections stood alone, illiterate or physically incapacitated electors would be unable to exercise their right of voting. That right, if they can exercise it, is conferred upon them equally with their more fortunate, though in some cases perhaps not more sensible, neighbours. So s. 171 makes provision for them. It declares that, 'in the case of a person claiming to be entitled to vote who makes a declaration that he is unable to read, the proceedings shall be' as therein follows. These proceedings are, that the deputy returning officer shall, in the presence of the agents on both sides, cause the vote to be marked as the voter directs on a ballot paper, and place it in the ballot box and make an entry of the fact and the reason for it in the poll-book. The section goes on to provide that 'the declaration . . . may be in the form of schedule E . . . and shall at the time of the polling be made by the person claiming to be entitled to vote, before the deputy returning officer,

who shall attest the same . . and the said declaration shall be given to the deputy returning officer at the time of voting." In the case of Hebrew voters objecting on religious grounds to mark a ballot on Saturday, the declaration of that objection may, under the same s. 171, be made orally. In the case of a person claiming to be entitled to vote who is incapacitated by blindness or other physical cause for marking his ballot, the section does not, expressly at least require any declaration, but the form schedule E seems intended to be used for such cases also. When we turn to that form, it reads merely, 'I, A. B., of etc., being numbered — on the voters' list, etc., being a legally qualified elector, etc., do hereby declare that I am unable to read'—and the illiterate voter is to make his mark to it.

"It was argued for the appellant that, in the cases to which s. 171 applies, the elector is given a vote only conditionally upon making the declaration, and that, if the condition was not complied with, the vote would be invalid. But that, I think, is manifestly not the intention nor the effect of the statute. Ability to read is not one of the qualifications of voters—any more than physical vigour, or vision or Christianity. The franchise is conferred absolutely, and, if its possessor chooses to risk making a haphazard mark on his ballot, no one has the right to prevent him. The section is based on the man being 'entitled to vote,' and the form of declaration asserts that title. It does not say that he gets the right upon making the declaration, but treats the right as existing, and merely declares what the proceedings shall be. Apparently, under s. 165, the elector is entitled to have the ballot delivered to him before he need say a word about his inability.

"No doubt, the formal declaration is not an idle ceremony, although it is a mere repetition, not under oath, of that which the elector has already stated—and having only his mark to a paper which he cannot read does not stand as inherent evidence against him. It brings to his attention the fact that he is doing something of importance. Section 176 of the Criminal Code, 1906, would apply to it if untrue, and a deputy returning officer wilfully omitting to obtain it would run the risk of punishment under s. 164 of the Criminal Code, and penalty under s. 194 of the Municipal Act. But these sanctions emphasize the object of requiring a true declaration which is, that the procedure for the assistance of voters in the exercise of their lawful right shall not be made use of except in cases in which it is honestly necessary. If it is so honestly necessary, the Legislature allows that modification of the rule of absolute secrecy. Nowhere do I find any indication of an intention to take away the vote because secrecy is not maintained, even in cases where it directs it to be maintained. In the Dominion Elections Act, s. 221, the ordinary elector is forbidden to shew his ballot paper, when marked, so as to allow his marking to be known, and so in the Ontario Election Act, 1908, s. 163. The Municipal Act, s. 168, requires him to deliver the ballot to the officer without shewing it to any one. But none of the Acts say that the vote shall be invalid if he does, and no case so holding has been cited. Displaying the ballot may be evidence to support a charge of corrupt practice, or to shew improper conduct of the election, but that is another matter. If, then, in the case of such a wilful breach of secrecy by the ordinary voter, he is not disfranchised, how can it be said that the illiterate elector loses his vote because, without fault of his own, the ballot is, without authority, marked in the presence of one or three persons sworn to secrecy. Taking the declaration may be a condition precedent to his right to claim assistance, but not to his right to vote. These men had that right. That they were in fact unable to read is not disputed, and there is no suggestion that their ballots were not marked in accordance with their own intention. In my view, there is no valid ground for striking them out of the count. It is said that the ballots of all or nearly all of them were marked when only the deputy returning officer was in the compartment with the voter, and without an agent on each side being present. It was only at polls Nos. 1 and 3 that they voted. The deputy returning officer at the former place makes affidavit that,

before marking any of the ballots of illiterates. he asked the agents on each side to be present. The officer at No. 3 swears that the agents acquiesced in his not taking declarations and in his going in alone when the ballots were marked—and, although the agent for those opposing the by-law denies acquiescence as to the declaration, he does not as to the marking. There is no suggestion that any agent who desired was in any way prevented or discouraged from being present. There is nothing in the facts with regard to any of these 10 votes to make one have regrets that the votes should not be struck out. It would be unfortunate if any of them were disallowed, so far as the facts appear, as no want of good faith anywhere is suggested."

In Re Schumacher and Chesley, 1910, 21 O. L. R. 537, illiterates voted without oath of secrecy in the presence of unauthorized electors and persons, and Riddell, J., said:

"I have in Re Ellis and Town of Renfrew considered the case of illiterates, and have decided that the formalities laid down for voting by illiterates, are not conditions precedent to the right to vote—and that, upon such inquiries as the present, irregularities not affecting the right to vote should not be considered in determining the number of votes for a by-law, whatever effect such irregularities may have in another point of view. I think Re Ellis and Town of Renfrew well decided, and adhere to the views there expressed."

In Re Sturmer and Beaverton, 1911, 24 O. L. R. 70, two old ladies who had not brought their glasses, and though able to read with them, could not see well enough to mark their ballots unaided. Without protest, they were aided by the deputy returning officer in the presence of scrutineers. This did not invalidate the ballots; (only three votes had to be struck off to change the result).

Neglect of the deputy returning officer to comply with the requirements of this section: Re Prangley and Strathroy, 21 O. L. R. 54; 1 O. W. N. 706; 15 O. W. R. 890.

The omision of an illiterate person to make a declaration is a mere irregularity: Re North Gower Local Option, 4 O. W. N. 1177; 24 O. W. R. 489; 25 O. W. R. 224; 5 O. W. N. 249.

Blind Voter.—See Re Ellis and Renfrew, 21 O. L. R. 74; 15 O. W. R. 880.

110. A voter who has inadvertently dealt with his ballot paper in such a manner that it cannot be conveniently used, upon returning it to the deputy returning officer shall be entitled to obtain another ballot paper, and the deputy returning officer shall immediately write the word "Cancelled" upon the first mentioned ballot paper, and preserve it. 3 Edw. VII. c. 19, s. 172. 3 & 4 Geo. V. c. 43, s. 110.

Cancelled Ballots.—This section differs from the corresponding provision of the Ballot Act, 1872 (Imp.) in that in the latter Act the voter is required to prove the fact of the inadvertence to the satisfaction of the presiding officer, and the Imperial Act also requires the returned ballot paper after being marked cancelled to be put at the close of the poll in a packet with the unused ballot papers, a provision which is also lacking in the Ontario Act. This makes it important that a returned ballot shall be marked "cancelled" at once; otherwise it may be confused with rejected ballots on a recount or scrutiny, with consequent difficulty in determining whether or not it is a ballot which should be counted for a candidate in case it is good on its face, and has merely been inadvertently marked for a candidate for whom the voter did not intend to vote.

It is to be noted that the Act does not use the term "spoiled ballots." This is the term used in the Ballot Act (Imp.) where the Ontario Act uses the term "cancelled ballots." The term "spoiled ballot" as popularly used includes "rejected ballot" with resulting confusion.

Inadvertently.—A voter who deliberately destroyed a ballot paper would not be entitled to obtain a new one. The question of the voter's honesty and good faith would become material in an action against the deputy returning officer for refusing another ballot paper: Hastings v. Summerfeldt, 1899, 30 O. R. 579.

Cannot Conveniently be Used.—The voter is the judge. "Conveniently" in this section means "conveniently for the voter and for his wish, purpose, and intention in voting": Falconbridge, J., in Hastings v. Summerfeldt, *supra*. The inadvertence may be in tearing or making an additional mark or marking by mistake for the wrong candidate. The ballot may on its face be a good ballot. In Hastings v. Summerfeldt, the deputy returning officer refused a new ballot till he had seen the old one and when he saw it, he shewed it to the scrutineers, declared it was a well marked, good ballot and refused to give another and placed it in the ballot box. He was penalized $400 on three grounds: (1) Disclosing the paper; (2) Not cancelling it; (3) Refusing a new ballot paper. See s. 143.

111. A person who applies for a ballot paper shall be deemed to have tendered his vote; and a person whose ballot paper has been deposited in the ballot box, or who has delivered it to the deputy returning officer or poll clerk for the purpose of having it deposited in the ballot box, shall be deemed to have voted. *New.* See 8 Edw. VII. c. 3, s. 110. 3 & 4 Geo. V. c. 43, s. 111.

The presumption is only *prima facie* evidence against the elector and does not apply in proceedings to set aside an election: R. ex rel. Tolmie v. Campbell, 4 O. L. R. 25. See Ontario Election Act, R. S. O. 1914, c. 8, s. 110.

112. The deputy returning officer, the poll clerk, the constable or constables, the candidates and their agents, and no others, shall be permitted to remain in the polling place during the time the poll is open or at the counting of the votes. 3 Edw. VII. c. 19, s. 173, *amended*. 3 & 4 Geo. V. c. 43, s. 112.

Persons Remaining in the Polling Place.—This is a mere irregularity which however may become fatal (s. 150). Re Schumacher and Chesley, 1910, 21 O. L. R. 538, and Re Ellis and Renfrew, 1910, 21 O. L. R. 74 and 23 O. L. R. 427, where the curative section was applied, and Re Hickey and Orillia, 1908, 17 O. L. R. 317, and Stoddart v. Owen Sound, 1913, 27 O. L. R. 221, where these irregularities combined with others destroyed the secrecy which is a fundamental principle. See also Quigley v. Bastard, 24 O. L. R. 622, and Re Service, and see also Frout of Escott, 13 O. W. R. 1215.

113. In cities in which the aldermen are elected by general vote a candidate shall be entitled to one agent only, and except in such cities a candidate in any municipality shall be entitled to two agents. 3 Edw. VII. c. 19, s. 175, *amended.* 3 & 4 Geo. V. c. 43, s. 113.

Two Agents Present.—In re Dillon v. Cardinal, 1905, 10 O. L. R. 371, Magee, J., in the D. C., held the presence of more than one agent where only one is authorized to be a mere irregularity, saying:

> "The restriction as to number of agents present is manifestly one of convenience combined with protection of all interests and of the principle of secrecy, as to the actual marking of the ballots."

114.—(1) No person on the day of the polling shall use or deliver to any other person any card, ticket, leaflet, book, circular or writing soliciting votes for or against any candidate, or by-law, or for an affirmative or negative answer to any question, or having upon it the name of any candidate.

(2) Every person who contravenes the provisions of s.-s. 1 shall incur a penalty not exceeding $20. 6 Edw. VII. c. 34, s. 12; 2 Geo. V. c. 40, s. 1. 3 & 4 Geo. V. c. 43, s. 114 (1-2).

Proceedings after the Close of the Poll. (*See 115-123.*)

115. Immediately after the close of the poll, the deputy returning officer shall first place all the cancelled and declined ballot papers in separate packets and seal them up, and shall then count the number of voters whose names appear by the poll book to have voted, and cause a certificate, in the following form:—"*I certify that the number of voters who voted at the election in this polling place is* (*stating the number in words*) *and that* ———— *was the last person who voted at this polling place,*" to be entered in the poll book on the line immediately below the name of the voter who voted last, and such certificate shall be signed by the deputy returning officer, the poll clerk, and any candidate or agent present who desires to sign it; then, in their presence and in full view he shall open the ballot box and count the number of votes for each candidate, giving full opportunity to those present

to examine each ballot paper. *New. See* 8 Edw. VII. c. 3, s. 113. 3 & 4 Geo. V. c. 43, s. 113.

116. In counting the votes the deputy returning officer shall reject all ballot papers—

(*a*) Which have not been supplied by him; or

(*b*) By which votes have been given for more candidates than are to be elected; or,

(*c*) Upon which there is any writing or mark by which the voter can be identified, or which has *been so torn,* defaced or otherwise dealt with by voter that he can thereby be identified;

but no word, letter or mark written or made or omitted to be written or made by the deputy returning officer on a ballot paper shall avoid it or warrant its rejection. *New. See* 8 Edw. VII. c. 3, s. 114. 3 & 4 Geo. V. c. 43, s. 116.

117.—(1) The deputy returning officer shall make a note of every objection taken to a ballot paper, by a candidate or his agent, and shall decide the objection subject to review on recount or in a proceeding questioning the validity of the election.

(2) Each objection shall be numbered, and a corresponding number shall be placed on the back of the ballot paper and initialed by the deputy returning officer. *New. See* 8 Edw. VII. c. 3, s. 115. 3 & 4 Geo. V. c. 43, s. 117 (1-2).

118.—(1) All the ballot papers except those rejected shall be counted, shall be put into a packet, and an account shall be kept of the number of ballots cast for each candidate, and of the number of rejected ballot papers, and the rejected and unused ballot papers shall be put into separate packets.

(2) Every packet shall be endorsed so as to indicate its contents, and shall *be sealed by* the deputy returning officer, and any candidate or agent present may write his

name on the packet and may affix to it his seal. *New.* See 8 Edw. VII. c. 3, s. 116. 3 & 4 Geo. V. c. 43, s. 118.

Extracts from the Ballot Act (Imp.).—Section 2 of the Ballot Act, 1872, 35 and 36 V., c. 33 (Imp.), is as follows:

"In the case of a poll at an election the votes shall be given by ballot. The ballot of each voter shall consist of a paper (in this Act called a ballot paper) showing the names and description of the candidates. Each ballot paper shall have a number printed on the back, and shall have attached a counterfoil with the same number printed on the face. At the time of voting, the ballot paper shall be marked on both sides with an official mark, and delivered to the voter within the polling station, and the number of such voter on the register of voters shall be marked on the counterfoil, and the voter having secretly marked his vote on the paper, and folded it up so as to conceal his vote, shall place it in a closed box in the presence of the officer presiding at the polling station (in this Act called 'the presiding officer') after having shown to him the official mark at the back.

"Any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything, except the said number on the back, is written or marked by which the voter can be identified, shall be void and not counted.

"After the close of the poll the ballot boxes shall be sealed up, so as to prevent the introduction of additional ballot papers, and shall be taken charge of by the returning officer, and that officer shall, in the presence of such agents, if any, of the candidates as may be in attendance, open the ballot boxes, and ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidates or candidate to whom the majority of votes have been given and return their names to the Clerk of the Crown in Chancery. The decision of the returning officer as to any question arising in respect of any ballot paper shall be final, subject to reversal on petition questioning the election or return."

Rule 36 of the first schedule of the Ballot Act (Imp.), is as follows:

"The returning officer shall endorse 'rejected' on any ballot paper which he may reject as invalid, and shall add to the endorsement 'rejection objected to,' if an objection be in fact made by any agent to his decision. The returning officer shall report to the Clerk of the Crown in Chancery the number of ballot papers rejected and not counted by him under the several heads of:

1. Want of official mark;
2. Voting for more candidates than entitled to;
3. Writing or mark by which voter could be identified;
4. Unmarked or void for uncertainty:

and shall on request allow any agents of the candidates, before such report is sent, to copy it."

See last part of s. 2 of the Ballot Act, *supra.*

THE ELECTIONS ACT (DOMINION).

Section 173. In counting the votes, the deputy returning officer shall reject all ballot papers:

(*a*) Which have not been supplied by him; or

(*b*) By which votes have been given for more candidates than are to be elected; or

(*c*) Upon which there is any writing or mark by which the voter could be identified, other than the numbering by the deputy returning officer, in the case hereinbefore provided for.

Ontario Elections Act.—R. S. O. 1914, c. 8, s. 114. In counting the votes, the deputy returning officer shall reject all ballots herein called "rejected ballot papers."

(*a*) Which have not been supplied by him; or

(*b*) By which votes have been given for more candidates than are to be elected; or

(*c*) Upon which there is any writing or mark by which the voter can be identified other than the number placed thereon by the deputy returning officer in the case provided for by s. 108.

But no word, letter or mark written or made or omitted to be written or made by the deputy returning officer on a ballot shall avoid the same or warrant its rejection.

The leading case dealing with the directions to voters as to marking, and to deputy returning officers as to counting ballots, is Woodward v. Sarsons, L. R. 10 C. P. 733. The following is an extract from the judgment:—

"In this case, therefore, it becomes necessary, not by way of scrutiny, but in order to determine whether the majority has been prevented from voting with effect, to determine upon the validity or invalidity of the votes which were given, and to which objection has been taken. In order to determine this part of the case it is necessary to consider and determine the construction of the Ballot Act. Now, first, the Act is divided into the principal part which contains certain sections and two schedules which contain certain rules and forms; and by s. 28, 'The schedules and the notes thereto and directions therein shall be construed and have effect as part of this Act.' The rules and forms, therefore, are to be construed as part of the Act, but are spoken of as containing 'directions.' Comparing the sections and the rules, it will be seen that, for the most part, if not invariably, the rules point out the mode or manner of doing what the sections enact shall be done. And in schedule 2, the first note states: 'The forms contained in this schedule or forms as nearly resembling the same as circumstances will admit shall be used.' And in the ballot paper, as given in the schedule, is: 'Directions as to printing ballot paper,' and 'Form of directions for the guidance of voters in voting,' etc. These observations lead us to the conclusion that the enactments as to the rules in the first schedule, and the forms in the second, are directory enactments as distinguished from the absolute enactments in the sections in the body of the Act. And in such case, in order to determine the preliminary question, which is, whether there has been a material breach of the Act, and which must be determined before determining what effect such breach has upon a vote on the election, the general rule is that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially. The second section enacts, as to what the voter shall do, that: 'The voter having secretly marked his vote on the paper and folded it up so as to conceal his vote, shall place it in an enclosed box.' This is all that is said in the body of the Act about what the voter shall do with the ballot paper. That which is absolute, therefore, is that the voter shall mark his paper secretly. How he shall mark it, is in the directory part of the statute. By rule 25, 'The elector on receiving the ballot paper shall forthwith proceed into one of the compartments in the polling station, and there mark his paper, and fold it up so as to conceal his vote, and shall then put his ballot paper so folded up into the ballot box.' This rule, it will be observed, does not yet say how the paper is to be marked. But in schedule 2 is given the 'form of ballot paper,' and appended to this form is a note, which, by the 28th section, is to be construed and have effect as part of the Act. This note contains the form of directions for the guidance of the voter in voting: 'The voter will go into one of the compartments and with the pencil provided in the compartment, place a cross on the right hand side, opposite the name of each candidate for whom he votes, thus X.' This is the only enactment throughout the statute

as to the manner and form in which the voter is to mark the ballot paper. And therefore, by the general rule before mentioned, it would be necessary that the absolute enactment that the paper should be marked secretly should be obeyed exactly, but it would be sufficient that the manner of marking the paper should be obeyed substantially. If these two enactments be so obeyed, there is no material breach of the Act. The extent of error, which is to vitiate so as to annul the ballot paper, is further to be gathered from the statute itself. By s. 2: 'Any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything except the said number on the back is written or marked by which the voter can be identified, shall be void, and not counted.' It is not every writing or every mark, besides the number on the back, which is to make the paper void, but only such a writing or mark as is one by which the voter can be identified. So in Rule 36: 'The returning officer shall report, etc., the number of ballot papers rejected, and not counted by him under the several heads of, first, want of official mark; secondly, voting for more candidates than entitled to; thirdly, writing or mark by which voter could be identified; fourthly, unmarked or void for uncertainty.' And then in schedule 2 in the note to the form before referred to, we have this warning: 'If the voter votes for more than one candidate, or places any mark on the paper by which he may be afterwards identified, his ballot paper will be void, and will not be counted.' The result seems to be, as to writing or mark on the ballot paper, that if there be substantially a want of any mark, or a mark which leaves it uncertain whether the voter intended to vote at all, or for which candidate he intended to vote if there be marks indicating that the voter has voted for too many candidates, or a writing or a mark by which the voter can be identified, then the ballot paper is void, and is not to be counted. Or, to put the matter affirmatively, the paper must be marked so as to shew that the voter intended to vote for some one, and so as to shew for which of the candidates he intended to vote. It must not be marked so as to shew that he intended to vote for more candidates than he is entitled to vote for, nor so as to leave it uncertain whether he intended to vote at all, or for which candidate he intended to vote, nor so as to make it possible, by seeing the paper itself, or by reference to other available facts, to identify the way in which he has voted.

"If these requirements are substantially fulfilled, then there is no enactment and no rule of law by which a ballot paper can be treated as void, though the other directions in the statute are not strictly obeyed. If these requirements are not substantially fulfilled, the ballot paper is void, and should not be counted; and if it is counted, it should be struck out on a scrutiny. The decision in each case is upon a point of fact to be decided, first, by the returning officer, and afterwards, by the election tribunal on petition."

As to Woodward v. Sarsons, in 1876, a select committee of the House of Commons (Imp.), appointed to enquire into the working of the Ballot Act, recommended to the Home Office that a copy of the report of Woodward v. Sarsons should be sent to every returning officer. Shortly after Woodward v. Sarsons was decided an effort was made to get an Election Court, consisting of Moss, C.J.O., and Galt, J., to apply the rule in Woodward v. Sarsons, which holds that ballots need not necessarily be marked with a cross, to ballots marked under the Dominion Act. The Court considered that the Canadian rule, holding a cross essential, was the necessary consequence of the differences between the two Acts. In other respects, however, Woodward v. Sarsons has been uniformly followed as a correct exposition of the rules to be applied to determine the validity of ballots.

Mark by which Voter can be Identified.—South Oxford Provincial Election Case, App. Div., 1914, 32 O. L. R. 1, contains the following:

1. That a ballot paper on which were two marks in the form of a T, the two lines not touching, should not be counted.

2. That a ballot marked V, the rest of the cross being apparently torn off, should be counted.

3. That a ballot paper marked with two strokes, the second a repetition of the first, but not quite covering it, not amounting to either a V or a cross, should not be counted.

4. That a ballot paper marked with a straight line instead of a cross should not be counted.

In the same case the following ballots having additional marks were held good:—

1. That a ballot paper with the word 'for' written after the cross should be counted.

2. That a ballot paper marked with a cross to the right of the name of one of the candidates with some irregular pencil markings under his name, should be counted, none of the markings being such as to identify the voter.

3. That ballot paper marked with a cross opposite the name of one candidate, and a line, apparently marked out, opposite the name of the other, should be counted for the first.

4. That a ballot paper marked with a cross containing three strokes in the centre of the name of one of the candidates, should be counted. This paper was returned by the deputy returning officer as a declined ballot; but the ballot is to be looked at and not the return: see form 21 and ss. 117 and 138 of the Act.

5. That a ballot paper marked with a cross, but having the figures 83 before the deputy returning officer's initials on the back, should be counted.

6. That a ballot paper marked with a cross, and a further line making a star, should be counted.

7. That a ballot paper marked with a cross opposite the name of one of the candidates, with a straight line in pencil under part of his name, should be counted.

8. That a ballot paper properly marked for one of the candidates, but with a cross on the back opposite the deputy returning officer's initials, should be counted.

In Muskoka Provincial Election Case, 4 O. L. R. 253, the following was held:—

Ballots marked with a cross, one upon and the other above the upper line, should not be rejected: *ibid.* (See amendment).

A cross made by three or four strokes was good.

Mark by which Voter can be Identified (Fatal).—In Re Lennox Provincial Election Case, 1902, 4 O. L. R. 381, Maclennan, J.A., disallowed a ballot which had the initials "S. A." in small but legible capitals, saying as follows:—

"In the West Huron Case, 1898, 2 E. C. 58, at p. 62, and the West Elgin Case, 1898, *ib.* 38 at pp. 44-5, respectively, Mr. Justice Osler and myself decided cases of ballots having writing upon them differently, and I have thought it right to confer with him before deciding this case. The result is, that after considering all the reported cases on the subject, both here and in England, we are both of opinion that any written word or name upon a ballot, presumably written by the voter, ought to vitiate the vote, as being a means by which he could be identified. We also think that in general other marks ought not to have that effect, without deciding that particular cases may not arise in which it ought to be held otherwise."

And the same Judge in North Grey Provincial Election Case, 1902, 4 O. L. R. 286, disallowed a ballot otherwise good which had the name of one candidate written on the back for the reason given by him in the Lennox case.

Mark by which Voter may be Identified (not Fatal).—In Re Muskoka Provincial Election Case, *supra*, an obscure pencil mark which might be taken for the letter "C" was held not fatal.

In Re Prince Edward Provincial Election Case, 1905, 9 O. L. R. 465, Maclennan, J.A., held the following ballot good for Norman:—

1	CURRIE.	
2	NORMAN.	*2*

In North Grey Provincial Election, 1902, 4 O. L. R. 286, Maclennan, J.A., held a ballot good for the candidate opposite whose name was a distinct cross; an obliterated cross being in the other division. A similar ballot was held good in Re Prince Edward Provincial Election, 1905, 9 O. L. R. 463.

In the Monck Case, 1876, Hodgins 729, Blake, V.C., said:—

> "I think the mark must contain in itself a means of identification of the voter in order to vitiate the ballot. There must be something in the mark itself, such as initials, or some mark known as being one the voter is in the habit of using. If there be not this restriction, then it will naturally follow that every peculiarity about every cross should be scanned in order to see whether some of the additions were not put there designedly so as to mark distinctively that particular ballot paper. Any mark in addition to the cross might thus void the vote; and on the same principle, any alteration in the position of the cross from a rigid observance of which is set forth in the Act should be taken as a means of denoting the ballot as one marked so as to require its rejection. I think if the Legislature intended this result, we should have found different language used from that which we have in this enactment;"

and accordingly held the following ballots good:

(1) A cross rightly placed with two additional crosses near the candidate's name;
(2) A cross with a line before it;
(3) Inadvertent marks in addition to cross.

Where the mark is an additional erased or obliterated cross, the ballot will be good: Re Prince Edward Provincial Election, 1905, 9 O. L. R. 463. In this case there was a well formed cross in one division but in the other there was a distinct indication that a cross had been placed there, which was afterwards carefully erased with a knife or other sharp instrument.

In Woodward v. Sarsons, the following ballots were held bad: 638 signed by a name appearing on the list—

638.

1	SARSONS.	X
2	WOODWARD.	

E. Prews.

844, marked as below, was commented on as follows:

1	SARSONS.	= *Sanen*
2	WOODWARD.	

889.

1	SARSONS.	*Sarsons*
2	WOODWARD.	

With some hesitation the Court disallowed Nos. 844 and 889, saying:

"There is no cross at all, and we yield to the suggested rule that the writing by the voter of the name of the candidate may give too much facility by reason of the handwriting to identify the voter."

410.

1	SARSONS.	
2	WOODWARD.	C W X

This ballot, as it contained the initials, was also disallowed.

In Muskoka Provincial Election, 1902, 4 O. L. R. 253, the Judge on a recount disallowed all the votes at a certain poll on the ground that the deputy returning officer, whose name was Henry Cully Guy, initialed all the ballots at that poll "H. G." instead of "H. C. G.," and he also disallowed all the votes at another poll on the ground that the deputy returning officer, William D. McNaughton, endorsed the ballots with the initial "McN." instead of with the full initials of his name. Maclennan, J. A., commented on this as follows:—

> "I am of the opinion that, the sole purpose of requiring the deputy returning officer to endorse his name or initials upon the ballot being the identification of the ballot brought back by the voter as that which was delivered out to him, the initials used by both these officers were sufficient. The Legislature has shewn its intention—when everything else is found to be regular—not to require great exactness in the matter of the name or initials, by enacting that where the number of ballots which were used is found to be correct, the total absence of name or initials, or some of them, should not be a ground for rejection: s. 112 (2). There was no suggestion that the number of ballots found at these polls was not correct, and that being so, I do not think it would have been right to disallow the votes if none of them had been initialed. However that may be, I think they were sufficiently initialed within the meaning of the statute."

In the Wigtown Case, 1874, 2 O'M. & H. 223, the following observations were made:

> "The merits of each vote may turn on questions of degree which it is always difficult to distinguish, as the one class may run almost imperceptibly into the other. P. 220.
>
> "For anyone to put instead of a cross, a circle or an oval or any other geometrical anomalous figure, would not be a compliance with the law, independently of the consideration that such a plain and wilful departure from what was intended would suggest strongly the suspicion that some sinister purpose was intended. P. 221.
>
> "On the other hand, there are ballot papers in which a cross is made or attempted to be made, but is not very well made; whether from unsteadiness of hand or accidental disturbance the cross lines are not clear or steady but somewhat shaky and irregular, I am of opinion that said imperfections and defects are not fatal. P. 221.

"If a voter besides his proper cross puts one or more additional crosses or puts circles or ovals *ad libitum*, he raises a strong suspicion against himself and has himself to blame if his ballot paper is rejected.

"I think some latitude must be allowed with regard to the position of the cross.

"I think it is not essential that the cross should be made with pencil.

"A good cross with any pencil or with any ink not peculiar seems unobjectionable."

The Election Court in the leading case of Woodward v. Sarsons, made the following references to the foregoing case:

"We are aware that in so applying the principles which we have deduced from the statute, we are acting apparently in opposition to some of the decisions in Haswell v. Stewart (The Wigton Case), but there may have been evidence in that case which does not exist in the present, and which made many of the marks there marks of identification, which the mere presence of the marks here does not do. If this was not so, we respectfully differ from the strict view taken by the majority of the learned Judges who decided that case, and adhere to the view of Lord Beenholme given in that case."

Mark by Which Voter Can be Identified.—In Woodward v. Sarsons, 1875, 44 L. J., C. P. 293, the following will be found:

"We cannot think that the mere fact of two crosses being placed, as in 433 or as in 928, ought to vitiate the ballot paper. There can be no doubt as to the intention to vote, and no doubt as to the intention to vote emphatically for one candidate. If there was evidence of an arrangement that the voter to indicate that it was he that voted, who had used the ballot paper, then, by reason of such evidence, such double mark would be a mark by which the voter could be identified, and then the paper, upon such proof being made, should be rejected. But the mere fact of there being two such crosses, is not, in our judgment, a substantial breach of the statute."

Ballot 433 mentioned above, is as follows:

1	SARSONS.	X X
2	WOODWARD.	

Ballot 928 mentioned above, is as follows:

1	SARSONS.	X	X
2	WOODWARD.		

928 had evidently been marked with an X in ink and folded up, thereby making a corresponding mark on the other part of the paper. Where a second cross is clearly an impression of an original cross, it will be ignored. Woodward v. Sarsons, *supra*, and re North Grey Case, *supra*.

The judgment then proceeds as follows:

"Neither is the mere fact of an additional mark such as is found in 926, nor the mere fact of the peculiar form of cross in 1,364 and 641, nor the marks on 1,726, 2,140, 3,562 or 911, though in these cases also extrinsic evidence of arrangement might make such peculiarities indications of identity."

The ballots mentioned above are as follows:

926.

1	SARSONS.	X
2	WOODWARD.	

On 926 an X in pencil had evidently been rubbed with a damp finger as above.

1,364.

1	SARSONS. X	X
2	WOODWARD.	

1,364 had evidently been marked with an X in ink and folded up, thereby making a corresponding mark on the other part of the paper.

641.

1	SARSONS.	*
2	WOODWARD.	

1,726.

1	X SARSONS. X	X
2	WOODWARD.	

2,140.

1	SARSONS.	X1
2	WOODWARD.	

3,562.

1	SARSONS.	X¶
2	WOODWARD.	

911.

1	SARSONS.	X
2	~~WOODWARD.~~	

911. The name "Woodward" has a pencil line through it, diagonally across the paper.

The following remarks of Hawkins, J., in the Cirencester Case, 1893, 4 O'M. & H. 194, have often been quoted and followed:

"We ought to interpret the Ballot Act liberally and subject to other objections to give effect to any mark on the face of the paper which in our opinion clearly indicated the intention of the voter, whether such marks were in the shape of a cross or a straight line or in any other form, and whether made with pen and ink, pencil or even an indentation made in the paper and whether on the right or left hand of the candidate's name or elsewhere within his compartment on the voting paper.

"There are some marks, however, which undoubtedly gave us much trouble to discover what was the real meaning of them . . . There were some marks and blotches of a very irregular character which might well be mistaken as indications of temporary unsteadiness if the voters who by their unsteadiness, imperilled their votes.

"In such cases, we have done our best to discover whether although obscured by blots, blurs and other marks, there existed positive indications on the part of the voter to vote without a thought of leaving behind a trace to enable him to be identified.

"It has been argued before us if the marks were such as might lead to the identification of the voter, that would be quite sufficient to vitiate and render void the vote. That is not our opinion.

"We think we ought to adhere to the language of the statute itself, which says that the voter can (not might possibly) be identified; whether the mark is such is a matter of fact."

A Cross is Essential.—In the South Wentworth Case, 1879, Hodgins 531, before Moss, C.J.O., and Galt, J., Moss, C.J.O., discussed the necessity for a cross as follows:

"The second class of cases reserved is that of voters who chose to mark their ballots with a straight line, instead of anything approaching to the form of a cross, opposite the name of a candidate.

"The decisions in our Courts upon the provisions of the Dominion Act, which do not appear to be distinguishable, are against the validity of such votes. But it is urged that these decisions are irreconcilable with and should be treated as overruled by the judgment of the Court of Common Pleas in England in Woodward v. Sarsons, L. R. 10 C. P. 746.

"We were much impressed with the force of Mr. McCarthy's argument upon this point; but, upon consideration, we do not think it can be sustained. The judgment of the English Court proceeded upon the ground that the making of the cross was merely directory and not mandatory. There is no reference to a cross in the enacting part of the Imperial Statute, but it makes its appearance for the first time in the instructions for the guidance of voters.

"It is in fact simply given as the appropriate mode for the voter indicating his choice. In our statute, it is very different. It is expressly enacted that the voter shall mark his ballot in the manner mentioned in the direction by placing a cross on the right hand side, opposite the name of the candidate for whom he desires to vote. The natural and obvious meaning of this language is that he must make a cross to signify his choice. The whole policy of securing

secrecy precludes the suggestion that the voter is at liberty to make any mark he pleases; and the Legislature has therefore prescribed a kind of mark which is the easiest and most familiar—that indeed which is used by the illiterate."

"In view of the difference between the English Statute and ours, we do not feel at liberty to refuse to follow the decisions of our own Courts.

"We may observe that this conclusion seems to be justified by the amending Act of 1879, which enacts that a voter may mark his ballot paper with a cross, either (as heretofore) on the right hand side opposite the name of the candidate for whom he desires to vote, or any other place within the division which contains the name of the candidate (while removing the objection as to the precise position of the mark in the compartment, this seems to insist upon its form being retained.)

Mark Made or Omitted by Deputy Returning Officer.—Without the exception contained at the end of s. 116, in uniform series of cases it had been held that an elector who had complied with every requirement of the law in marking his ballot, was nevertheless liable to have his vote destroyed by the wrong or improper act of an election officer in dealing with his ballot paper. By 42 V. c. 4, s. 18 Ont., this contingency was provided against by enacting that ballot papers should not be rendered void by "words or marks corruptly or intentionally or by mistake written or made, or omitted to be made, by the deputy returning officer." The Dominion Act in 1905 contained no such provision. In one of the polls in the Wentworth Dominion Election, the deputy returning officer marked on the back of each ballot paper handed out by him a number which corresponded with the number of the voter in the poll book. Meredith, C.J.C.P., after examining the authorities, reluctantly held that the ballots must be rejected and applied the principle of Woodward v. Sarsons and declared the election null and void. As the number of ballots so dealt with was greater than the majority of the candidates returned, he was elected. In the Supreme Court, 36 S. C. R. p. 497, this judgment was affirmed although the Court was divided, 3 to 2. In consequence of this decision, the Dominion Election Act was amended.

The proviso at the end of s. 116 has reference to marks improperly made.

Peculiarities in Connection with Form or Position of Cross (Not Fatal).—In re Muskoka Provincial Election, 1902, 4 O. L. R. 253, a ballot marked with a cross upon the upper line was held good, thus:

		X
1	BRIDGLAND.	
2	MAHAFFY.	

In the same case, a ballot marked with a cross above the upper line, was held good.

		X
1	BRIDGLAND.	
2	MAHAFFY.	

A cross made with ink good. A cross made with coloured pencil or with coloured ink is probably not good. A cross made with a worn and defective pencil so that there is only the impression of a cross on the

paper was held good. South Oxford Provincial Election, 1914, 32 O. L. R. 1.

Section 102 of the Election Act, R. S. O., 1914, c. 8, directs that the voter shall mark his ballot by "making a cross with a black lead-pencil." This direction is not imperative. Re South Oxford Provincial Election Case, *supra*.

In re West Huron Provincial Election, 1905, 9 O. L. R. 602, Maclennan, J.A., held the following ballots valid; the only question involved being as to the sufficiency of the mark as a cross:

3189	1	CAMERON.	
	2	HOLMES.	

4183	1	CAMERON.	&
	2	HOLMES.	

9493	1	CAMERON.	X
	2	HOLMES.	

Position of the Cross.—A cross outside of compartment in which a candidate's name appears, is good. All above the first candidate's name may be regarded as his compartment, or all below the last candidates' names as his. Accordingly in West Elgin, 2 E. C. 41, ballots marked outside of the vertical line separating the candidates' numbers from their names were allowed. North Bruce, unreported, to the contrary, was on an express provision of the Act in question directing the cross to be made in the white space containing the name of the candidate. The Full Court in McKinnon v. McNeil, 1908, 41 N. S. R. 503, followed in Re Lennox, 4 O. L. R. 380, holding that all the space above the top line might be regarded as the space of the first candidate. Russell, J., said:—

> "I make no comment on the ruling quoted from the English case of Woodman v. Sarsons, L. R. 10 Q. B., at 746, that the rules as to the manner of marking the ballot were, except as to the requirement of secrecy, merely directory. That ruling was doubtless correct as applied to the English statute, but the English statute differed in this respect from the Ontario statute. There was no enactment in the English statute similar in terms to that of the Ontario statute providing that the voter 'shall mark his ballot in the manner mentioned in the directions.' The difference between the two statutes will be seen by comparing s. 25 of the English Act . . . with s. 103 of the Ontario Act, R. S. O. 1897, p. 130. Yet, notwithstanding this difference, McLennan, J., held that the ballot was well marked above or below the top or bottom line. I think we are safe in following the Ontario decisions, notwithstanding the differences, which are of form, but not I think of substance, between our own and the Ontario statute."

Torn Ballots.—In Woodward v. Sarsons & Sadler, 1875, L. R. 10 C. P. 733, the ballot was torn through the middle but was held good.

1,374.

1	SARSONS.	
2	WOODWARD.	X

(Dots show where paper torn.)

In South Wentworth, 1879, Hodgins 531, a marked half only of a torn ballot was placed in the box by inadvertence, a new ballot being rejected; the ballot was held good. In West Huron, 1898, 2 Elec. Cas. 58 at p. 62, a substantial part of the ballot, the part having the official number upon it, had been torn off and was wanting, and was disallowed. In re West Huron Provincial Election, 1905, 9 O. L. R. 602, a ballot torn in two and pinned together, no part of it being absent or wanting, was held to be a good ballot. The ballot bore evidence that it had been folded up in many narrow folds and the election judge inferred that it was torn in opening it by the deputy returning officer in the presence of the agents who made no objection to the ballot. Maclennan, J.A., followed in Re West Elgin (No. 1) 1898, 2 Elec. Cas. 38, and held the ballot good.

In re Prince Edward Provincial Election, 1900, 4 O. L. R. 255, the Deputy Returning Officer in detaching counterfoils from ballots used in provincial elections, tore away a part of the ballot paper in a number of cases so that the candidates' numbers which should have appeared on the ballot paper, were detached. Osler, J.A., in allowing the ballots, said:—

> "Sub-section 2 appears to be the only section which contains any positive enactment as to what is required to be printed on the face of the ballot paper, aside from its mere form. Nothing more seems necessary than the names of the candidates. For the rest the ballot papers may be in the form given in the schedule. That is directory; and the form, no doubt, shews a number in a compartment to the left of the candidate's name, indicating the order in which it appears on the paper.
>
> "I am unable to say that this number must be regarded as an essential part of the ballot paper. On the contrary, I feel no doubt that it is not.
>
> "It was argued that the omission of the compartment containing the candidate's number left so much less space in which the voter might make his mark. I think it leaves him less room to go wrong.
>
> "And it was said that the voter who was unable to read might yet be able to recognize a number and be able to mark his ballot opposite the candidate's number. Perhaps in this way the number might be an aid to an illiterate voter; but, in the absence of any positive enactment (apart from colouring), I ought not to hold that the error of the Deputy Returning Officer in tearing off that number works the destruction of the ballot, nor should we strain the Act in favour of the illiterate voter. Section 106 goes far enough in that direction.
>
> "I should have thought that s.-s. 4 of s. 69 required the name of the electoral district to be printed on the face of the ballot paper. The form, however, shews it printed on the back beneath the number of the ballot paper.
>
> "Sub-section 2 is the mandatory clause as to what is to be printed on the face of the ballot paper, and, as that says nothing about the number of the candidate, I conclude that such number is not a material part of it."

Sealing Ballots in Packets.—In Re Ottawa Municipal Election, 1895, 26 O. R., the deputy returning officers in two wards failed to seal the ballots in packets. On a recount the County Court Judge refused to count the ballots. Boyd, C., refused a mandamus to compel the counting and said:

"Now when the provisions of the statute have been followed the ballot papers come before the County Judges carrying their own authentication, as being those which were sealed up at the close of the first count; for section 166 provides that any indorsement appearing on any package of ballot papers produced by the clerk shall be evidence of such papers being what they are stated to be by the indorsement. But without this, how can the Judges know that the unsealed and unsecured ballots are the same and in the same state and condition as when deposited by the voters? Because no means are given upon the recount by which he can take evidence to shew with what other or equivalent care and custody the ballots have been protected.

"The Judges, perhaps, might have a discretion to proceed with the recount, assuming that all is right, as suggested by Hagarty, C.J., in In re Centre Wellington Election, 44 U. C. R. 132; but, speaking for myself, I think the better course was to hold their hand, as the plain provisions of the statute had been disregarded. No special harm results from this, except that the summary recount cannot be adopted in the present cases, and the parties complainant must resort to the usual *quo warranto* remedy, which is expressly preserved by the Act: section 164."

Note.—The provision embodied in s. 166 referred to by Boyd, C., has been eliminated from the Act It still appears in the Manitoba Act, R. S. M. 1913, c. 133, s. 149.

119.—(1) The deputy returning officer shall make out a statement in duplicate of—

(*a*) The number of ballot papers received from the clerk;

(*b*) The votes given for each candidate and the rejected ballot papers;

(*c*) The used ballot papers which have not been objected to and have been counted;

(*d*) The ballot papers which have been objected to, but which have been counted by the deputy returning officer;

(*e*) The rejected ballot papers;

(*f*) The cancelled ballot papers;

(*g*) The declined ballot papers;

(*h*) The unused ballot papers;

(*i*) The number of voters whose ballot papers have been marked by the deputy returning officer under s. 109.

(2) One statement shall be attached to the poll book, and the other shall be enclosed in a special packet and delivered to the clerk.

(3) The statement shall be signed by the deputy-returning officer and the poll clerk and such of the candidates or their agents as are present, and desire to sign it.

(4) The deputy returning officer shall deliver to such of the candidates or their agents as are present, if requested to do so, a certificate of the number of ballot papers counted for each candidate, and of the rejected ballot papers. *New.* *See* 8 Edw. VII. c. 3, s. 117. 3 & 4 Geo. V. c. 43, s. 119 (1-4).

Omission to make Statement.—There is nothing in the Act making invalid or void the votes cast at any particular poll in case the deputy returning officer has failed to comply with the requirements of the Act after the close of the poll. The Ontario Election Act, s. 127, gives the returning officer authority in such a case to examine on oath the deputy returning officer, poll clerk or other person respecting the matter, but there is no corresponding provision in the Municipal Act. See Re Prince Edward Provincial Election, 1905, 9 O. L. R. 463.

120. The poll clerk, immediately after the completion of the counting of the votes, shall take and subscribe an *oath* similar to that required by s.-s. 3 of s. 122, to be taken by the deputy returning officer. *New.* *See* 8 Edw. VII. c. 3, s. 119. 3 & 4 Geo. V. c. 43, s. 120.

121. The poll book, the voters' list, the packets containing the ballot papers, and all other documents which served at the election, except the duplicate statement, shall then be placed in the ballot box. *New.* *See* 8 Edw. VII. c. 3, s. 118. 3 & 4 Geo. V. c. 43, s. 121.

122.—(1) The deputy returning officer shall then immediately lock and seal the box, and any candidate or agent present may also affix to it his seal, and the deputy returning officer shall then forthwith deliver it *personally to* the clerk, or if he is unable to do so owing to illness or other imperative cause, he shall deliver it to the poll clerk, or where the poll clerk is unable to act, to some person chosen by the deputy returning officer for the purpose of

delivering it, and shall on it or on a ticket attached to it write the name of the person to whom the ballot box has been delivered, and shall take a receipt for it, and the poll clerk or person so chosen shall forthwith deliver the ballot box personally to the clerk and shall take and subscribe before him, the oath, Form 12. *New.* *See* 8 Edw. VII. c. 3, s. 120 (1).

FORM 12.

OATH OF POLL CLERK OR MESSENGER WHERE THE DEPUTY RETURNING OFFICER IS UNABLE TO DELIVER THE BALLOT BOX TO THE RETURNING OFFICER.

I, swear that I am the person to whom deputy returning officer for polling sub-division No. , of the of entrusted the ballot box for the said polling sub-division to be delivered to the clerk; that the ballot box which I delivered to the clerk this day is the ballot box I so received; that I have not opened it and that it has not been opened by any other person since I received it from the deputy returning officer.

Sworn before me at this day of 19 .

3 & 4 Geo. V. c. 43, Form 12.

(2) In cities and towns, the deputy returning officer, or in case of his inability, as mentioned in s.-s. 1, the poll clerk or the person chosen, shall proceed directly from the polling place to the office of the clerk with the ballot box, and there personally on the same day, as soon as possible after leaving the polling place, deliver it to the clerk, and the poll clerk or the person chosen shall take and subscribe before him the oath, Form 12, and the clerk shall remain in his office on the evening of the polling day until all the ballot boxes have been returned to him. 3 Edw. VII. c. 19, s. 177 (4), *first part amended.*

(3) Forthwith thereafter the deputy returning officer shall take and subscribe the oath, Form 13, and shall personally deliver it or transmit it by registered post to the clerk. *New.* *See* 8 Edw. VII. c. 3, s. 120 (2); 3 & 4 Geo. V. c. 43, s 122 (1-3).

FORM 13.

OATH OF DEPUTY RETURNING OFFICER AFTER CLOSING OF THE POLL.

I, *A. B.*, Deputy Returning Officer for Polling Subdivision No. , of the City (*or, as the case may be*) of in the County , swear that, to the best of my knowledge and belief, the poll book kept for the said polling place under my direction has been kept correctly, that the total number of votes polled according to the said poll book is , and that it contains a true and exact record of the votes given at the said polling place, as the said votes were taken thereat; that I have correctly counted the votes given for each candidate, in the manner by law provided, and performed all duties required of me by law, and that the statement, voters' list, poll book, packets containing ballot papers, and other documents required by law to be returned by me to the Clerk, have been faithfully and truly prepared and placed in the ballot box, and are contained in the ballot box returned by me to the Clerk, which was locked and sealed by me, in accordance with the provisions of the Municipal Act, and remained so locked and sealed while in my possession.

Sworn before me at
in the County of
this day of , 19

A. B.

3 & 4 Geo. V. c. 43, Form 13.

Importance of the principle of the inviolability of the ballots cast: R. ex rel. Hewson v. Riddell, 14 O. W. R. 49. Upon a scrutiny it was found that the ballot papers had been tampered with, and there was also a breach of the Act in that the deputy returning officer took the ballot box to his own house instead of to the town clerk. It was impossible to say that the result of the election had not been affected thereby, and the election was set aside: R. ex rel. Ivison v. Irwin, 4 O. L. R. 192.

Judicial Duties of Returning Officer on Polling Day.—In Pritchard v. Bangor, 1888, 13 App. Cas. 241, 57 L. J. Q. B. 313, in the House of Lords, Lord Watson said:—

> "Certain judicial duties are committed to the returning officer. He is to decide upon the validity of ballot papers, and his decision remains final, if not challenged and reversed in an election Court. But so far as regards the taking of their votes from the electors, and the reporting of the result of these, it appears to me that his duties are purely ministerial. He is to count the votes, and when he has done so, and has ascertained the number given for each of the candidates, he is to make a declaration of the number of the votes and of the persons who have received the greater number Having done that, he is *functus officio*."

Absence of Deputy Returning Officer.—In R. ex rel. Watterworth v. Buchanan, 1897, 28 O. R. 352, this was held not to be fatal, as the result was not affected. During one of the Deputy Returning Officer's absences, the Returning Officer acted and placed the Deputy Returning Officer's initials on the ballots which were cast. This, of course, should not have been done, as the Returning Officer had no more right to act than any other person. Interruption from illness or absence should be dealt with as provided in s. 128.

In R. v. Durocher, 1913, 28 O. L. R. 499, an information was laid for an offence under s. 193 1 (b) of the Consolidated Municipal Act, 1903 (now 138 (c)) and clause (3) of s 193, provided a penalty. It was held that the offence was punishable by indictment, and that the magistrate should not be prohibited from taking the preliminary examination.

In the Appellate Division, Meredith, C.J.O., considered that the order might be supported on the ground "that the act for which the appellant

has been prosecuted is prohibited by s.-s. (1) of s. 193 of the Consolidated Municipal Act, 1903, and the penalty, the provision for which it is contended excludes the right to proceed by indictment, is prescribed by a later and substantive clause (s.-s. (3))."

But see other grounds assigned discussed, *infra*, s. 138 (c).

Taking Ballot Box Away.—In R. ex rel. Ivision v. Irwin, 1902, 4 O. L. R. 192 at p. 197, MacMahon, J., said:

> "Although the deputy returning officer said that when taking the ballot box from the poll to the office of the town clerk, he only called at his own house for a few moments, his taking the ballot box there was violating a very stringent provision of the Act. . . . This together with the finding by the County Court Judge that a large number of the ballots had been tampered with after the papers had been placed in the ballot box, renders it impossible to say that such irregularities did not affect the result of the election."

Secrecy of the Ballot.—The Act contains many sections aimed at ensuring the secrecy of the ballot, viz., s. 88 requiring a screened compartment for voting; s. 106 requiring a voter to retire to the compartment to vote and to fold his ballot so as to conceal his vote; s. 107 forbidding any person to enter the compartment while a voter is in it; s. 108 forbidding the taking of a ballot out of the polling place; s. 112 forbidding unauthorized persons to be present in the polling place; ss. 131, 132 and 133 requiring secrecy on the part of election officers and voters; s. 134 requiring an oath of secrecy from election officers; s. 135 requiring election officers to notify the Attorney-General of violations of the law as to secrecy and s. 136 forbidding the disclosure by any person in Court of how he voted. While individual breaches of these requirements have repeatedly been held to be mere irregularities, general violation of secrecy has been held to be fatal. In Hickey v. Orillia, 1908, 17 O. L. R. 317 D. C., a by-law was quashed because of violations of secrecy. Riddell, J., in the D.C., said:

> "The manner in which this election was conducted seems to me to be a violation of the principles upon which an election under the Act should be conducted—that is, I conceive, the meaning of the odd expression 'the principles laid down in this Act.' To mention but one: secrecy is a great desideratum under the Act, and all the provisions for securing secrecy were disregarded. It is, of course, obvious that in an election involving a social question, complete secrecy is of the very greatest importance—absolute secrecy, so that by no means may a voter's decision come to be known.
>
> "It is unnecessary to consider if the irregularities as a fact did not affect the result of the election. The saving virtue of s. 204 is only effective if the two concur, viz.: (1) that the election was conducted in accordance with the principles laid down in the Act; and (2) that the irregularity did not affect the result of the election. The evidence is not such as to enable us to find one way or the other."
>
> "As I am of opinion that there has been a disregard of the principles so laid down, it follows that the people have not declared their will in the only way in which they are authorized and empowered to do so."

The following is a summary of the violations:

At Poll No. 1 in the front part of a store, with two compartments, the place was not large and was full all the time. Three or four ballots were out at a time. Messenger boys were running in and out all the time. Relatives of owner of the store were passing through all day long even where the deputy returning officer was. They and the boys could see how people voted if they wished. Voters instead of waiting to get into compartments marked ballots wherever they could. Voters seemed to be voting together "one in on top of the other as it were."

At Poll No. 2, a fire hall, there was always a crowd of voters waiting to vote. Three or four ballots were out at once. Ballots were marked "on the window sill, on the engine, on the reel and on the hose-cart."

Two persons were in a compartment together on two occasions. People who had no business came in to the polling place and "chatted around the engine." The people were close to the voters. Any person who wished to could see how "a person was voting." Boys went in and out with badges. One voter admitted seeing how another voted.

At Poll No. 3 in the Council Chamber there were two compartments. Sometimes four sets of ballots were out at a time. As many as thirty people were in the polling station waiting for ballots, at one time. Boys were going backward and forward through the polling station. People who were not entitled to vote, were coming in and out.

NOTE.—In this case the polling sub-division contained too many voters contrary to the provisions of Part XIX. and this was a further ground for quashing the by-law as was the circumstance that many voters were prevented from voting by the crowds of voters ahead of them. Meredith, C.J., upheld the by-law by an application of the curative section, but was reversed by the Divisional Court.

In Stoddart v. Owen Sound, 1912, 27 O. L. R. 221, Lennox, J., had to consider numerous violations of secrecy of which the following is a summary:

"Polling sub-division No. 1: A busy poll. A room for the returning officer. An average of fifteen to twenty persons there at a time. Two other rooms used as voting compartments. A table in one of these where the voter marked his ballot. The other supplied with three desks for the same purpose. As to this the witness said on cross-examination that the desks were about seven feet apart, and if a man wanted to mark his ballot secretly he could do it. There was no division between the desks.

"Sub-division No. 2: A school-house. A class-room served for all purposes. Not more than eight or nine people in the room at one time. Two compartments were formed by a blackboard placed six feet from the wall, forming a lane, and this lane walled across in the centre by a map. This formed compartments of a sort, each open at the end. This opening was six feet wide, and without screen. This was in the morning. Later, as the witness puts it, they 'made' three more compartments; but the making consisted in allowing the voters to mark their ballots on window-sills. These windows were three or four feet wide.

"Sub-division No. 3: The officer was in a room behind a shop. Behind this was a kitchen, in size about nine by twelve feet. One witness said it was a little larger. There were three places provided in this kitchen for voting. One was in a corner, screened. It is said that the voter in this could be seen, but could avoid being seen. The other two voting places were a table and a stove. These points open from all sides. Usually—or often at all events—three voters voted in this kitchen at the same time.

"Sub-division No. 4: This was in a dwelling-house. The deputy returning officer occupied the kitchen. There were 212 votes cast. Said to have been "a rush of votes." There was no attempt at providing screened compartments. A small room was behind the deputy's room. Two tables there. Voters marked their ballots at these. Usually two in this room at a time. There were doors leading from this room outside, which the voters could open. In addition, in the deputy's room there were many places for marking ballots: on the sink, on the sideboard, and the walls. There was an average of from eight to fourteen persons in this room during polling. It is sworn that at times there would be in all as many as five voting at once; that the way persons were voting could be seen by people in the polling-place standing about.

"Sub-division No. 5: One room used. Including officers and agents, about twenty persons in the room during voting. Great numbers voting at once, at one time, about noon, running up to eight or nine. At busy times marked their ballots anywhere—on window sills, desks, and the like. There were several witnesses as to this polling place. The deputy returning officer swore. There were three illiterate voters. It was a busy time. Difficult to keep up. Began with four voting-places. Three other places adopted—'any-

where the voter could find a place.' 'Eight or ten at my desk at a time, and six or eight voting about the room. Nothing to prevent seeing a voter voting, but might not see how he voted.'

"Sub-division No. 6: No screens or compartments. Five or six voting, and as many waiting, at a time. Marked their ballots anywhere. Three illiterate voters. Deputy returning officer marked for one; and Alexander Wright, a scrutineer, and the other scrutineer, marked for the other two. About twelve or fourteen voting and waiting at times. Wright swears that some parties sat down at his desk to mark their ballot. When rush on, not told where to go.

"Sub-division No. 7: The deputy returning officer swears that until the middle of the day from five to thirty present. As many as eight or nine voting at once. A great many people, perhaps as many as twenty or thirty, present when these voted. There were two tables where ballots were marked, and other voters had to pass these, and could see, if they looked down. A scrutineer swore four tables provided for voting. School desks also used. Voters told to go anywhere. Possibly as many as ten voting at once. There were 302 votes polled. Nothing to prevent seeing how ballots were marked. Three or four illiterate voters' ballots marked right at the desk. Crowds standing around could see how these ballots were marked and hear what was said.

"Sub-division No. 7*a*: Two compartments, but more than one voter allowed into them at the same time, and the vote there was sworn not to have been secret (see Karn's evidence). They voted also on desks, four or five at a time. and as many waiting to vote. Three illiterate voters. These ballots were marked at deputy's table. There were men standing near who could see how these ballots were marked. It is sworn, too, that persons passing the compartments could see in. They selected any desks they liked.

"Sub-division No. 9: Irregular. Want of secrecy, but an average of only eight or nine present.

"Sub-division No. 10: Margaret Wright was in and out a good deal. Her mother, Mrs. Wright came to vote, but left without voting. This lady came again, and her daughter Margaret says she stood by and saw the officer mark her mother's ballot, and that she could have seen how it was marked. Mr. . . . swears he voted at No. 10. Others voting at the same time. Voted at table, and another voter at this table, too. They compared ballots. Four more waiting.

"Sub-division No. 11: As usual, people were allowed to loiter. There is evidence of irregularities, but nothing serious, and I attach no great importance to them.

"Sub-division No. 13: No adequate provision for secrecy. One of the voting compartments composed of chairs piled up, I do not know how."

Upon the foregoing facts, he commented as follows:

"It is frequently said that in municipal contests and voting upon by-laws we must not look for literal compliance with every provision of the statute. I quite agree. There will always be cases arising in which the provisions of the Act being, in the main, substantially complied with, the Courts will, even without reference to s. 204, overlook isolated and trifling irregularities.

"Section 204, which is, by s. 351, made applicable to voting on by-laws as well, enacts that 'no election shall be declared invalid . . . by reason of any irregularity, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance, mistake or irregularity did not affect the result of the election.'

"This section clearly indicates the bounds beyond which I ought not to go. The onus of shewing that the omission, mistake, or irregularity did not affect the result is upon those who assert that it did not: re Hickey and Town of Orillia, 1908, 17 O. L. R. 317. There was no attempt made to prove that the result was not affected by the conditions which generally characterized this election; and, although

there is a considerable difference in the votes pro and con, I am very far from being able to say that with these conditions eliminated, and the statute complied with, the majority might not have been the other way.

"But, at most, this is only a secondary consideration. The initial condition is, that the by-law is submitted, and the vote taken, in accordance with the principles of the Act. Without specific provisions at all, a ballot *per se* imports secrecy; and, when voting by ballot was adopted, the Legislature thereby wholly abandoned and repudiated open voting. With this, and the specific sections referred to secrecy is now a basic principle of our municipal voting; and, if it is important in a municipal contest, it is vital in a vote upon a tense social question such as this.

"It is not enough to say that the method pursued was just as good as, or even better than, the statutory method. It is the statutory method that gives meaning and validity to the vote. The vote without the statute is of no effect, is meaningless, binds nobody.

"Almost every witness was asked, 'Could the voters not conceal their votes if they wanted to?' That is not enough. The dangerous voter, the bribed voter, is the one who does not want to conceal his vote. The aim of the statute is not alone that the voter can conceal, but that while voting he shall not disclose—shall not be in a position to disclose—how he votes. To ignore the observance of the latter requirement would be to enable the bribed voter to prove himself entitled to the bribe, and thus remove one of the greatest obstacles from the briber's path.

"There was no evidence as to polling sub-division number 12. In all the others there were grave, if not gross, irregularities, and in eleven out of a total of fourteen sub-divisions the voting, speaking of it generally, was characterized throughout by a flagrant, callous, and wholly inexcusable disregard of the plain provisions of the statute.

"The irregularities are somewhat of the same class, but disregard of the law was far more general in this case than in Re Hickey and Town of Orillia, 17 O. L. R. 317; Re Quigley and Township of Bastard, 1911, 24 O. L. R. 622; or Re Service and Township of Front of Escot, 1909, 13 O. W. R. 1215.

"It cannot be argued for a moment that the vote in this case was taken in accordance with the principles of the statute, or that there was an opportunity afforded for 'a full, fair, and untrammelled vote of the electorate;' and I find that this vote was not so taken.

"Nor can it be contended that what took place on the 1st January last was a *bona fide* submission of a repealing by-law, within the meaning of 6 Edw. VII., c. 47, s. 24, or—subject of course to the discretionary will of the council—that this so-called submission and vote stand in the way, or should be allowed to stand in the way, of the exercise of the people's franchise upon this question until January, 1915; and I find that it was not a *bona fide* submission or vote, within the meaning or intent of s. 24."

In Re Sinclair and Owen Sound, 1906, 12 O. L. R. 488, there was a failure by deputy returning officers and poll clerks and agents to take the oath of secrecy. This was held to be a mere irregularity and to be cured by s. 204 (now as amended s. 150). In the C. A. 13 O. L. R. 447, the point was not discussed as a serious objection.

In Re Wynn and Weston, 1907, 15 O. L. R. 1, Meredith, C.J.C.P., held the provisions of old s. 368 (now 134) to be directory only, and that the failure of the officers to comply with its requirements did not affect the validity of the election. The D. C. dismissed an appeal.

In Re Duncan and Midland, 1907, 16 O. L. R. 132 C. A., the same ballot boxes, poll books, lists, declarations of secrecy were used on concurrent votings. It was vainly objected that there should be separate declarations of secrecy in respect of each voting.

Violation of Oath of Secrecy.—In Re Sturmer and Beaverton, 1911, 24 O. L. R. 65, Middleton, J., pointed out that the deputy returning officers and agents who made affidavits as to what had taken place in

connection with the marking of the ballot of an illiterate voter, were acting improperly and in violation of their oath of secrecy.

123. The clerk, upon the receipt of a ballot box, shall take every precaution for its safe keeping and for preventing any other person from having access to it, and shall immediately on the receipt of it seal it with his own seal in such a way that it cannot be opened without his seal being broken, and that any other seals affixed to it are not effaced or covered. *New.* *See* 8 Edw. VII. c. 3, s. 121. 3 & 4 Geo. V. c. 43, s. 123.

124. A deputy returning officer in a city or town shall not under any circumstances take, or allow to be taken, the ballot box to his home, house, office, or place of business, or to any house or place except the office of the clerk. 3 Edw. VII. c. 19, s. 177 (4), *last part amended.* 3 & 4 Geo. V. c. 43, s. 124.

[*Note.—Old s. 177 (6), providing for clerk determining disputes between D.R.O. and agents on day following the poll, struck out, as D.R.O. is required by s. 176 to determine question subject to recount, etc. The sub-section was enacted before any provision was made for a recount.*]

125. Where the holding of the election has been interrupted, as mentioned in s. 128, the deputy returning officer shall delay making his return to the clerk until the polling has taken place. *New.* 3 & 4 Geo. V. c. 43, s. 125.

126. The clerk, after he has received the ballot papers and statements of the number of votes given at each polling place, without opening any of the sealed packets of ballot papers, shall cast up from the statements the number of votes for each candidate; and at the *town hall,* or if there is no town hall, at some other public place, at four o'clock in the afternoon in the case of a city having a population of not less than 100,000, and at noon in the case of other municipalities on the day following the return of the ballot papers and statements, shall publicly declare to be elected the candidate or candidates having

the highest number of votes; and he shall also put up in some conspicuous place a statement under his hand, shewing the number of votes for each candidate. 3 Edw. VII. c. 19, s. 178, *amended* 3 & 4 Geo. V. c. 43, s. 126.

..... at the town hall ..... shall ..... declare ..... Making declarations elsewhere may be an irregularity with the curative effect of s. 150: R. ex rel. Armour v. Peddie, 9 O. W. R. 393; 14 O. L. R. 339.

This section applies to local option contests: Re Ellis and Renfrew, 23 O. L. R. 427.

127. If, upon the casting up of the votes or upon a recount, two or more candidates have an equal number of votes, the clerk, or other person appointed by by-law to discharge the duties of clerk, whether otherwise qualified or not, shall, at the time he declares the result of the poll, or after receiving the certificate of the result of the recount, as the case *may be, give a vote* for one or more of such candidates, so as to decide the election. 3 Edw. VII. c. 19, s. 179 (1), *amended.* 3 & 4 Geo. V. c. 43, s. 127.

As to right of clerk to vote: see s. 60, *ante.*

Case of Election not held at Proper Time, etc.

128. If, by reason of a riot or other emergency, an election, or the voting at a polling place, is not commenced on the proper day, or is interrupted after being commenced and before the lawful closing thereof, the returning officer, or deputy returning officer, as the case may be, shall hold or resume the election on the following day at the hour of nine o'clock in the forenoon, and continue the same from day to day until a fair opportunity for nominating candidates has been given or, in the case of polling, until the poll has been opened without interruption and with free access to voters for eight hours in all. 3 Edw. VII. c. 19, s. 184, *amended.*—*See* 8 Edw. VII. c. 3, s. 5. 3 & 4 Geo. V. c. 43, s. 128.

Postponement of Election in Case of Epidemic.—The Public Health Act, R. S. O. 1914, c. 218, s. 116, provides.

(1) Where the provincial board reports to the Lieutenant-Governor that on account of the prevalence in any municipality of any communicable disease it would be dangerous to hold an election in

such municipality, the Lieutenant-Governor in Council may, of his own motion, or upon the application of the council of the municipality, issue his proclamation postponing the holding of any intended municipal or school election for a period not exceeding three months, and may from time to time further postpone such election if, in the opinion of the Board, the necessity for postponement continues.

(2) The Lieutenant-Governor may, by the proclamation, name the days for holding the nomination and polling, but, if no days are named therefor, the council shall as soon as practicable after the period named in such proclamation, or the last of such proclamations, expires, by by-law name the days for nomination and polling.

Recount.

129.—(1) If within fourteen days after the declaration by the clerk of the result of the election, upon the application of a candidate or voter it is made to appear by affidavit to a Judge of the county or district court of the county or district in which the municipality is situate, that a deputy returning officer, in counting the votes has improperly counted or rejected any ballot paper, or made an incorrect statement of the number of ballots cast for any candidate, and if within that time the applicant deposits with the clerk $25 as security for the costs in connection with the recount of the candidate declared to be elected, or if at any time within four months after such declaration in a city having a population of not less than 100,000, the council has by resolution declared that a recount is desirable in the public interest, the Judge may appoint a time and place to recount the votes. 3 Edw. VII. c. 19, s. 189 (3); 6 Edw. VII. c. 35, s. 22, *amended.*

(2) At least two days' notice in writing of the time and place appointed shall be given to the candidates and to the clerk, and the clerk shall attend the recount with the ballot boxes and all documents relating to the election.

[*Note.—Old s. 189 (4) and (4a) as to deposit by applicant and as to recount on application by council of a city over 100,000, struck out, being covered by new s. 129.*]

(3) The Judge, the clerk, and each candidate and his agent appointed to attend the recount, but no other person, except with the sanction of the Judge, shall be entitled to be present at the recount.

(4) At the time and place appointed, the Judge shall recount all the ballot papers received by the clerk, and shall in the presence of such of the persons entitled to be present as attend, open the sealed packets containing the used ballot papers which were not objected to and were counted; the ballot papers objected to, but which were counted; the rejected ballot papers; the cancelled ballot papers; and the unused ballot papers.

(5) The Judge shall, as far as practicable, proceed continuously, allowing only time for refreshment and excluding, except so far as he and the persons present agree, the hours between six o'clock in the afternoon and nine o'clock in the succeeding forenoon, and during the excluded time the Judge shall place the ballot papers and other documents relating to the election close under his own seal, and the seals of such of the persons present as desire to affix their seals, and shall otherwise take all necessary precautions for the security of them. 3 Edw. VII. c. 19, s. 189 (5-7), *amended.*

(6) Subject to s.-ss. 3 and 4 the Judge shall proceed according to the provisions for the counting of the ballot papers at the close of the poll by a deputy returning officer, and shall verify and correct the statement of the poll. *New.* *See* 8 Edw. VII. c. 3, s. 138.

(7) If for any reason it appears desirable to do so, the Judge upon the application of any party to the proceeding may hear such evidence as he may deem necessary for the purpose of making a full and proper recount of the ballot papers. 3 Edw. VII. c. 19, s. 189 (8), par. 1, *amended.*

(8) Upon the completion of the recount the Judge shall seal up all the ballot papers in their separate packets, and shall forthwith certify the result to the clerk, who shall then declare elected the candidate having the highest number of votes. 3 Edw. VII. c. 19, s. 189 (8), par. 5, *amended.*

(9) Nothing in this section shall affect any remedy which any person may have under the provisions here-

inafter contained by proceedings in the nature of *quo warranto* or otherwise. 3 Edw. VII. c. 19, s. 189 (9). 3 & 4 Geo. V. c. 43, s. 129 (1-9).

130.—(1) The costs of the recount shall be in the discretion of the Judge, who may order by whom, to whom, and in what manner the same shall be paid.

(2) The Clerk of the County or District Court shall tax the costs and shall, as nearly as may be, follow the tariff of costs of the County Court. *New. See* 8 Edw. VII. c. 3, s. 142.

(3) Where costs are directed to be paid by the applicant, the money deposited as security for costs shall be paid out to the party entitled to such costs, so far as necessary. *New. See* 8 Edw. VII. c. 3, s. 143.

(4) Payment of the costs may be enforced by execution, to be issued from any County or District Court, upon filing therein the order of the Judge and a certificate shewing the amount at which the costs were taxed and an affidavit of the non-payment of them. 3 Edw. VII. c. 19, s. 190 (3). 3 & 4 Geo. V. c. 43, s. 130 (1-4).

If it is made to Appear by Affidavit that, etc.—In Re Dauphin Dominion Election, 1911, 19 W. L. R. 451, the affidavit was based on belief only, and Robson, J., said:—

> "It would be impossible that the deponent could have personal knowledge to justify his swearing positively to the matters recited from his affidavit above. His belief must have been based on information. The sources of the information were evidently satisfactory to him, but they may not themselves have been first hand. According to the statute, it is to be made to appear to the Judge that wrong has been done. The belief of the party making the affidavit does not satisfy that requirement.
>
> "In the Nova Scotia case cited (North Cape Breton and Victoria Election, 6 E. L. R. 37, 532), the affidavit was similar, but stated the source of the information. Townshend, C.J., referring to the terms of s. 193 as to the affidavit, says: 'Does this mean a general statement such as is contained in Mr. Gunn's affidavit, or does it mean at least some specific instance, in which the deputy returning officer did wrong to the actual knowledge of the deponent, or knowledge received from a person who witnessed the wrong act? If the latter, there was no such affidavit before the Judge on which he could act. It seems to me necessary that an actual case of wrongdoing is contemplated by the statute before the Judge is justified in ordering a recount of the votes, and nothing of this kind was shewn when he made the appointment. . . . . As the matter then stands, Mr. Gunn has merely sworn that some persons told him that votes had been improperly rejected at the election, which some one else may have told them, and that he believes such to have been the case.' And Townshend, C.J., sums up thus:

'It is, as I have said, much to be regretted that this speedy and comparatively inexpensive method of determining the number of votes should be defeated, for the reasons given; but I apprehend, when a party invokes these provisions of the statute, he is bound to comply directly with its terms, otherwise he has no right to call in the County Court Judge to make a recount.' And, after mentioning the importance of the matter, he stated that he had felt it to be his duty to adhere strictly to what he believed to be the true interpretation and intention of the statute. On the ground mentioned, he declined to make an order under s. 206.

"That case fits the present one. The learned Judge's reasoning is unquestionable."

An order for a mandamus requiring the County Court Judge to proceed was therefore refused, as in the Nova Scotia case.

Death, Illness or Absence of the Judge.—In Re Prince Edward Provincial Election, 1905, 9 O. L. R. 463. the jurisdiction of the Deputy Judge appointed under ss. 9 and 10 of the Local Courts Act, R. S. O. 1897, c. 54, to conduct a recount, was upheld.

Mandamus to County Court Judge.—The Ontario Election Act provides for an appeal from the County Court Judge. The Dominion Election Act, s. 206, declares, in case of any omission of the Judge to comply with the provisions of the Act respecting recounts, the party aggrieved may apply for an order requiring him to proceed. There are no similar provisions in the Municipal Act.

In Regina v. Prudhomme, 1887, 4 M. R. 259, on a recount, the County Court Judge confined himself to considering the objections noted by the deputy returning officer, a mandamus was refused by the full Court on the ground that there was another remedy provided and this principle would probably be applied under the Municipal Act (Ont.), for proceedings to unseat under Part IV. can be resorted to, and in them the ballots can be counted and evidence taken as to them which could not be taken on a recount.

In Re Ottawa Municipal Election, 1895, 26 O. R. 106, two County Court Judges refused to proceed with two different recounts; two applications were made for writs of mandamus. The Judges stopped because the ballots were not sealed up in separate packets. Boyd, C., refused both applications. With hesitation, he held that the better course for them to pursue was to hold their hand. The argument was that there was no jurisdiction to grant a writ of mandamus as there was a remedy by *quo warranto* which was not dealt with. Counsel for the applicants cited Re Whitaker and Mason, 18 O. R. 63; In re Marter and Gravenhurst, *ib.* 243; In re Centre Wellington Election, 44 U. C. R. 132; Re Canada Temperance Act, 9 O. R. 154; Chapman v. Rand, 11 S. C. R. 312; Shortt on Information, Bl. ed., 252. Of these, note the Centre Wellington case, which Killam, J., in Regina v. Prudhomme, declined to follow.

Ballots should be Held Good if Possible.—In Phillips v. Goff, 1886, 17 Q. B. D. 814, 55 L. J. Q. B. 512, Lord Coleridge, C.J., said:—

"All reasonable probabilities ought to be taken into consideration by the commissioner; and all we can say is, that upon these it is for him to decide whether it should be rejected or not. If, however, he is reasonably certain that either of the other two views I have propounded can be honestly supported from the facts surrounding the case, he ought to adopt one or the other of them, and render the vote effectual if he can, since the voter clearly meant to exercise his franchise somehow or another."

Prohibition to County Court Judge.—While a mandamus probably would not be granted to compel a County Court Judge to proceed, an order might be granted prohibiting him from giving a certificate under s.-s. 8. While the scope of a scrutiny is wider than that of a recount, the conclusions of the Judge are given by certificate as on a recount.

In Re Local Option By-law of Saltfleet, 1908, 16 O. L. R. 293, an order was made by Teetzel, J., prohibiting the County Court Judge in his certificate from making any allowance for votes illegal because of the disqualification of the voter and ordering that he be restricted to a scrutiny of the ballot papers only, on the ground that certifying the result was a judicial act and not a mere ministerial act, and that the Judge might be prohibited from allowing his certificate of the result to be affected by any matter which he should not have considered in arriving at the result and to that extent only. This judgment was upheld by the D. C.

A preliminary objection that the motion was too late, because what remained to be done was only a ministerial act, the County Court Judge having performed all his judicial functions, and that therefore there was no jurisdiction to prohibit him from certifying, was overruled.

Re Saltfleet was followed in Re Orangeville, 1910, 20 O. L. R. 476.

In Re West Lorne Scrutiny, 1911, 23 O. L. R. 598, 25 O. L. R. 267, 26 O. L. R. 399, 47 S. C. R. 451, Middleton, J., made an order to prohibit the learned County Court Judge from certifying to the municipal council that the by-law had not been approved by three-fifths of the qualified voters voting thereon, until he had made inquiry and ascertained how the five spurious voters, or a sufficient number of them to enable him to certify, marked the ballots improperly cast and placed in the ballot box, and directing the learned Judge to enter upon the inquiry indicated for the purpose of ascertaining the facts necessary to enable him to certify as a matter of fact, and not as the result of an assumption that the improper votes must be deducted from those cast in favour of the by-law.

The order was finally upheld, except in so far as it purported to authorize the County Court Judge to inquire how unqualified voters voted.

In Re Aurora Scrutiny, 1913, 28 O. L. R. 475, a motion for prohibition was refused.

In Re West Lorne Scrutiny in the D. C., 1911, 25 O. L. R. 267, at 281, Teetzel, J., said:—

> "Until the abolition of the numbered ballot in the Ontario Election Act, the Court, upon a scrutiny, could trace the ballot of an illegal voter for the purpose of ascertaining how it was marked. But in Re Lincoln Election Petition, 4 A. R. 206, the ballots of alleged illegal voters, with others, had been stolen, so it was impossible to ascertain how they were marked, except by evidence of the persons who had marked them. The learned Chief Justice of Ontario, in delivering the judgment of the Court, at p. 210, says: 'Again, by s. 115 it is expressly stated that no person who has voted at an election shall, in any legal proceeding to question the election or return, be required to state for whom he has voted. Although this does not in express terms extend to the case of the voter voluntarily tendering himself as a witness, it is obvious that even in that case he must be subject to cross-examination. We think that this section should, in furtherance of the objects of the Act, be construed as absolutely exclusive of such testimony.' Again, at p. 212, the learned Chief Justice says: 'Where it is sought to diminish the majority of the respondent by a vote, two things must be proved: firstly, that the voter had no vote; and secondly, that he assumed to vote for the respondent. In the case put, the second is incapable of proof, and the petitioner therefore fails to prove that the vote was cast for Rykert and not for Neelon.'
>
> "In the Haldimand Dominion Election Case, 1 Ont. Elec. Cas. 529, which was under the Dominion Election Act, where, as in the present Municipal Act, the ballot was not numbered and could not be traced, Strong, J., at p. 547, says: 'Nothing could be made of this charge without admitting the evidence of voters to shew how they voted. This, I hold, cannot be done. To do so would, in my opinion, be a direct violation of the Act which requires secrecy. Section 7 of the Dominion Elections Act enacts: No person who has voted at an election shall, in any legal proceeding questioning the election or return, be required to state for whom he voted.' It is no answer to this to say that secrecy is imposed for the benefit of the voter and that he can waive it, for I hold secrecy to be imposed as an absolute rule of public policy, and that it cannot be waived.'

"Following these decisions, in R. ex rel. Ivison v. Irwin, 4 O. L. R. 192, the late Mr. Justice MacMahon, on an appeal in a *quo warranto* proceeding under the Municipal Act, held that the provision of s. 200 of the Municipal Act must be construed in furtherance of the object of the Act as absolutely excluding evidence to shew how the ballot was marked.

"The last judicial pronouncement on the question is by the learned Chief Justice of the Common Pleas in Re Orangeville Local Option By-law, 20 O. L. R. 476, where, at p. 477, he says: 'It is clear, I think, that the Judge had no authority to require any person who voted to state for whom he voted. Section 200 of the Consolidated Municipal Act, 1903, which by s. 351 is made applicable to voting on by-laws, forbids that being done, and the other provisions as to secrecy of proceedings, secs. 198 and 199, shew how careful the Legislature has been to keep the secrecy of the ballot inviolate.'

"It is to be observed that the language of s. 200 is, that 'no person' who has voted, etc., not that 'no voter,' etc.; so that it follows that such person, if his name was on the list, is clearly protected if he actually voted, although he may not have had a legal right to vote."

And in the C. A., 26 O. L. R. at 334, Moss, C.J.O., while agreeing with the majority of the Court that the judgment of the D.C. should be reversed, expressly stated his agreement with the view of Teetzel, J., given above, and the Supreme Court, 47 S. C. R. 451, upheld the view that a Judge on a scrutiny has no power to inquire whether rejected ballots were cast for or against the by-law.

In Smith v. Baskerville, 1914, 24 M. R. 349, C. A., under the Municipal Act (Man.) of which s. 168 is identical with s. 136, it was proved before the County Court Judge on an election trial that eight aliens had voted and evidence was given by them that they had voted for the respondent who had been declared elected by a majority of three. The C. A. rejected the evidence of the aliens as to how they had voted and upheld the election, following Re Lincoln and Re West Lorne, *supra.*

Evidence on a Recount.—In Re Halton Provincial Election, 1902, 4 O. L. R. 345, five ballots were marked with a plain cross made with blue or indelible, or at least not with a common black pencil, and the ballots were objected to as offending against the requirements of the Act, not being marked with the pencil provided by the deputy returning officer for the use of voters and thus shewing marks of some common design to disclose the identity of the voters. Osler, J.A., in allowing the ballots, said:

"On an enquiry of this kind evidence cannot be received by the Judge; he deals with the ballots in the condition in which they come before him. It might have been just as forcibly argued by the counsel . . . that other ballots marked in black pencil were objectionable for the same reasons which are urged against these five. I do not know, nor do counsel know, nor does the County Judge, that the pencil with which these ballots were marked was not supplied by the deputy returning officer. Nor do we know on what ground that official rejected the ballots in question.

"All this may appear upon a scrutiny, but with what result as affecting these ballots I cannot now say, nor have I the right to express an opinion."

Sub-section 7 corresponds with s. 134 of the Election Act and indicates that the Judge can take evidence for the purpose of a recount. This probably means as to the identity of ballot papers or as to whether marks on them were made by a deputy returning officer or not. In Re West Huron Provincial Election, 1905, 9 O. L. R. 606, the ballots at one poll were all numbered to correspond with the numbers of the voters in the poll book. Maclennan, J.A., said on appeal:

"The contention was that all those ballots should have been rejected, for the reason that they were all marked on the back with the number in the poll book opposite to the name of each voter, and that by that means the identity of each voter could be discovered.

"The learned Judge came to the conclusion that the numbers were placed on the ballots by the deputy returning officer, and that the case was governed by s.-s. 3 of s. 112, and that the validity of the ballots was not thereby affected.

"The learned Judge had ample evidence before him to enable him to judge whether the numbers had been placed by the deputy returning officer or his poll clerk, evidence which I have not before me, the appeal being a limited one, and I cannot review his decision on that question of fact.

"The objection was not urged before me with much confidence; nor could it be, having regard to the decision in Re Russell (2) 1879, H. E. C. 519, which decides the very point involved."

Marks made by D. R. O's.—Cannot be investigated by county judge but such ballots should be counted when evidence shows the marks were made by D. R. O's. Russell (2) Provincial Elections, 1879, Hodgins, 519; Re West Huron, 9 O. L. R. 602.

A Judge of the County.—This includes a junior Judge. In re North Grey Provincial Election, 1902, 4 O. L. R. 286, under the Election Act, which authorized application to "the Judge of the County," it was held that an application to a junior Judge was proper and his jurisdiction free from doubt.

Scope of Recount.—In Re Lennox Provincial Election, 1902, 4 O. L. R. 378, Maclennan, J.A., said:

"It was argued that the learned Judge was confined on the recount to the consideration of cases in respect of which an objection was made before the deputy returning officer when counting the votes at the close of the poll. This objection was probably suggested by the query in Jenkins v. Brecken, 7 S. C. R. 247, a decision upon the Ballot Act, 1874, 37 V. c. 9 (D.), which made no provision for a recount, otherwise than upon a scrutiny. In support of this contention, s. 112 (4) of the Ontario Election Act, R. S. O. 1897, c. 9, was cited. That sub-section directs the Deputy Returning Officer to take a note in a prescribed form of any objection made to any ballot found in the ballot box, and to decide any question arising out of the objection; and declares that his decision is to be final, subject only to reversal on a recount by the County Court Judge on petition questioning the election or return. Section 124 was also cited as supporting that contention. I am, however, clearly of opinion that there is nothing in the contention. What s. 112 (4) says is that the decision of the deputy returning officer is subject to reversal, not on appeal to the County Judge, but on a recount. And s. 112 (4) says that the County Judge is to appoint a time, and give notice of a time and place at which he will proceed to recount the votes. This is the expression which is used in several other sub-sections of s. 124; and, finally, s. 126 directs that at the time and place appointed, the County Judge shall proceed to recount all the votes or ballot papers returned by the several deputy returning officers. All this makes it clear that the County Judge is not confined on the recount to an examination of the ballots to which objection was made before the deputy returning officer, and I therefore overrule the objection."

Ballot Papers Sticking Together.—This apparently happened in Re West Huron Provincial Election, 1905, 9 O. L. R. 602. The ballots were numbered as required by the Election Act (Ont.). The County Judge said:

"Mr. . . . contended that as 5359 was returned as a spoiled ballot it must be so regarded and could not have gone into the ballot box. He suggests that these two ballot papers were handed out by the deputy returning officer as one ballot paper, adhering together, which accounts for the initials of the deputy returning officer being endorsed only on the back of 5359, and not on 5358; that possibly the voter when marking discovered the fact and returned 5358 marked

on the face for Holmes, and it was put in the box, and the other paper 5359 must have been handed by him to the deputy returning officer, who then put it in the spoiled ballot envelope in which it was returned. In this polling division 111 persons voted, and 112 ballot papers were returned by the deputy returning officer, including 5358 and 5359, and Mr. . . . contends that, treating 5359 as a spoiled ballot, 5358 is necessary and must be counted to equal the number of voters.

"In the absence of evidence, I do not find as a fact, that the spoiled ballot paper 5359 was in the ballot box, but from the fact that it bears no mark of any kind that could be said to spoil it, and is not mutilated, and as 5358 was undoubtedly found in the ballot box without the initials of the deputy returning officer, and as they are consecutive numbers, I infer that they must have adhered together, and have been given out as one ballot, and as such went into the ballot box, and were found to be two ballot papers at the close of the poll, which made one ballot too many, and that the deputy returning officer following s. 112, s.-s. 1, rejected 5358 as not bearing his initials; and as I felt bound by the same section, I felt it my duty under that section to reject 5358 and to count 5359 as one of the ballots cast."

On appeal, Maclennan, J.A., upheld this ruling, saying:

"I have felt a desire, if possible to allow this ballot fairly and honestly marked by the voter for the candidate of his choice.

"Even if he noticed that there were two papers, he may have thought that was the proper method of voting, having received them both from the deputy returning officer. He therefore complied with s. 103, folded them across so as to conceal the names of the candidates and the mark on the face of the paper, and so as to expose the initials of the deputy returning officer and the number on the back, and delivered them so folded to the deputy returning officer. The folds of both papers correspond exactly, shewing that he must have done all that.

"The same s. 103 required the deputy returning officer, when the ballot was delivered to him, to deposit it in the ballot box, without unfolding it, or in any way disclosing the names of the candidates, or the mark made by the elector. His duty is merely to verify his own initials and the number on the back of the paper, and he is expressly forbidden to unfold it.

"I am therefore compelled to agree with the inferences of the learned Judge, that both papers folded together were placed in the box by the deputy returning officer, and that when the ballots were counted at the close of the poll, No. 5358, although properly marked, being found without initials, had to be rejected, as required by s. 112. I have considered whether these papers could not be treated as one ballot, and be allowed; but I think I may not do that. That would be to condone the error of the deputy returning officer, and to encourage laxity in the discharge of an important public duty. The ballot must be held to have been rightly rejected."

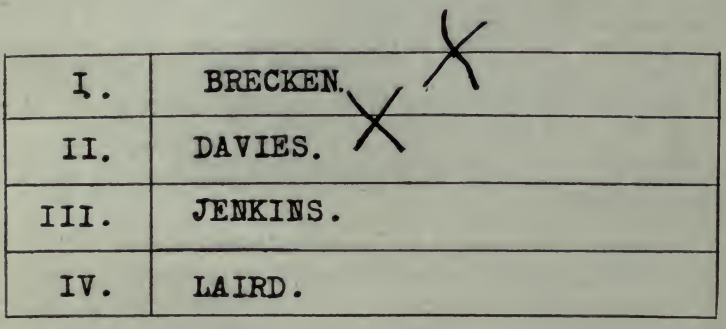
Torn Ballot Papers.—In West Huron Election Case, 2 E. C. 58, the official number was torn off, but the initials of the deputy returning officer were on a narrow strip which had been torn off along the upper part from one end to the other at right angles to the division between the ballot and the counterfoil. Osler, J.A., rejected the ballot, saying: "An integral part of the ballot having thus been removed, I am of opinion that the remainder has ceased to be a ballot. Very different considerations would apply if merely a blank part of the ballot paper had been torn off."

Jurisdiction of Judge on Recount. — In Re Russell, Hodgins 519 at 521, Blake, V.C., held that the County Court Judge on a recount could not entertain or listen to evidence as to whether words or marks on ballots were made by the deputy returning officer.

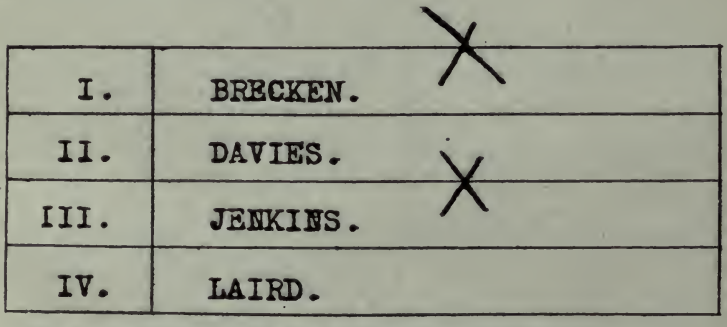
Relator Estopped by taking seat.—See Jenkins v. Brecken, 1883, 7 S. C. R. 247, 263, followed Regina ex rel. Watterworth v. Buchanan, 28 O. R. 352.

Ballots not Initialed by Returning Officer Who Nevertheless had Means of Identifying the Ballot Papers held Good.—See Jenkins v. St. Croix Brecken, 1883, 7 S. C. R. 247.

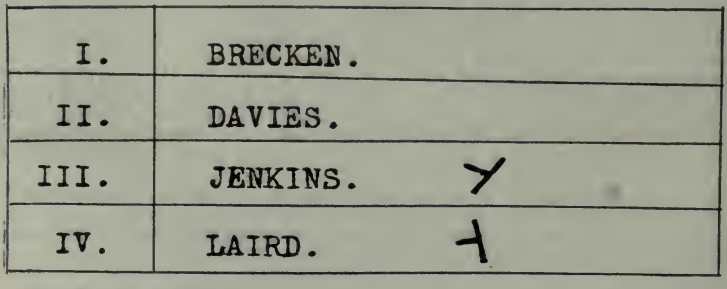
In Jenkins v. St. Croix Brecken, 1883, 7 S. C. R. 247, the following rulings were given:



Ballot allowed.



First cross allowed for Brecken; second cross disallowed.



Allowed for Jenkins.

I.	BRECKEN.
II.	DAVIES. X
III.	JENKINS. X
IV.	LAIRD.

Disallowed.

I.	BRECKEN. /
II.	DAVIES. X
III.	JENKINS. X
IV.	LAIRD.

Allowed on appeal for Jenkins.

Costs.—In the West Huron Case, 1898, 2 E. C. 58, Osler, J.A., refused costs to either side, saying:

> "I do not think that any of the appeals can justly be described as frivolous, and unless that were the case in a proceeding of this kind permitted by law in order to ascertain and determine as far as possible the result of the election, it would be very hard measure to visit the unsuccessful party in the appeals with the costs."

And in Re Halton Election, 1902, 4 O. L. 349, he followed the same practice, also in Re Prince Edward Provincial Election, 1900, 4 O. L. R. at 257.

Secrecy of Proceedings.

131.—(1) Every person in attendance at a polling place or at the counting of the votes shall maintain and aid in maintaining the secrecy of the voting.

(2) No person shall interfere or attempt to interfere with a voter when marking his ballot paper, or obtain or attempt to obtain at the polling place information as to how a voter is about to vote or has voted.

(3) No person shall communicate any information obtained at a polling place as to how a voter at such

polling place is about to vote or has voted. 8 Edw. VII. c. 3, s. 160; 3 & 4 Geo. V. c. 43, s. 131 (1-3).

Compare R. S. O. c. 8, s. 160. This section is apparently borrowed from the English Ballot Act, 35 & 36 Vict. c. 33, s. 4, as to which it was *held* in Clementson v. Mason, L. R. 10 C. P. 209, that it plainly pointed not only to secrecy as to the way in which an elector has voted (secrecy as to that is to be maintained forever), but it requires secrecy until the poll is closed, as to the names, not only of those who have voted, but of those who have not offered their vote. The intention as to these last, must be to prevent pressure being put upon those electors who do not wish to vote. The persons towards whom this secrecy should, it would seem, be most observed, are the candidate and his agents. This part of the section does not name, nor of itself include, the candidate.

See also s. 144, which provides that: "The candidate may undertake the duties which his agent might undertake," but note that this is subject to the exception mentioned in s. 109 (1), (2), where cases of incapacity to mark the ballot papers are provided for: see Wentworth, 36 S. C. R. 497.

It should be noted that the English Ballot Act provides that ballot papers shall be numbered consecutively, and that the numbers of each voter's ballot shall be entered in the poll book opposite his name. This provision enables illegally cast ballots to be traced at an election proceeding, and to be deducted from the total of the candidate for whom they were cast. Canadian legislatures in refusing to adopt this practice have sought to render the secrecy of the ballot more complete. The result will be seen in Smith v. Baskerville, 1914, 24 M. R. 349 C. A., where the Canadian cases are discussed. See *supra*, p. 164.

132. No person shall, directly or indirectly, induce or attempt to induce a voter to show his ballot paper after he has marked it, so as to make known to any person how he has voted. 8 Edw. VII. c. 3, s. 161; 3 & 4 Geo. V. c. 43, s. 132.

133. Subject to section 109 a voter shall not show his ballot paper, when marked, to any person so as to make known how he voted. 8 Edw. VII. c. 3, s. 163; 3 & 4 Geo. V. c. 43, s. 133.

134. Every returning officer, and every officer, clerk, constable, agent and other person authorized to attend at a polling place, or at the counting of the votes, shall, before entering on his duties, take the oath of secrecy, Form 14. 8 Edw. VII. c. 3, s. 164; 3 & 4 Geo. V. c. 43, s. 164.

FORM 14.

OATH OF SECRECY.

I, *A. B.*, swear that I will not at this election disclose to any person the name of any person who has voted, and that I will not in any way unlawfully attempt to ascertain the candidate or candidates for whom any elector shall vote or has voted, and will not in any way aid in the unlawful discovery of the same; and that I will keep secret all knowledge which may come to me of the person for whom any elector has voted.

Sworn before me this day of 19 . } *A. B.*, *C. D.*, J. P., or as the case may be.

NOTE.—*When the voting is on a by-law or question the Form is to be adapted to that case.*

3 Edw. VII. c. 19, *Sched.* I.
3 & 4 Geo. V. c. 43, Form 14.

The provision of the section requiring oath of secrecy, is directory only, and the failure of the officers to comply with its requirements does not invalidate the election: See Re Sinclair and Owen Sound, 1906, 8 O. W. R. 460; 12 O. L. R. 488; Re Wynn and Weston, 10 O. W. R. 1115; 15 O. L. R., followed: Re Brandon Election, 1911, 17 W. L. R. 207; 20 M. R. 705; see also declaration, Form 17, s. 242 (4).

135.—(1) If a returning officer, deputy returning officer or poll clerk becomes aware, or has reason to believe or suspect, that any provision of the law as to secrecy has been violated, he shall forthwith communicate the particulars to the Crown Attorney.

(2) The Crown Attorney, on receiving such information from any person, shall forthwith enquire into the matter and, if proper, prosecute the offender. 8 Edw. VII. c. 3, c. 165; 3 & 4 Geo. V. c. 43, s. 315 (1-2).

136. No person who has voted at an election shall, in any legal proceeding to question the election or return, be required to state how or for whom he has voted. 3 Edw. VII. c. 19, s. 200; 3 & 4 Geo. V. c. 43, s. 136.

Asking Voter How He Voted.—See s. 166 Ont. El. Act, R. S. O. 1914, c. 8, also Dom. El. Act.

In the Haldimand Election Case, 1888, 1 E. C. at 547, the C. J. said: "Nothing could be made of this charge without admitting evidence of votes to show how they voted. This, I hold, cannot be done. To do so would in my opinion be a direct violation of the Act which requires secrecy . . . It is no answer . . . to say that secrecy is imposed for the benefit of the voter, and that he can waive it, for I hold secrecy to be imposed as an absolute rule of public policy, and that it cannot be waived." The late

C. J. Moss in the Lincoln Election Petn., 1879, 4 A. R. 206, at 210 said: "We think that this section in furtherance of the objects of the Act be construed as absolutely exclusive of such testimony."

See also R. ex rel. Ivison v. Irwin, 1902, 4 O. L. R. 198, and *ante*, p. 175, and Smith v. Baskerville, 1914, 24 M. R. 349 C. A., and cases there cited.

General.

137. Every returning officer, deputy returning officer, or other person whose duty it is to deliver poll books or who has the custody of a voters' list or poll book, who wilfully makes any alteration or insertion in or wilfully omits anything from or in any way wilfully falsifies such voters' list or poll book, shall incur a penalty of $2,000, and shall also be liable to imprisonment for any term not exceeding one year. 8 Edw. VII. c. 3, s. 191, *amended;* 3 & 4 Geo. V. c. 43, s. 137.

138. Every person who—

(*a*) Fraudulently alters, defaces or destroys a ballot paper or the initials of the deputy returning officer thereon; or

(*b*) Without due authority supplies a ballot paper to any person; or

(*c*) Fraudulently places in a ballot box a paper other than the ballot paper which he is authorized by law to place therein; or

(*d*) Fraudulently delivers to the deputy returning officer to be placed in the ballot box any other paper than the ballot paper given to him by the deputy returning officer; or

(*e*) Fraudulently takes a ballot paper out of the polling place; or

(*f*) Without authority destroys, takes, opens, or otherwise interferes with a ballot box or book or packet of ballot papers or a ballot paper or ballot in use or used for the purposes of an election; or

(*g*) Applies for a ballot paper in the name of another person whether the name be that of a person living or dead, or of a fictitious person, or having voted applies at the same election for a ballot paper in his own name or votes oftener than he is entitled to; or

(*h*) Being a deputy returning officer, contravenes section 124, or fraudulently puts his initials on the back of any paper purporting to be or capable of being used as a ballot paper at an election; or

(*i*) With fraudulent intent, prints any ballot paper or what purports to be or is capable of being used as a ballot paper at an election; or

(*j*) Being employed to print the ballot papers for an election, with fraudulent intent prints more ballot papers than he is authorized to print; or

(*k*) Attempts to commit or aids, abets, counsels or procures the commission of any offence mentioned in this section;

if a returning officer, deputy returning officer or other officer engaged in the election, shall be liable to imprisonment for any term not exceeding two years, and, in the case of any other person, to imprisonment for any term not exceeding six months. 8 Edw. VII. c. 3, ss. 174 (1) and 192, *amended;* 3 & 4 Geo. V. c. 43, s. 138.

Indictment for election offences.—Where a provincial legislature makes an act illegal and prescribes a penalty and a mode of procedure for exacting it, the procedure so prescribed must be followed, and indictment will not lie.

If there is no penalty or mode of punishment, the case comes within s. 164 of the Criminal Code: R. v. Meehan, 1902, 3 O. L. R. at 572. where a mandamus was granted to compel a police magistrate to consider and deal with an application for an information where the accused was charged with voting in more than one ward at a municipal election, contrary to 1 Edw. VII. c. 26, s. 9 (o).

Where a punishment is provided, but in a different section or subsection from that which creates the offence, but no procedure is provided for enforcing the punishment prescribed for a violation of the provision in question, an indictment will lie at common law, and this procedure has not been superseded or repealed by the Criminal Code. Section 164 of the Code does not go so far as the common law, which will be found in Haw-

kin's Pleas of the Crown, Bk. 2, c. 25, s. 4: R. v. Buchanan, 8 Q. B. 883; R. v. Tyler and International, 1891, 2 Q. B. 588, at p. 592; R. v. Hall, 1891, 1 Q. B. 747; Russell on Crimes, 7th ed., pp. 11, 12; Archbold's Criminal Pleadings, 24th ed., at p. 3; Craies' Statute Law, 2nd ed. p. 224; see judgment of Maclaren, J.A., R. v. Durocher, 1913, 28 O. L. R. at 504, where the Court refused to prohibit a magistrate from proceeding on an information for having fraudulently put in a ballot box a ballot paper purporting to have been used by a person who did not vote at the election, contrary to 193 (1) *b* of the Cons. Mun. Act of 1903. Meredith, C.J.O., based his concurrence on the additional ground that the act for which the appellant was prosecuted was prohibited by s.-s. (1) of s. 193, and the penalty, the provision for which it was contended excluded the remedy by indictment, was prescribed by a later and substantive clause, s.-s. (3).

139.—(1) Every person who wilfully and maliciously destroys, injures or obliterates, or causes to be destroyed, injured or obliterated, a warrant for holding an election, a poll book, voters' list, certificate, affidavit, or other document or paper made, prepared or drawn according to or for the purpose of meeting the requirements of this Act or any of them, shall incur a penalty of $2,000, and shall also be liable to imprisonment for any term not exceeding one year.

(2) Every person who aids, abets, counsels or procures the commission of a violation of subsection 1 shall incur the like penalty and be subject to the like imprisonment. 8 Edw. VII. c. 3, s. 193, *amended.*

(3) The pecuniary penalty shall be recoverable by action at the suit of His Majesty, and the imprisonment may be directed by the court in which the action is brought. *New.* 3 & 4 Geo. V. c. 43, s. 139 (1-3).

140.—(1) Every deputy returning officer who wilfully omits to put his initials on the back of a ballot paper in use for the purposes of an election, shall incur a penalty of $10 in respect of every such ballot paper.

(2) A deputy returning officer or poll clerk who refuses or neglects to perform any of the duties imposed upon him by sections 115 to 123 shall, for each refusal or neglect, incur a penalty of $200. 8 Edw. VII. c. 3, s. 194, *amended.* 3 & 4 Geo. V. c. 43, s. 140.

141. Every deputy returning officer or poll clerk who wilfully miscounts the ballots or otherwise makes up a

false statement of the poll shall incur a penalty of $200. 8 Edw. VII. c. 3, s. 195; 3 & 4 Geo. V. c. 43, s. 141.

142. Every person who acts in contravention of sections 131 to 133 shall be liable to imprisonment for any term not exceeding six months. 8 Edw. VII. c. 3, s. 198, *amended.*

143. Every officer engaged in the election who is guilty of a wilful act or omission in contravention of this Act shall in addition to any other penalty or liability to which he may be subject forfeit to any person who may be aggrieved thereby the sum of $400. 3 Edw. VII. c. 19, s. 194, *amended;* 3 & 4 Geo. V. c. 43, s. 143.

Wilful.—May mean intentional, Wilson v. Manes, 1897, 28 O. R. 419; or perverse or malicious, Johnson v. Allen, 1895, 26 O. R. 550; or that a man knows what he is doing, or that he intends what he is doing, or that he is a free agent. In re Young & Harston's Contract, 1885, 31 Ch. D. 168; Lewis v. G. Western Rw., 1877, 3 Q. B. D. 195.
All discussed in Smith v. Carey, 1903, 5 O. L. R. at p. 207.

Miscellaneous Provisions.

144. A candidate may undertake the duties which his agent might undertake, or he may assist his agent in the performance of such duties, and may be present at any place at which his agent is authorized to be present; but no candidate shall be present at the marking of a ballot paper under section 109. 3 Edw. VII. c. 19, s. 201, *amended.* 3 & 4 Geo. V. c. 43, s. 144.

145. Except where otherwise provided any oath required to be taken in connection with an election may be taken before the clerk of the municipality, a returning officer or a deputy returning officer, as well as before any other person by whom under the Interpretation Act an oath may be administered. *New.* See 3 Edw. VII. c. 19, s. 199, *last part.*

The Interpretation Act, R. S. O. 1914, c. 1, s. 23, provides as follows:

(1) Where by an Act of this legislature or by a rule of the assembly, or by an order, regulation or commission made or issued by the Lieutenant-Governor in Council under a law authorizing him to require the taking of evidence under oath, an oath is authorized or dir-

ected to be made, taken or administered, the oath may be administered and a certificate of its having been made, taken or administered may be given by anyone named in the Act, rule, order, regulation or commission, or by a Judge of any Court, a Notary Public, Justice of the Peace, or Commissioner for taking affidavits, having authority or jurisdiction in the place where the oath is administered.

(2) Any officer authorized to administer an oath or take an affidavit may take any declaration authorized or required by an Act of this legislature.

(3) Every Justice of the Peace having authority in Ontario shall have the same powers to take and receive affidavits and affirmations as a Commissioner appointed under the Commissioners for taking affidavits Act.

(4) In every case where an oath, affirmation or declaration is directed to be made before any persons or officer, such persons or officer shall have full power and authority to administer the same and to certify to its having been made.

146.—(1) The clerk shall retain in his possession for one month all the ballot papers, and, unless otherwise directed by an order of a Judge or officer having jurisdiction to enquire as to the validity of the election, shall then destroy them in the presence of two witnesses, who shall make a declaration that they witnessed the destruction of them.

(2) The declaration shall be made before the head of the municipality, and filed in the office of the clerk. 3 Edw. VII. c. 19, s. 188, *amended.*

147.—(1) No person shall be allowed to inspect any ballot paper in the custody of the clerk except under the order of a Judge or an officer having jurisdiction to inquire as to the validity of the election.

(2) The order may be made on the Judge or officer being satisfied by affidavit or other evidence that the inspection is required for the purpose of maintaining a prosecution for an offence in relation to ballot papers, or of taking proceedings for contesting the election or return.

(3) The order may be made subject to such conditions as the Judge or officer may deem proper. 3 Edw. VII. c. 19, s. 189 (1-2), *amended.*

148. Where an order is made for the production by the clerk of any document in his possession relating to an

election, the production of it by him in such manner as may be directed by the order shall be evidence that the document relates to the election; and any indorsement appearing on any packet of ballot papers so produced shall be evidence that the contents are what they are stated to be by the indorsement. 3 Edw. VII. c. 19, s. 192, *amended.*

149. Where in this Part expressions are used, requiring or authorizing any act or thing to be done, or implying that any act or thing is to be done in the presence of the agents of the candidates, they shall be deemed to refer to the presence of such agents of the candidates as are authorized to attend, and as have in fact attended, at the time and place where such act or thing is being done; and the non-attendance of an agent at such time and place, if it is otherwise duly done, shall not invalidate the act or thing done. 3 Edw. VII. c. 19, s. 202. *amended.*

Effect of Amendment Made to Old s. 204 by s. 150.—In re Sharp and Holland Landing, 1915, 24 O. L. R. 186, Hodgins, J.A., discussed the effect of the amendment made to s. 204 as follows:

> "The practical difference in the two enactments is seen in three directions. The former statutory provision applied to the taking of the poll; the present one also includes 'anything preliminary thereto.' Then, the words 'by reason of any irregularity' are replaced by the expression 'by reason of any mistake or irregularity in the proceedings at or in relation to' the vote.
>
> "The important change, however, is this. Under the previous clause the validity of the by-law was saved if it appeared to the tribunal having cognizance of the question that 'such non-compliance, mistake or irregularity did not affect the result.' This meant affirmative proof, or conviction from the proved circumstances, that the result was not affected. All the Judges who decided Re Hickey and Town of Orillia, 1908, 17 O. L. R. 317 (except Mulock, C.J., who expressed no opinion on the point), dwell upon the fact that the onus, under the provisions of the statute, was upon the respondent to prove two things—compliance with the principles laid down in the Act, and that the irregularities did not affect the result.
>
> "Under the present section it is sufficient to uphold the by-law that there is no proof that the result was affected by the non-compliance, mistake or irregularity. If the applicant does not prove it and it does not otherwise appear, then, provided the principles of the Act governed the conduct of the vote, the by-law stands. In other words, the onus upon those supporting the by-law is confined to shewing compliance with the principles laid down in the Act, while upon the applicant is laid the burden of shewing that the result was affected by the proved irregularities.
>
> "This seems to me to render the task of upsetting a by-law a formidable one. Formerly, proof of irregularities unsettled the basis on which the vote rested, and the Court had to be satisfied in some way that the result was not affected thereby. Now, when irregularities are proved, the Court is not concerned with their effect, subject always to compliance with the principles laid down in the Act, unless and

until it is made to appear that those irregularities did in fact affect the result. In my view, the legislature has at last so provided that the Courts will not in the future have to busy themselves annually in considering the mass of infinitesimal and unimportant suggested improprieties relied on to defeat every local option vote."

He then proceeded to discuss the facts as follows:

"There are 7 electors in all whose right to vote is questioned as being disqualified in point of residence or length of residence and one . . . because his description does not appear in the voters' list. The vote stood 63 for and 39 against, so that 5 votes have to be struck off those in favour of the by-law to destroy the majority. But, if I come to the conclusion that these 7 votes are bad, where does that leave the matter? I am unable to inquire how these men voted; and the reason underlying the rule of subtraction hitherto followed has, in consequence of the amendment I have mentioned, disappeared. That rule was to deduct them from the votes in favour of the by-law, and the reason was that it could not be made to appear to the Court that the result would not be affected: Re Leahy and Village of Lakefield, 1906, 8 O. W. R. 743; Re Gerow and Township of Pickering, 1906, 12 O. L. R. 545; Re Sinclair and Town of Owen Sound, 1906, 12 O. L. R. 488; Re Cleary and Township of Nepean, 1907, 14 O. L. R. 392; Re Ellis and Town of Renfrew, 1910, 21 O. L. R. 74.

"Now, it must actually appear that the result was in fact affected; and, if the contentions now made by the applicant are resolved in his favour, there still remains the question, why should they be deducted from those in favour of the by-law?

"While the statute remained as it was, a reason existed, namely, the possibility of the majority in favour being made up of illegal votes. Now, while that possibility still exists, it remains a possibility only, and it cannot be made to appear that the result was really affected. I do not say that, if a class of voters is disfranchised or wrongfully enfranchised, the vote could be said to be conducted according to the principles laid down in the Act: In re Pounder and Village of Winchester, 1892, 19 A. R. 684. But, if only isolated votes here or there, of a class of voters properly entitled to vote, are tendered by persons on the voters' list, and they are received as prescribed by the Act, then, although the voters are in fact unqualified, and their votes are subject, therefore, to scrutiny and rejection, I cannot think that the whole vote must be set aside as for a departure from the scheme laid down in the Act.

"For this reason, I propose to examine, following the precedent set by Mr. Justice Riddell in Re Ellis and Town of Renfrew, 21 O. L. R. 74, only three votes, leaving the others to depend on the view I have expressed—that, if held to be invalid, they cannot be said affirmatively to have affected the result of the vote, and that the attacked votes, in number and circumstances, are not sufficient to satisfy me that the principles laid down in the Act have been departed from.

150. No election shall be or be declared to be invalid—

(*a*) For non-compliance with the provisions of this Act as to the taking of the poll or anything preliminary thereto, or as to the counting of the votes; or

(*b*) By reason of mistake in the use of the prescribed forms; or

(*c*) By reason of any mistake or irregularity in the proceedings at or in relation to the election;

If it appears to the tribunal by which the validity of the election or any proceeding in relation to it is to be determined, that the election was conducted in accordance with the principles laid down in this Act, and it does not appear that such non-compliance, mistake or irregularity affected the result of the election. 3 Edw. VII. c. 19, s. 204, *amended* 3 & 4 Geo. V. c. 43, s. 150.

The Remedial Section.—The original source of s. 150 is s. 13 of the Ballot Act of 1872, 35 and 36 V. c. 33 (Imp.), which is as follows:—

> "No election shall be declared invalid by reason of a non-compliance with the rules contained in the First Schedule to this Act, or any mistake in the use of the forms in the Second Schedule to this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election."

Section 13 with verbal changes was incorporated in s. 38 of 38 V. c. 28 (Ont.), an Act to provide for voting by ballot at municipal elections, which was as follows:—

> "38. No election shall be declared invalid by reason of a non-compliance with the rules contained in this Act, as to the taking of the poll or the counting of the votes, or by reason of any mistake in the use of the forms contained in the schedule to this Act, if it appear to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance or mistake did not affect the result of the election."

The last mentioned Act provided that the elections of 1875 should be by the old method, and the next year by 39 V. c. 5, s. 16, it was enacted as follows:—

> "No election shall be declared void by reason of any irregularity if it appear to one tribunal having cognizance of the question that the election was conducted in substantial accordance with the intention of the law, and that the non-compliance or mistakes did not affect the result of the election."

Sections 38 and 16 were combined and appeared in R. S. O. 1877, c. 174, s. 169, as follows:—

> "169. No election shall be declared invalid by reason of a non-compliance with the provisions of this Act as to the taking of the poll or the counting of the votes, or by reason of any mistake in the use of the forms contained in the schedules to this Act, or by reason of any irregularity, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance, mistake or irregularity did not affect the result of the election."

The section continued in this form till by 3 and 4 Geo. V. c. 43, s. 150, it was altered to its present form, being successively known as: 46 V. c. 18, s. 174; R. S. O. 1887, c. 184, s. 175; 55 V. c. 42, s. 175; R. S. O. 1897, c. 223, s. 204; 3 Edw. VII. c. 19, s. 204.

The Principles Laid Down in the Act.—This expression has been the subject of frequent comment. Anglin, J., in Re Hickey and Orillia, 1908, 17 O. L. R. 328:

"The cardinal principles underlying the various provisions of the Act governing municipal elections appear to me to be that the electors shall have a fair opportunity for polling their votes and that the secrecy of the ballot shall be preserved. If a reasonable opportunity for voting has not been afforded, or if there has been a substantial disregard of the regulations prescribed to ensure the secrecy of the ballot, the election cannot, in my opinion, be said to have been conducted in accordance with the principles of the Act, and it is difficult to perceive how the respondents could satisfy the Court that the irregularity did not affect the result of the election."

In the same case Riddell, J., took "principles laid down in this Act" to mean "the principles on which an election under the Act should be conducted" and he considered secrecy a great desideratum under the Act. In the same case it was pointed out that the Act was framed with great care to provide for compulsory secrecy and the amplest opportunity for each voter to express his judgment.

Another principle underlying the Act is that there shall be a fair, free and uninfluenced expression of the will of the electors. Part V. aims at securing this.

Election cases in which the remedial section has been applied:—

Election Upheld.—In R. ex rel. Watterworth v. Buchanan (1897), 28 O. R. 352, the Deputy Returning Officer was absent from the poll several times. During one of these absences an equal number of votes were polled for each candidate. No voters presented themselves during the other absences. Rose, J., upheld the election, saying:—

"There is no objection of bad faith. If the fact of absence for a few moments through illness would of itself avoid the election, a fainting fit or other uncontrollable cause might be fatal. This could not be so where no harm has been done.

"Permitting the returning officer to act during the second and third absences was a pure mistake, and a not unnatural one. The deputy might well think that his place might be supplied by the returning officer himself. The name 'deputy' is probably misleading."

Election Set Aside.—In R. ex rel. St. Louis v. Reaume et al. (1895), 26 O. R. 460, the successful candidate participated in a transaction by which some eighty names were illegally added to the list which was used. Only thirty-one of those whose names were added voted, and while the majority of the successful candidate for reeve was sixty-six, Boyd, C., in setting aside the election of the guilty candidate for reeve and upholding the election of the councillors, said:—

"True it is, that if you judge by the marks in the polling books, only some thirty-one of those whose names were illegally added cast votes, yet I deprecate that arithmetical test as being the standard by which to judge s. 175 of the Consolidated Municipal Act, 1892, 55 V. c. 42 (O.). Having made such changes contrary to law, it became the duty of the elected candidate, who was privy to the changes, to demonstrate that the result of the election was not affected thereby, if even that peradventure would suffice to relieve from the consequence of this unwarrantable proceeding. But upon the present evidence no one can say how these names being added operated on the voting constituency. Even the returning officer, when questioned, cannot negative the injurious results. This, at p. 33: 'Q. This allowing people to vote must have had a material effect upon this election? A. Well, as far as I can see, perhaps it must have, but I don't think it would have much. Q.—You can't tell how much it would have? A.—No.'

"It may be said also that the election was not conducted in accordance with the principles of the Act, because the whole system is based on the finality of the voters' list as settled and certified by the Judge; but all this was disregarded by the prior addition of names from other sources and by the subsequent issuance of certificates to persons assumed to be entitled to vote, on which they were allowed to vote, though their names were not on the list. The Judge below

has adverted to this as a grave irregularity, which has before to some extent been practised in this municipality, but which it is hoped will now not again be heard of. The other candidates for the council were innocent as regards the change made in the voters' lists, and their majorities ran from seventy-five upwards over the next candidate, and for this reason I agree with the result of trial before the County Judge, who did not disturb them in their seats, but I cannot agree that they should have costs against this relator, who has done right in bringing the violation of the law before the Court."

Election Upheld.—In re Ottawa Municipal Election, 1895, 26 O. R. 106, a mandamus to command a County Judge to proceed with a recount was refused. The Judge had stopped because on opening the ballot box it appeared that the ballots were not put up in separate, sealed and authenticated packages. Boyd, C., said: "The applicants cannot invoke the curing clause (s. 175), which has reference to provisions of the Act other than those giving the recount. . . . The provision as to recount . . . is merely meant to give a limited supervision to the County Judge, but not constituting him a tribunal having cognizance of the election as a whole."

Election Upheld.—In R. ex rel. Thornton v. Dewar (1895), 26 O. R. 512, Rose, J., held that the unbending and refolding of ballot papers in good faith by a Deputy Returning Officer so as to exhibit his initial was an irregularity which in that case did not affect the result of the election.

In re Brandon Election (1911), 20 M. R. 705, Cumberland, Co. Ct. Judge, applied the remedial section in the Manitoba Act, which is to the same effect as c. 204, *supra*, and upheld the election, there having been no wilful violation of the Act notwithstanding numerous irregularities.

The principal irregularity was the failure of the clerk to post up notice of the election. The Court refused to follow the by-law cases in which notice clauses have been held imperative, such as: Hatch v. Oakland, 19 M. R. 692; Re Pickett and Wainfleet, 28 O. R. 464; Mace and Frontenac, 42 U. C. R. 70; Re Salter and Beckwith, 4 O. L. R. 51; Re Henderson and Mono, 9 O. W. R. 599; Brophy and Gananoque, 26 U. C. C. P. 290; Re Johnson and Lambton, 40 U. C. R. 297, and Re McCartee and Mulmur, 32 O. R. 69, pointing out that the giving of a notice in connection with the taking of a vote on a by-law is generally a condition precedent affecting the very jurisdiction of the council to take the vote, while the election in question was the ordinary annual election, the purpose of which is known to everybody and the date of holding which is fixed by Statute, and he followed a Saskatchewan case to the same effect: Re Jones and Stribell (1909), 10 W. L. R. 518.

Other irregularities were that the clerk failed to furnish to deputy returning officers the names of the candidates, did not furnish copies of the sections dealing with corrupt practices, nor post the same in the post office, directions for the guidance of voters were not furnished to deputies, and were not posted up. The oath of secrecy was not taken by many deputies, poll clerks and agents. Persons were permitted to be present in some polling places and were even permitted to act as deputies, as in R. ex rel. Watterworth v. Buchanan, *supra*. Declarations were not taken from some illiterate voters and their ballots were marked in the presence of agents. After discussing these the learned Judge, said:—

"Taking the election as a whole, while the formalities of the statute have in many cases been omitted or departed from, the cardinal principle of election by ballot—the securing of a fair, free and secret expression of the will of the voters—has been, in my opinion, adhered to in all substantial respects . . .

"I am satisfied on the evidence that the result of the election as it has been declared was the result desired by the majority of the voters, and that, if the provisions of the statute had been rigorously adhered to, the result would have been the same . . .

"I do not for a moment wish to minimize the importance of complying with the provisions of the statute as closely as possible.

While, in my opinion, the election officers here should be acquitted of any intentional misconduct and, while the complicated character of the particular election and the amount of work that it entailed, and the unsuitable premises where some of the polls were held, offer a reasonable explanation of a good many of the matters complained of, some of them were inexcusable."

Election Upheld.—In R. ex rel. Tolmie v. Campbell, 1902, 4 O. L. R. 25, at an election for reeve, the successful candidate was declared elected by a majority of six. Many electors voted for reeve at more than one polling place. Britton, J., in holding the election good, said:—

"It is now impossible to say that the respondent has not a clear majority of the legal votes of the township.

"I accept as the general principle to govern Courts, that an election should be set aside if a Judge, without being able to say that a majority has been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate of their choice: Woodward v. Sarsons (1875), L. R. 10 C. P. 733, at p. 744.

"There is not, in my opinion, in this case reasonable ground for believing that the result would be different if all illegal votes could be struck off."

Election Set Aside.—In R. ex rel. O'Shea v. Letherby, 1908, 16 O. L. R. 581, the mayor and councillors failed to file declarations of qualification. The Master held that the irregularity could not be cured by s. 204, following an unreported opinion of Meredith, C.J., in overruling the Master's decision in R. ex rel. Milligan v. Harrison, 1908, 11 O. W. R. 554

Election Set Aside.—In R. ex rel. Ivison v. Irwin, 1902, 4 O. L. R. 192, a large number of ballots were tampered with by putting additional marks on the papers after they had been placed in the box in consequence of a violation of duty by the Deputy Returning Officer. MacMahon, J., set aside the election on the ground that it was impossible to say that the irregularities did not affect the result.

Election Upheld.—In R. ex rel. Warr v. Walsh (1903), 5 O. L. R. 268, the relator sought to have the election of a mayor set aside on the ground that the nomination took place at 10 a.m., at the same time and place as the nominations of the councillors, and not at noon. Meredith, C.J.C.P., held that the then Act enabled the nominations for mayor to be held at 10 a.m., and upheld the election, setting aside the order of the Master, who held that the nominations for mayor did not take place at the proper time, and that the remedial section (then 204), could not be applied. Meredith, C.J., said that if he had found the nomination irregular there was much to be said in favour of the view that the Master would have been warranted in placing a more liberal construction on the section.

Election Upheld.—In R. ex rel. Armstrong v. Garratt, 1907, 14 O. L. R. 397, the making of a declaration in November by a prospective candidate who expected to be away at election time, which was later filed at the proper time by a friend, was held at worst to be an irregularity which did not affect the result of the election.

Election Upheld.—In Rex ex rel. Martin v. Watson (1906), 11 O. L. R. 336, the declaration filed by the defendant before election was untrue in fact; the defendant was not in fact qualified upon the property specified in his declaration; but the municipal clerk placed the defendant's name on the ballot papers, and he was elected. He had other property sufficient to qualify him. A motion made to unseat him, on the ground that his interest in the property specified in his declaration was insufficient to qualify him, was dismissed by a County Court Judge, and on appeal, Teetzel, J., said:—

"The first declaration being on its face sufficient in form, and having in view its limited purpose, and the respondent being in fact duly

qualified for the election, and having been elected, I think it is too late, after the election, to contend that the misstatement regarding the qualifiying property mentioned in the first declaration is a ground for setting aside the election, which is otherwise free from objection."

Election Upheld. — In Rex ex rel. Cavers v. Kelly (1906), 7 O. W. R. 280, 600, the declarations of the successful candidate under s. 129 (3a), were made before a Commissioner in the High Court of Justice, and not before one of the persons named in s. 315. The relator contended that such declarations were mere nullities. The Master in Chambers upholding the election said: "Section 204 is to be liberally applied. . ."

Election Upheld.—In R. ex rel. Armour v. Peddie (1907), 14 O. L. R. 339, the clerk declared the result of the election at an unauthorized place. The Master in applying s. 204, said:—

> "Unless s. 204 can be applied here, it would be of little practical use. No doubt it was an irregularity to have the declaration at any other place than the 'town hall.' As I have said before, those holding municipal offices and busying themselves in these elections must be presumed to know the statutory requirements as to those matters; and it is their plain duty to see that these are carefully and literally complied with."

Election Set Aside.—In R. ex rel. Bawkes v. Letherby (1908), 17 O. L. R. 304, a new election became necessary and the clerk did not issue a warrant as required by then s. 212 (now s. 156). Meredith, C.J., in setting aside the election said:—

> "It is contended that the curative provisions of s. 204 ought to save the election. I do not think so . . .
>
> "Here the non-compliance was not in the proceedings mentioned in the section or an irregularity only, but was an omission of that which was the very foundation for the holding of the election itself. . . .
>
> "It is unfortunate that this municipality should have been subjected the second time to the inconvenience of holding an election to serve no practical end. No public end is to be served by these proceedings. The only object of them must be to put to trouble those who have been chosen—to put them to trouble and costs—and the only effect of setting aside the election will be to disturb the electors."

Election Set Aside.—In R. ex rel. Black v. Campbell, 1909, 18 O. L. R. 269, the proper list was not used. Anglin, J., in setting aside the election thus dealt with the application of s. 204:—

> "In my opinion, the list used was not the proper list, and the election held it cannot be supported.
>
> "It was argued that the use of the wrong list is merely a non-compliance with the provisions of the Act as to the taking of the poll, or an irregularity which should be held to be cured by the provisions of s. 204. In my opinion, this case does not come within s. 204. The foundation of a contested election under the Municipal Act is the voters' list. As provided by s. 165, his right to vote depends upon the elector's name being entered upon the voters' list. If an election is held upon a list which is not a voters' list, or is not the proper voters' list to be used, it is not, in my opinion, an election conducted in accordance with the principles laid down in the Act.
>
> "But if s. 204 did apply, it would be, I think, impossible to say that 'it appears' to the Court 'that such non-compliance, mistake or irregularity did not affect the result of the election.' It was argued that the applicant must shew that the irregularity did affect the result of the election. This would involve treating the statute as if it read, 'if it does not appear . . . that such non-compliance, mistake or irregularity did affect the result of the election.' Although

some of the cases appear to lend colour to this view of the provisions of s. 204, I can find no justification for so altering its plain language. The burden is upon the applicant to establish the non-compliance, mistake or irregularity; but when that is shewn the burden rests upon the person upholding the election to make 'it appear . . . that such non-compliance, mistake or irregularity did not affect the result of the election:' Re Hickey v. Town of Orillia (1908), 17 O. L. R. 317, 330-1."

Cases on Statutes Which do not Contain a Remedial Section.—Ex p. Robinson (1876), 16 N. B. R. 389; People ex rel. Conliss v. North (1878), 72 N. Y. 124; People ex rel. Woods v. Crissey (1883), 91 N. Y. 617.

Section 13 and the Ontario sections modelled on it have been said "merely to echo the common law." See Re Cartwright and Napanee, 1905, 11 O. L. R. 71.

It has been said that this section (13), was inserted *ex abundanti cautela*, and that the same law would be applied if the section had not existed: Woodward v. Sarsons, L. R. 10 C. P., at p. 751.

In R. ex rel. Hogan v. Jollivette (1912), 20 W. L. R. 364, Alta., the ordinance had no remedial section and required at least six days' notice of a special election, and notice had been given on the 16th for the 21st. Beck, J., after referring to the then Ontario s. 204, said:—

"There is no such provision in our Ordinance . . .

"I have considered a large number of cases with the result that my conclusion is this. Statutory provisions with respect to time are very often merely directory and not mandatory; for instance, a provision that an election shall be held within a certain time, where, consequently, it would be unreasonable that the office should not be filled, though the time limited has been allowed to pass. Again, in the case of a general election, where the day of nomination and the day of polling are fixed by statute, irregularities in or in respect of the notices directed by the statute may be somewhat readily disregarded. But in the case of a special or casual election, where the date for nomination at least is necessarily brought to the knowledge of the public only by the public notice directed by the statute, it seems to me that the statutory provision, so far at least as relates to the length of such notice, must be treated as mandatory, though irregularities in other respects may be treated as merely directory: first, because that notice is the foundation of the election; and, secondly, because in such a case, it would be scarcely possible to say that the result might not have been affected by a notice of less duration than that provided by the statute. See 15 Cyc. *et seq.*; Am. & Eng. Encyc. of Law, 2nd ed., Vol. 10, pp. 624, *et seq.* I think, therefore, the special election of the 21st December, whereat the respondent was elected, was invalid."

In R. ex rel. Gunder Bjorge v. Zellickson (1910), 13 W. L. R. 433, an election of a councillor under the Local Improvement Act, Sask., which does not contain a remedial section, was set aside as not being an election under the Act. The Court applying the principles laid down in Woodward v. Sarsons, *supra*.

APPLICATION OF THE REMEDIAL SECTION TO VOTING ON BY-LAWS.

By-law Upheld.—In re Pickett and Wainfleet, 1897, 28 O. R. 464; Wynn v. Weston, 1907, 15 O. L. R. 1, and Re Ellis v. Renfrew, 1910, 21 O. L. R. 74, the clerk acted also as a Deputy Returning Officer, and this was held to be only an irregularity, although indavisable and improper.

By-law Upheld.—In re Young and Binbrook, 1899, 31 O. R. 108, the names of eighty persons entitled to vote upon the by-law were omitted by the clerk from the lists furnished the officers conducting the voting, but this was done under a misapprehension. Street, J., in upholding the by-law, said:—

"I think under those circumstances we are bound to assume that all persons left off the list would have voted against the by-law, but we are not bound to go beyond this assumption or to assume that the error had any effect upon the minds of the persons upon the list who voted or abstained from voting . . . Had it been shewn that the result of the error had in any way affected the votes which were cast or that persons who would otherwise have voted, had abstained from doing so on account of the error, or that there was any other good ground for believing that the result might probably have been different, had the lists been properly prepared, we might have given effect to the objection raised. In the absence, however, of any evidence of this character, I do not think we should quash the by-law upon vague suggestions that the result may have been affected."

By-law Quashed.—In re Salter and Beckwith, 1902, 4 O. L. R. 51, D. C., the failure to furnish directions to voters according to schedule "L" (now Form 22), was held fatal. Britton, J., in refusing to apply s. 204, said:—

"I cannot say this omission did not affect the result. It perhaps did not. I cannot say, and ought not to be called upon to say, in the absence of any record by the council of what they did or intended to do in regard to conducting the voting on this by-law in accordance with the principles laid down in the Act, how the result was affected."

By-law Upheld.—In re Dillon and Cardinal, 1905, 10 O. L. R. 371, D.C., notwithstanding that no persons were appointed to attend on behalf of those interested, that persons were allowed to vote who were not entitled to, that no screened compartments were provided, that other persons were present in compartments and in the polling place, and were allowed to see how voters marked their ballots, and that, the Returning Officer failed to perform various duties at the close of the poll, the by-law was upheld by an application of s. 204, on the ground that the result of the voting was not affected by the irregularities.

By-law Upheld.—In Cartwright v. Napanee, 1905, 11 O. L. R. 71, Meredith, J., refused to apply s. 204 to cure insufficient publication, saying:—

"The provisions of s. 204 of the Act made generally applicable to voting on by-laws by s. 351, and which seem to but echo the common law, see Woodward v. Sarsons, 1875, L. R. 10 C. P. 733, can hardly cover a substantial omission of a positive requirement of s. 569 (5), the publication for four times only in circumstances which required five, can, again, speaking generally, hardly be deemed unsubstantial—one of the trifles about which the law cares not."

[Notwithstanding this substantial omission the Court refused to quash the by-law, and allowed it to become valid under the operation of the section; as to registration for full discussion: see under ss. 282-286.]

By-law Upheld.—In re Sinclair and Owen Sound, 1906, 12 O. L. R. 488, D.C., affirmed 13 O. L. R. 447 C. A., and 39 S. C. R. 236, the D. C. set aside the judgment of Maybee, J., and upheld a by-law notwithstanding numerous irregularities, namely: (a) The clerk did not prepare and certify the voters' list, furnished to the several deputies; (b) no certified copy of the defaulters' list was furnished; (c) the clerk did not give certificates to the deputies, enabling them to vote; (d) the deputies, poll clerks and agents did not take the declarations of secrecy; (e) the deputies and poll clerks did not record the names of voters in the poll book; (f) the deputies did not certify as to the number of persons who voted at their respective polls; (g) the deputies did not make and subscribe the declaration as to the result of the poll; (h) persons other than voters were allowed to enter polling compartments and to interfere with voters when voting; (i) the clerk did not deliver to the deputies directions to voters; (j) a large number of persons voted who were not

legally entitled to vote. Mulock, C.J., in giving the judgment of the D. C., said:—

"The formalities said to have not been complied with are not such as are required by the statute in express words to be observed as a condition precedent to the right to pass the by-law, but come within the curative provisions of s. 204 of the Municipal Act.

"In the present case there is nothing to shew, or even to suggest any intentional violation of the directions of the Act, nor is there any reason for believing that any disregard of the statutable formality called for by the Act affected the result. There is no evidence to shew that a single elector was prevented from recording his vote, or that the return was not made in strict accordance with the voting.

"Every elector appears to have had the free and fair opportunity of voting for or against the by-law, and out of the total number of two thousand votes cast there was a majority of four hundred and seventy-six in its favour. It, therefore, seems to me that the election was conducted in accordance with the principles laid down in the Act, and that the curative provision of s. 204 may be properly applied in respect of the matters referred to in the objections lettered: (a), (b), (c), (d), (e), (f), (g), (h), (i)."

As to objection (j), it was pointed out that even after deducting the alleged illegal votes from the majority there would still remain a majority and this objection was also overruled.

By-Law Quashed.—In re Rickey v. Marlborough, 1907, 14 O. L. R. 587, D. C., the Court following Re Mace and Frontenac, 1877, 42 U. C. R. 70, and Cartwright v. Napanee, 1905, 11 O. L. R. 69, held that non-compliance with then s. 388 (now s. 263), after publication, could not be treated as a mere irregularity, which might be cured under s. 204, and further held that this view was not inconsistent with Re Robinson and Beamsville, 8 O. W. R. 689, 9 O. W. R. 273. See also Re Pickett and Wainfleet, 1897, 20 O. R. 464; Re Begg and Dunwich, 1910, 21 O. L. R. 94, in which statutory directions as to publications were held imperative. In re Henderson and Mono, 1907, 9 O. W. R. 599; also Re Bell and Elma, 1906, 13 O. L. R. 80, are to the same effect.

By-law Upheld.—In re Wynn and Weston, 1907, 15 O. L. R. 1, failure by election officers to take declarations of secrecy, failure to have voting in one sub-division, and failure by deputies at the close of the poll to certify the number of voters and the presence of unauthorized persons at the counting of the votes were held not to affect the validity of the proceedings.

By-law Upheld.—In re Duncan and Midland, 1907, 16 O. L. R. 132, C. A., a number of voters instead of handing their ballots to the deputy placed them in the ballot box themselves. It was sought by an application of s. 170 (now s. 108), to have these votes disallowed. Riddell, J., and the D. C., said:—

"Had the section stopped with the words 'forfeit his right to vote,' the argument would have had some weight; but the remainder of the section shews that what was being provided against was the voter going away without voting or declining to vote. It never could have been intended that a voter who, upon the direction or with the approval of the Deputy Returning Officer, himself in good faith placed the ballot in the box, instead of handing it to the Deputy Returning Officer, thereby should disenfranchise himself. Section 204 cures this defect."

The failure to supply voters' lists to the deputies was excused, following Re Sinclair and Owen Sound, *supra;* also the fact that the voters' list for one sub-division contained more than three hundred, but not more than four hundred names, irregular appointments of deputies and poll clerks, open voting, voters going in compartments together, and the administration of a worthless form of oath by deputies, were held to be cured by s. 204.

By-law Quashed.—In re Hickey and Orillia, 1908, 17 O. L. R. 317, D. C., Riddell, J., thus described the question before the Court:—

"An election is conducted with polling sub-divisions so large, and with a number of voters so great, that there are—not a single voter alone—but 10, or 15, or 20, or 30 in the polling place at the same time, and in some cases persons other than voters also present; the Deputy Returning Officer so hurried that he must initial ballots in advance; the voter, instead of proceeding forthwith to the compartment, either marking his ballot where he can, on ledge or window sill, on engine or hose reel, and so that many might see if they wished, or obliged to wait until a compartment is empty, and even then in some instances having another come in on him; sometimes ballots left on the counter for the Deputy Returning Officer, who was too busy to receive and attend to them at the time; sometimes ballots, for the same reason, placed in the ballot box by the voter—not to speak of the boys running in and out. All these are irregularities, and the sole question is, are they so grave that the election should be declared void?"

The Court refused to apply s. 204, Riddell, J., saying:—

"The manner in which this election was conducted seems to me to be a violation of the principles upon which an election under the Act should be conducted—that is, I conceive, the meaning of the odd expression 'the principles laid down in this Act.'"

Anglin, J., said:—

"The cardinal principles underlying the various provisions of the Act governing municipal elections appear to me to be that the electors shall have a fair opportunity for polling their votes, and that the secrecy of the ballot shall be preserved. If a reasonable opportunity for voting has not been afforded, or if there has been a substantial disregard of the regulations prescribed to ensure the secrecy of the ballot, the election cannot, in my opinion, be said to have been conducted in accordance with the principles of the Act, and it is difficult to perceive how the respondent could satisfy the Court that the irregularity did not affect the result of the election."

By-law Upheld.—In re Prangley and Strathroy, 1910, 21 O. L. R. 54, there was open voting in the case of illiterate persons without declarations of inability, there was no agents appointed, and proper entries were not made in the polls. One voter was accompanied into the polling compartment by a person who saw how the ballot was marked. Sutherland, J., sighted with approval the observations of Street, J., in Re Young and Binbrook, and Mulock, C.J., in Re Sinclair and Owen Sound, pointing out that there was no evidence to show intentional violation of the Act, and that the result of the poll was not in any way affected.

By-law Upheld.—In re Schumacher and Chesley, 1910, 21 O. L. R. 522, D. C., s. 204 was applied to save a by-law, notwithstanding that there was open voting by illiterates, that the names of persons on the voters' list were entered in the poll books before the day of polling, and that the head of the municipality did not appoint persons to attend the various polling places. Riddell, J., pointed out that irregularities not affecting the right to vote, as in the case of the illiterates, should not be considered in determining the number of votes for a by-law whatever effect such irregularities may have at another point of view, following Re Ellis and Renfrew, *supra*.

By-law Upheld.—In re Ryan and Alliston, 1910, 21 O. L. R. 582, 22 O. L. R. 200, D. C., a by-law was upheld in which the last list certified by the Judge and transmitted by him as required was used, notwithstanding numerous irregularities in connection with the revision of the list. The applicant claimed that this was an irregularity which could not be cured by s. 204, citing Ex rel. Black v. Campbell, 1909, 18 O. L. R. 269. Boyd, C., thought that the irregularities in the list which

consisted in the improper addition of two names, did not *per se* vitiate the list, and that the error was so trifling as not to affect the result of the election, having regard to the votes cast. Middleton, J., thought that unless and until the act of the Judge had been quashed, or in some way annulled, it was conclusive upon all.

By-law Upheld.—In re Ellis and Renfrew, 1910, 21 O. L. R. 74, Riddell, J., 2 O. W. N. 27, D. C.; 23 O. L. R. 427, all Courts upheld a by-law and applied s. 204. The irregularities were: open voting by illiterates; ballots exposed to the public after the closing of the polls; town clerk acting as deputy in one poll; no declaration of the result by the clerk, or at best an illegal declaration, violation of secrecy in the case of two voters. Garrow, J.A., thus discussed s. 204:—

> "This section had hitherto, in cases where the general intention to follow the statutory provisions is apparent, been, very properly, construed liberally so as to cover all objections not fundamental or in the nature of statutory conditions precedent, or which have not affected the result; the idea, no doubt, being that an honest vote should not be lost because of the ignorance or carelessness of those whom the law has appointed to receive it."

By-law Upheld.—In re Sturmer and Beaverton, 1911, 24 O. L. R. 65, the by-law was upheld notwithstanding open voting by two electors. Failure to record two names in the poll book.

By-law Quashed.—In re Quigley and Bastard, 1911, 24 O. L. R. 622, in two polling places the compartments were not entirely screened in, electors remained in the polling place after voting, more than one voter was allowed in compartments at the same time, people were in positions from which they could observe the mode in which voters marked their ballots. Ballots were taken out of the polling place to voters who were unable to come into the booths and were marked by the voters in their carriages in the street, from five to thirty people, voters and non-voters, were allowed to be present in booths, unauthorized persons were present at the counting of the ballots, illiterate voters had their ballots marked in the presence of many persons, one married lady gave an extended address in the polling booth to a large number of persons there, holding her ballot in her hand, and speaking in favor of the by-law. While the acts complained of were not so flagrant as in the case of Re Hickey and Orillia, 1908, 17 O. L. R. 317, Sutherland, J., held them within the scope of that decision, and also of Re Service and Escott, 1909, 13 O. W. N. 1215, and his decision was upheld by the D. C., Riddell, J., calling attention to the settled rule, that the onus of supporting a by-law under s. 204 is upon those setting up that section, and that they must show that the irregularity did not affect the result of the election.

By-law Upheld.—In re Giles and Almonte, 1910, 21 O. L. R. 362, D. C., the form of ballot paper used read: "For the by-law" and "Against the by-law." The statute provided: "The form . . . shall be . . . for local option—against local option." Another by-law was voted upon at the same election, and it was contended that an imperative provision of the statute had been broken, and that mistake or confusion might have arisen. Britton, J., applied s. 204; Clute, J., applied s. 7 (35) of the Interpretation Act; Middleton, J., reluctantly concurred, expressing doubt as to the application of s. 204.

By-law Quashed.—In re Milne and Thorold, 1911, 25 O. L. R. 420, the ballot paper was: "For the by-law" and "against the by-law," instead of: "For local option" and "against local option." Sutherland, J., in the first instance, and the D. C. on the appeal, treated the case as governed by Re Giles and Almonte, *supra*. The Court of Appeal, however, held that the by-law ought to be quashed. Moss, C.J.O., thus dealt with Re Giles and Almonte:—

> "In that case the Courts seemed to consider that the onus was on the applicant to shew by evidence that the mistake did not mislead or

affect the result of the election. But, where it is shewn that there was a mistake made in the use of the form, or that there was a deviation from the form prescribed, the rule, upon general principles, should be that it lies upon the party seeking to support what was done to make it appear that the departure was of such a nature as not to affect the substance of the voting or to be calculated to mislead, and did not affect the result.

"It happened that in the Giles case there was no evidence one way or the other, and so the Courts were apparently able to see their way to upholding the by-law.

"But the circumstances which appear in this case are such as to render it entirely different from any of the decisions upon which reliance is placed for supporting this by-law.

"The applicant, accepting the view that the onus was upon him, adduced evidence from which it is apparent that voters were misled, and persons who intended to vote were unable intelligently and properly to mark their ballot papers.

"The evidence shews that the form of ballot paper used did lead to confusion and create difficulty in the minds of a number of voters as to the proper manner of recording their votes.

"The Legislature has deemed it proper specially to provide that in the case of voting upon local option by-laws the ballot paper shall be in a form calculated to distinguish it from that to be used in voting upon other by-laws. No doubt, the object of this provision was to prevent just such confusion and difficulty as has been shewn to have occurred in this case.

"In the face of the very positive provision of the statute, and in view of the evidence, it is beyond question that the mistake in adopting such a widely different form to that prescribed was a substantial departure from the directions of the Act, and was calculated to mislead, and did actually mislead."

By-law Quashed.—In Stoddart v. Owen Sound, 1912, 27 O. L. R. 221, an action was brought for a declaration that a by-law had not been submitted to the vote of the electors in the manner provided by law. There were no screened-in compartments, though persons could mark their ballots secretly if they wished to. Many persons were in the polling place, the voting was characterized by "flagrant, callous and wholly inexcusable disregard of the plain provisions of the statute." The irregularities were far more general than in Re Hickey and Orillia, *supra*; Re Quigley and Bastard, *supra*, or Re Service and Escott, 1909, 13 O. W. R. 212. Lennox, J., refused to apply s. 204.

Section 204 above mentioned was as follows:

"No election shall be declared invalid by reason of a non-compliance with the provisions of this Act as to the taking of the poll or the counting of the votes, or by reason of any mistake in the use of the forms contained in the schedules to this Act, or by reason of any irregularity, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance, mistake or irregularity did not affect the result of the election."

151. The reasonable expenses incurred by a clerk or any other officer for printing, providing ballot boxes, ballot papers, materials for marking ballot papers, and balloting compartments, and for the transmission of packets, and reasonable fees and allowances for services rendered under this Part, shall be paid to the clerk by the treasurer, and shall be paid by the clerk to the per-

sons entitled thereto. 3 Edw. VII. c. 19, s. 206; 6 Edw. VII. c. 35, s. 24, *amended.*

Vacancies in Council.

152. The seat of a member of a council shall become vacant if he—

(*a*) Is undergoing imprisonment under sentence for a criminal offence; or

(*b*) Becomes insolvent within the meaning of any Insolvent Act in force in Ontario; or

(*c*) Is in close custody under the Fraudulent Debtors Arrest Act or is discharged from close custody under s. 53 of that Act; or

(*d*) Assigns his property for the benefit of his creditors; or

(*e*) *Absents himself* from the meetings of the council for *three* successive months without being authorized so to do by a resolution of the council entered upon its minutes;

and the council shall forthwith declare the seat to be vacant. 3 Edw. VII. c. 19, s. 207, *amended.*

Assigns, etc.—This evidently means a general assignment for the benefit of creditors such as is referred to in the Assignments and Preferences Act, R. S. O. 1913, c. 134, s. 6. Such an assignment is to be distinguished from a deed of trust by which property is conveyed for the benefit of creditors which does not of itself create a trust for any of the creditors and which constitutes a mere revokable mandate: Johns v. James, 1878, 8 Ch. D. 744, 47 L. J. Ch. 853. The council would do well to wait until notice of such assignment appears in the Ontario Gazette under the provisions of s. 7 of the Assignments and Preferences Act, *supra.*

A councillor apparently can transfer or assign the property in respect of which he was qualified to be elected after he takes the declaration required by s. 242 without becoming disqualified. Riddell, J., based his judgment to this effect in R. ex rel. Morton v. Roberts, 1912, 26 O. L. R. 263, in part on the provisions of s. 152, after pointing out that the property qualification is one entitling a person "to be elected:" see s. 52, and that certain disqualifications render a person ineligible "to be elected" or to sit or to vote in council: s. 53. He added:

> "The difference in the terminology affords a very cogent argument against the view that the Legislature intended the sale of the qualifying property to operate as an act *ipso facto* disqualifying the member, at all events after proper declaration of qualification made—had that been the intention, it is difficult to see why the provision that an assignment for the benefit of his creditors is made specifically

a ground of disqualification, without the addition 'a sale or assignment of qualifying property.'"

Becomes Insolvent. — In Warnock v. Kleopfer, 1887, 14 O. R. 288, 15 A. R. 324, 18 S. C. R. 701, the definition of insolvency given by Boyd, C., was adopted:

> "A man may be deemed insolvent in the sense of the Act if he does not pay his way, and is unable to meet the current demands of creditors, and if he has not the means of paying them in full out of his assets realized upon a sale for cash or its equivalent."

Killam, J., in Bertrand v. Canadian Rubber Co., 1897, 12 M. R. 27, said of this definition:

> "I would, however, qualify the latter test a little to meet the case of a man whose liabilities are not wholly matured and who can sell on terms which will enable him to pay those which have matured and others as they mature. Such a man I would not deem to be in insolvent circumstances within the meaning of the statute. What is termed 'commercial insolvency,' the inability of a trader to pay his liabilities in cash as they mature, would not seem to be an absolute test, though it might afford evidence of his being in insolvent circumstances."

See also Hart v. Allen, 1902, 40 N. S. R. 352.

Shall Become Vacant . . . and the Council shall Declare the Seat to be Vacant.—Section 39 of the Municipal Corporations Act, 1882, 45 and 46 V., c. 50 (Imp.), provides that: (1) If the mayor or an alderman or councillor (*a*) is declared bankrupt, or (*b*) is, except in case of illness, continuously absent from the borough . . . for more than six months, he shall thereupon immediately become disqualified and shall cease to hold office; (2) In any such event the council shall forthwith declare the office to be vacant, and signify the same by notice signed by three members of the council . . . and fixed on the town hall, and the office shall thereupon become vacant.

Under this section and a similar provision found in s. 46 of the Local Government Act, *infra*, the seat does not become vacant until the notice has been posted: Hardwick v. Brown, [1873] L. R. 8 C. P. 406.

Apparently in case of absence the council ought to give the member a chance to explain: Richardson v. Methley, [1893] 3 Ch. 510, 62 L. J. Ch. 943, where an injunction was granted restraining the Board from declaring the seat vacant, and see R. v. Hunton, 9 L. J. R. 751, decided under s. 46, the Local Government Act, 1894, 55 and 56 V., c. 73 (Imp.)

The time begins to run from the first meeting from which the member is absent: Kershaw v. Shoreditch, 1906, 22 T. L. R. 302, where a council was restrained by injunction from declaring a seat vacant. If the council refused to make the declaration, under s. 39, *supra*, a mandamus could be obtained.

Under a provision by which school trustees upon the happening of certain events *ipso facto*, vacated their seats, and requiring the remaining trustees to declare the seat vacant and forthwith order a new election, the Q. B. D. held that the seats did not actually become vacant until the declaration was made: Chaplin v. Woodstock, 1889, 16 O. R. 728.

It is submitted that, under s. 152, a seat does not become vacant until the council so declares; that such a declaration should be by by-law; that the council on a proper case may be compelled to make the necessary declaration, and if threatening wrongfully to make a declaration may be restrained by injunction, and further, having reference to s. 153, that proceedings under Part IV. cannot be taken to have the seat declared vacant by reason of any of the grounds mentioned in s. 152.

In Mearns v. Petrolia, 1880, 28 Gr. 98, it was held that the time of absence was to be computed from the date of the first meeting from which the member is absent, and the Court granted an injunction to restrain the other members of the council from excluding members who had not in fact been absent for the period mentioned in the section.

In Calloway v. Pearson, 1890, 6 M. R. 364, Bain, J., thought that before Mearns v. Petrolia could be followed, the plaintiff's right to a mandamus would have to be made clear beyond question and he refused a mandamus where a member had been unseated by a County Court Judge on the trial of an election petition, the respondent claiming that the County Court Judge had acted without jurisdiction where, in fact, the respondent was disqualified.

153. Except in the cases provided for by s. 152, if a member of a council forfeits his seat or his right to it or becomes disqualified to hold it and does not forthwith resign his seat, proceedings may be taken under ss. 160 to 179 to declare it vacant. 3 Edw. VII. c. 19, s. 208, *amended*. 3 & 4 Geo. V. c. 43, s. 113.

[*Sec. 209 repealed by 6 Edw. VII. c. 35, s. 34.*]

154. A member of a council, with the consent of the majority of the members present at a meeting, entered upon the minutes of it, may resign his office and his seat in the council. 3 Edw. VII. c. 19, s. 10, *amended*. 3 & 4 Geo. V. c. 43, s. 154.

See notes following, s. 156.

155.—(1) The warden of a county may resign his office either by verbal intimation to the county council when in session or by letter to the clerk when the council is not in session.

(2) Where from any cause a vacancy occurs in the office of warden when the council is not in session, the clerk shall forthwith notify the members of the vacancy, and if required in writing, so to do by a majority of them, he shall call a special meeting of the council to fill the vacancy. 3 Edw. VII. c. 19, s. 211, *amended*. 3 & 4 Geo. V. c. 43, s. 155 (1-2).

See notes following, s. 156.

156.—(1) Subject to ss. 157 and 158, a new election shall be forthwith held where—

(*a*) A person elected has neglected or refused to accept office or to make the prescribed declarations within the prescribed time; or

(*b*) A vacancy, except in the office of controller, occurs from any cause.

(2) Where a new election is to be held the head of the council, or if he is absent or unable to act or there is a vacancy in the office, the clerk, or if they are both absent or unable to act or both offices are vacant, one of the members of the council shall forthwith issue a warrant under his hand for the holding of the new election.

(3) The returning officer and the deputy returning officers appointed to hold the next preceding election shall be the returning officer and the deputy returning officers to hold the new election, and the nomination shall be held and the polling shall take place at the respective places at which the nomination was held and the polling took place at such last election, unless the council appoints other persons to hold the election and other places at which the nomination shall be held and the polling take place, which the council may do. 3 Edw. VII. c. 19, s. 212, *amended*. 3 & 4 Geo. V. c. 43, s. 156 (1-3).

Section 36 of the Municipal Corporations Act, 1882, 45 and 46 V., c. 50, provides:

(1) A person elected to a corporate office may at any time, by writing signed by him and delivered to the town clerk, resign the office, on payment of the fine provided for non-acceptance thereof.

(2) In any such case the council shall forthwith declare the office to be vacant, and signify the same by notice in writing, signed by three members of the council and countersigned by the town clerk, and fixed on the town hall, and the office shall thereupon become vacant.

Under this section, in R. v. Wigan, 1885, 14 Q. B. D. 908; 54 L. J. Q. B. 338, a member forwarded his resignation and the amount of the fine, but the council requested him to withdraw it, which he did. It was held that, under s. 36, the resignation could not be withdrawn, and a rule *nisi* for mandamus to compel the council to accept it was obtained.

In Pease v. Lowden, [1899], 1 Q. B. 386, 68 L. J. Q. B. 239, also decided upon s. 36, it was held that, after tender of resignation and payment of fine, the resigning alderman could not vote though the seat did not become vacant till the council made the declaration.

In Re Vandyke and Grimsby, 1906, 12 O. L. R. 211, a motion to quash a by-law was based upon the objection (among others) that the by-law was signed on the 3rd February by the reeve who had, on the 2nd February, gone through the form of resigning his position as reeve: Teetzel, J., overruling this objection, said:

"His resignation, however, in my opinion was not effective to disqualify him from signing the by-law, inasmuch as there was not a compliance with s. 210 of the Municipal Act, which provides for resignation with the consent of the majority of the members of the council present, to be entered upon the minutes of the council. This not being done, the resignation was not effective. See Chaplin v. Woodstock, 1889, 16 O. R. 728; Hardwick v. Brown, 1873, L. R. 8 C. P. 406."

If a person who is in fact disqualified to be elected, is declared elected and takes his seat, he cannot, strictly speaking, resign the seat as he never held it: Hardwick v. Brown, 1873, L. R. 8 C. P. 406, but this refinement is ignored by the Act which provides for a disclaimer in such a case, ss. 181 and 182, and further provides that such disclaimer shall operate as a resignation: s. 184. See notes to s. 184.

Vacancy in Office of Controller.—This is to be filled by the council, at a meeting to be called for the purpose: s. 212 (2).

Whole Council Unseated.—See notes to s. 175.

A Majority of the Full Number of the Council—This is the quorum provided by s. 200 (1). The fact of vacancies existing does not even in the absence of such a provision as is found in s.-s. 7 render meetings of the existing members illegal, if a quorum is present: See s. 200. If any of the persons present are disqualified and nevertheless vote on by-laws or resolutions, such may be quashed if carried by the votes of the disqualified persons, or if there is not a quorum of qualified members the whole proceedings may be set aside.

In R. ex rel. Hogan v. Jollivette, 1912, 20 W. L. R. 364, 1 W. W. R. 829 (Alberta), P., a member of the council whose term had expired at the end of 1911 had been declared elected for the years 1912-13, and before the term for 1911 was ended he handed in his resignation as councillor for the remainder of the year 1911 and for the year 1912-13, and at the same meeting was appointed secretary-treasurer of the town. Section 106 of the Municipal Ordinance (Consolidated Ordinances), 1898, s. 70, provided as follows:

> "In case of the resignation, death or removal of any member of a council, or in the event of a vacancy occurring in the council from any cause whatsoever, the council at its next meeting shall order an election and the member so elected shall hold office for the unexpired period of the member whose place he was elected to fill."

Beck, J., said: "Acceptance by the council is possibly necessary to make resignation effective . . . there being, as I have said, a right under the Ordinance to resign, I cannot see any reasonable ground for the contention that resignation can be made only after the member elect has taken full possession of the office in pursuance of his right. He can equally well, I think, resign his right to the office before the time has arrived at which actual possession is possible. I think, therefore, that P.'s resignation was effective; and that, therefore, the council rightly proceeded to a new election, in pursuance of s. 106."

R. ex rel. Bawkes v. Letherby, 1908, 17 O. L. R. 304, was decided upon ss. 212 and 214 above mentioned. The clerk did not issue a warrant for the holding of the new election, and the proclamation which he made did not fix the nomination within 15 days. The mayor and six councillors were accordingly unseated on the ground as stated by Meredith, C.J.:

> " . . . the only authority for anybody assuming to put in motion the proceedings for electing those who are to govern the municipality is to be found in the Municipal Act.
>
> "The general election, which takes place in December, when nominations are held in most municipalities, at all events, is provided for by statute.
>
> "In the case of subsequent vacancies, provision is similarly made by statute that the electors shall be brought together for the election of their representative by the issue of a warrant. That is the only authority for anybody to hold the election under s. 212; and I think, therefore, that the Master was right in holding that, if there was no warrant issued, all that took place was a mere nullity, and there was no election.
>
> "I should have been glad if I could have come to the conclusion that the proclamation which was issued by the town clerk, as returning officer, answered the requirements of a warrant. There is no magic in the term 'warrant.' No particular form is given, and any

direction or any document signed as the statute requires, which contains what is required is a warrant in substantially the terms of the statute, would be a warrant, in my judgment, quite sufficient to answer all the requirements of the statute; but in this case there is no direction to the deputy returning officers—nothing but a notice that on a particular day a meeting of the electors will be held to nominate a mayor and six councillors, and that, if a poll is demanded, voting will take place on a named day at places that are designated; and then a further statement of who the deputy returning officers and poll clerks are to be.

"There is nothing in this document which, in terms or by implication, requires the gentlemen whose names are given as deputy returning officers to hold the poll; and it seems to me that the document does not contain all that is necessary to constitute what the statute speaks of as a warrant for holding the election.

"It is contended that the curative provisions of s. 204 ought to save the election. I do not think so. . . .

" . . . here the non-compliance was not in the proceedings mentioned in the section or an irregularity only, but was an omission of that which was the very foundation for the holding of the election itself.

"I do not think that there is anything in the objection that the day named for the holding of the election was not within the time fixed by the statute. That provision is, in my opinion, merely directory, and an election held at a later date would not be invalidated by the failure to observe this direction. If it were not so, the result would be that the failure of the returning officer to discharge his duty would absolutely prevent the holding of an election and the filling of the vacancy it was required to fill, and that is the strongest reason for coming to the conclusion that the provisions of the section are directory."

Where the town clerk is by the Act the returning officer, he must issue a warrant to himself: See R. ex rel. Bawkes v. Letherby, *supra*.

(4) Where a new election becomes necessary before the first meeting of the council in the year for which it is elected the duties which by s.-s. 2 are to be performed by the head, clerk, or a member of the council shall be performed by the head, clerk, or a member of the council of the next preceding year. 3 Edw. VII. c. 19, s. 213, *amended*.

(5) The new election shall be held at the latest within fifteen days after the receipt of the warrant by the person to whom it is directed, and the person issuing the warrant shall appoint a time for the nomination of candidates and for the polling if a poll is required, and the election shall be conducted in like manner as an annual election. 3 Edw. VII. c. 19, s. 214, *amended*.

(6) The person elected shall hold office for the residue of the terms for which the person whose place he is elected to fill was elected. 3 Edw. VII. c. 19, s. 215.

(7) Notwithstanding that a new election becomes necessary meetings of the council may be held if a ma-

jority of the full number of the council is present. 3 Edw. VII. c. 19, s. 213, *last part amended.* 3 & 4 Geo. V. c. 43, s. 156 (4-7).

157.—(1) Where a vacancy occurs in the office of alderman in a city where aldermen are elected by general vote, the unsuccessful candidate who received the highest number of votes at the next preceding election shall be entitled to the office upon making the prescribed declarations within the prescribed time, and if he fails to do so or disclaims the office one of the candidates following in regular order according to the number of votes received shall, as hereinafter provided, become entitled to the office on making such declarations within the prescribed time.

(2) Where the number of votes cast for two or more of such candidates is equal, their order of succession shall be determined by the amounts for which they are respectively rated upon the last revised assessment roll, the candidate having the largest assessment having the priority.

(3) The clerk shall immediately after the vacancy occurs give notice in writing to the candidate who is first in succession that he is entitled to such vacant office if he makes the prescribed declarations within one week after the giving of the notice, and that if he fails to make the declarations within that time he shall be deemed to have disclaimed the office.

(4) If a candidate fails to make the prescribed declarations within the prescribed time, or disclaims the office, the clerk shall forthwith give notice in writing to the candidate next in succession in the same terms as the notice to the first candidate, until the vacant office has been filled or the list of candidates entitled to take it is exhausted.

(5) The notice may be served personally or may be sent by registered letter addressed to the candidate, and a record of the service or of the mailing and of the address shall be preserved by the clerk.

(6) If all the aldermen were elected by acclamation, or if no candidate takes the vacant office under the preceding provisions of this section, the council shall forthwith elect a person to fill the vacancy for the remainder of the term of the member whose seat has become vacant. 3 Edw. VII. c. 19, s. 215, *amended.* 3 & 4 Geo. V. c. 43, s. 157 (1-6).

158.—(1) Where the office of mayor of a city becomes vacant after the first day of July in any year and an election to fill the vacancy has not been ordered in a judicial proceeding, the council shall elect one of their number to fill the office for the remainder of the term.

(2) Where the office of mayor, reeve or deputy reeve of a town or of reeve or deputy reeve of a village or township becomes vacant after the first day of November in any year, and an election to fill the vacancy has not been ordered in a judicial proceeding, the council may elect one of its number to fill the office for the remainder of the term.

(3) Where a vacancy occurs in the office of alderman where aldermen are not elected by general vote or of councillor after the first day of November in any year and an election has not been ordered in a judicial proceeding it shall not be necessary that the vacancy be filled if the council so directs. 3 Edw. VII. c. 19, s. 216, *amended.* 3 & 4 Geo. V. c. 43, s. 158.

159. Where the electors do not elect the requisite number of members, the members elected if they equal at least one-half of the council when complete or a majority of them or if half of such members were not elected the members for the next preceding year or a majority of them shall elect as many qualified persons as are necessary to constitute or complete the requisite number of members. 3 Edw. VII. c. 19, s. 218, *amended.* 3 & 4 Geo. V. c. 43, s. 159.

This must refer to a case where there are no nominations or where all persons nominated resign: See s. 70, "Where elected members do not exceed one-half."

PART IV.

Proceedings to Declare Seat Vacant.

Procedure.

160. In this Part,—

(*a*) "Judge" unless the Court is referred to by name shall include a *Judge* of the High Court and a Judge of a County or District Court;

(*b*) "Master in Chambers" shall include any officer having jurisdiction to sit and act for the Master in Chambers. *New.* 3 & 4 Geo. V. c. 43, s. 160.

161.—(1) The validity of the election of a member of a council or his right to hold his seat, or the right of a local municipality to a deputy reeve, may be tried and determined by a Judge of the High Court, by the Master in Chambers, or by a Judge of the County or District Court of the county or district in which the municipality is situate.

(2) Where the right of a municipality to a deputy reeve is contested any municipal elector in the county or where the validity of the election is contested, any candidate at the election or an elector who gave or tendered his vote at it, or where the election was by acclamation, or the right to sit is contested on the ground that the member has become disqualified or has forfeited his seat since his election, an elector entitled to vote at the election may be the relator. 3 Edw. VII. c. 19, s. 219 (1-2), *redrafted.* 3 & 4 Geo. V. c. 43, s. 161 (1-2); 4 Geo. V. c. 53, s. 5.

[*Note.*—*S. 219 (3) now s. 179.*]

Proceedings Civil, not Criminal.—Proceedings under this Part are civil proceedings. An information in the nature of a *quo warranto* is criminal in its nature. The proceedings under the Act being civil proceedings, "cannot be regulated by analogy to criminal proceedings, nor do

the special provisions found in the statute of Anne and the English Crown Office practice rules afford any guide; in fact, the absence of these provisions indicates the absence of the special powers they confer:" Middleton, J.: R. ex rel. Warner v. Skelton, 1911, 23 O. L. R. 182.

Statute Must be Strictly and Literally Followed.—"The proceedings authorized by the Municipal Act to contest the validity of elections to municipal offices are statutory, and, as is the case with all purely statutory proceedings, the statute must be strictly and literally followed. There is no inherent jurisdiction, and considerations of convenience and analogy find no place in the discussion:" Middleton, J., R. ex rel. Warner v. Skelton, *supra*.

The Former Procedure.—The following account of the former procedure was given by Riddell, J., in R. ex rel. Morton v. Roberts, 191, 26 O. L. R. at 271.

"The common law writ of *quo warranto*—sometimes called *quo jure*—was used by the King to call upon any subject who exercised office or franchise, to shew by what authority the office or franchise was enjoyed—it might also be used by the King to call upon any one who held land to shew by what title or warrant he held. The right to such a writ rested, of course, upon the principles that the King has the sole power of bestowing offices and franchises, and he is lord paramount of all land within the kingdom. The writ, which was an original writ out of Chancery, fell into disuse early, probably in the time of Richard II. (Coke, 2 Inst. 498, etc.), and an information in the nature of a *quo warranto* took its place. This was much abused in Stuart times, but has survived and still may be put in action in a proper case—it lies against persons who claim any office, franchise, or privilege of a public nature, and not merely ministerial and held at the will and pleasure of others: Darley v. The Queen (1845), 12 Cl. & F. 520.

As it was held at the common law, the King alone could have such an information against those usurping offices, etc., in municipal corporations, the statute 9 Anne c. 20 was passed, providing for the issue of such informations at the instance of private prosecutors in such cases—and this statute became part of our law by the Provincial Act, 32 Geo. III., c. 1.

Both in England and in Upper Canada, the practice in such cases has been simplified; the statutory provisions are, in cases covered by the statutes, now taken advantage of—but, if there be any *casus omissus*, the information under the statute of Anne may be still appealed to. In our own Courts the most recent case I know of is Regina ex rel. Moore v. Nagle, 1894, 24 O. R. 507; Askew v. Manning (1876), 38 U. C. R. 345, is another.

By the Act of 12 Vict. c. 81, s. 146, it was provided "that at the instance of any relator having an interest as a candidate or voter in any election . . . a writ of summons in the nature of a *quo warranto* shall lie to try the validity of such election, which writ shall issue out of His Majesty's Court of Queen's Bench . . . upon such relator shewing upon affidavit . . . reasonable grounds for supposing that such election was not conducted according to law, or that the party elected or returned thereat was not duly or legally elected or returned." The informant, the writ of summons was read instead of the information in the nature of a *quo warranto* in cases to which it was applicable.

When the case of R. ex rel. Grayson v. Bell, 1 U. C. L. J. N. S. 130 was decided (1865), the statute in force was C. S. U. C. 1859, c. 54. . . . The only matters which could be thus contested were, (s. 127), "the right of any municipality to a reeve or deputy reeve, or . . . the validity of the election or appointment of a mayor, warden, reeve, deputy reeve, alderman, councilman, councillor or police trustee." It is in view of the provisions of the existing statute that Hagarty, J., says: "As Bell was properly qualified, and nothing is alleged against the manner of his election, I do not see how I can interfere by *quo warranto*, because an apparent mistake . . . has been made in the description of the nature of an estate in property. . . ."

In 1870 when R. ex rel. Halsted v. Ferris, 6 U. C. L. J. N. S. 266 was decided, the Act in force was, 1866, 29 and 30 Vict. c. 51.

The statute, 36 V., c. 48, ss. 131, 132, was the same and also R. S. O. 1877, c. 174, ss. 179, 180, which last contained the statutory enactments when the two cases of R. ex rel. Clavey v. St. Jean and R. ex rel. Clavey v. Conway, 46 U. C. R. 77, 85 came on. And it was due to the limited class of cases for the application of the statutory procedure that in these cases an information, and not a writ of summons in the nature of a *quo warranto* was applied for.

In 1892, by s. 188 of the Statute 55 V., c. 42, a notice of motion in the nature of a *quo warranto* was substituted for a writ of summons, and this practice has continued to the present time; the statute 60 V., c. 15, schedule c. (44), struck out in the beginning all reference to the right of a municipality to a reeve or deputy reeve; and 3 Edw. VII. c. 18, s. 32 made a most important change:—"In case the validity of the election or the appointment or right to hold the seat of a mayor, warden, reeve, alderman, county councillor or councillor is contested, etc." Before that time it was only the validity of the election which could be challenged in the statutory method—thereafter the right to hold a seat could be attacked in the same way. . . . The Consolidation of 1903, 3 Edw. VII. c. 19, s. 219, followed, and that Act has been slightly amended by 6 Edw. VII. c. 35, s. 26, and 9 Edw. VII. c. 73, s. 5 (1)." These provisions are now embodied in s. 161.

Principles of the old law applicable to proceedings under Part IV.—Under a provision similar to s. 52 (7) which stated that if at the time of election there were not at least two persons qualified to be elected for each seat in the council no qualification beyond that of a municipal elector should be necessary the clerk stated at the nomination meeting that there were not two persons qualified for each office and accordingly persons possessing the qualifications of electors but not the other qualifications were nominated for the vacancies and an election was held. The relator was present and concurred in the statement and was nominated but was subsequently defeated at the election. He then brought proceedings under the Municipal Act to set the election aside claiming that as a fact there were in the village at least two persons qualified to be elected for each seat. Harrison, C.J., dismissed the relator's summons with costs: Reg. ex rel. Regis v. Cusac et al, (1876) 6 N. R. 303, stating as follows:—

"The summary mode prescribed by the Municipal Institutions Act for the trial of municipal elections is a substitute for the arduous and expensive proceeding by *quo warranto* information: R. ex rel. White v. Roach, 18 U. C. Q. B. 226, and the general practice is to confine parties as much as possible to relief under the statute: In re Kelly and Macarow, 14 C. P. 457. But in dealing with cases which arise under the statute, the principles of the old law as to the competency of the relator are still applicable, and, so far as applicable, ought to be followed: R. ex rel. Loyall v. Ponton, 2 Prac. R. 18; R. ex rel. Rosebush v. Parker, 2 C. P. 15; In re Kelly and Macarow, 14 C. P. 457; R. ex rel. Grayson v. Bell, 1 C. L. J. N. S. 130.

In Cole on Informations, p. 174, it is said "A burgess or other person having sufficient interest to be a relator in a *quo warranto* information, may nevertheless have so acted as to render himself disqualified to be such relator, and on that ground the Court will refuse an information at his instance, although a valid objection to the defendant's title be shown.

A party ought not to be permitted to play 'fast and loose' in these matters just to suit his own particular interest: per Taunton, J., in The King v. Parkyn, 1 B. & Ad. 694. The principle is, that a man shall not apply to the Court as relator if he has concurred in the irregularity of which he complains: per Coleridge, J., in R. v. Green, 2 Q. B. 405. It is very much like the case where an arbitrator has done something wrong, but both parties although knowing of it, nevertheless proceed, and neither can afterwards take advantage of the objection: per Blackburn, J., in R. v. House, L. R. 1 Q. B. 440.

A person who, at the time of an election, is aware of some irregularity, but lies by and consents to the election as if regular, will not afterwards be heard as relator to question its regularity: King v. Stacey, L. T. R. 1.

The Courts have on several occasions said, and said wisely, that they will not listen to a corporator who has acquiesced or perhaps concurred in the very act which he afterwards comes to complain of when it suits his purpose: Per Lord Kenyon, in R. v. Clarke, 1 East 46.

In R. v. Mortloch, 8 T. R. 300, the Court refused to grant an information in the nature of a *quo warranto*, because the party applying for it had agreed not to enforce a by-law upon which he afterwards attempted to impeach the defendant's title.

An application for a *quo warranto* information, made on the affidavits of several persons, of whom all but one consented to the election proposed to be impeached, may be granted on the affidavit of that one, if he avow himself to be the relator: R. v. Symmons, 4 T. R. 223.

It has been held that it is a valid objection to a relator applying for a *quo warranto* that he was present and concurred in the election of another burger, when the objection he sought by the application to avail himself of was taken and overruled, and he voted for the party then elected: R. v. Parkyn, 1 B. & Ad. 690.

Where a corporator has attended at a meeting for the election of the officers of the borough, he will not be allowed to become relator in *quo warranto*, and impeach the titles of the persons there elected, on account of an objection to the title of the presiding officer, unless he shew that at the time of the election he was ignorant of the objection: R. v. Slythe, 6 B. & C. 240.

A borough officer who administers a declaration of office to a disqualified councillor, will not be heard as a relator to upset the election: R. v. Greene, 2 Q. B. 460.

Previous to an election, voting papers were delivered duly filled up, except that the column for the number of votes was left blank. After the election, a rule for a *quo warranto* was obtained by one Edward Shaw, one of the unsuccessful candidates, against two of the persons declared duly elected, on the ground that the voting papers having been left blank, the election was void. But the Court held that as Shaw himself had voted with a voting paper left blank, and had also taken part at former elections where a similar course had been pursued, and had been himself so elected, that he could not be heard as relator: R. v. Lofthouse, L. R. 1 Q. B.

In the last mentioned case, Shee, J., said:

> "The present relator has concurred in the very act he now complains of, for he has used voting papers in blank in this very election and in others. Therefore, in the exercise of our discretion, we ought not to assist him." P. 144.

The principle of the foregoing cases is, that the acquiescence of the relator in the objectionable election, instead of at the time raising the objection, precludes him from afterwards becoming relator.

It might be different if it were shewn that the conduct of the returning officer was plainly illegal; and that the relator was not in any manner instrumental in, or accessory to producing the result which he afterwards complained of: R. ex rel. Mitchell v. Adams, 1 Cham. B. 203.

It is doubtful whether at the time of the election, there were in the village two persons qualified for each seat in the council. If the relator at the time knew or had good reason to believe that there were a sufficient number of qualified persons in the village to be elected, it was his duty to have raised the objection instead of acquiescing in the assertion of the township clerk, that there were not. But instead of doing so, he submits to the assertion of the township clerk, who of all men in the township, was best qualified to give an opinion in such a matter, and endeavours to gain an advantage by it by having himself elected to the council, although not qualified, if his present contention is well grounded.

When defeated in this attempt, he suddenly becomes concerned for the public interests, proclaims the clerk was wrong, that all the electors were wrong, that all the elected were wrong, and that he himself was wrong, for there were, in truth, ten qualified persons.

His zeal for the public, if not simulated, comes too late. He does not pretend that he was ignorant of the facts which he now sets up, at the time of the election; on the contrary, he desires the Court to understand

that he, or somebody else not named, made the objection at the time of the nomination; other electors with more appearance of truth say that there was no such objection made.

I do not now decide whether the objection was good or bad, and I do not think I am called upon to decide at the instance of the relator, who, as it appears to me, to serve his own purpose, and his own interests, rather than the interests of the electors generally, is endeavouring to play 'fast and loose.'"

Miscellaneous Cases as to Relators.—In R. ex rel. Brine v. Booth, 1883, 9 P. R. 452, affirmed 3 O. R. 144, the relator though successful was deprived of costs on the ground that he was auditor. See also R. ex rel. Lafinson v. McCarthy, 1903, 5 O. L. R. 338, where the Master refused to follow R. v. Booth, *supra*, in the absence of actual proof that the clerk of the township was behind the proceedings but each party was ordered to pay his own costs though the relator was successful.

In R. ex rel. Sharpe v. Beck, 1909, 13 O. W. R. 457, 539, a relator was held incompetent to attack the right of a municipality to a deputy reeve, because he voted at the election. The statute removes this ground. It was suggested in this case, and also in R. ex rel. Sullivan v. Church, 1914, 26 O. W. R. 375; 6 O. W. N. 116, 365, that the obvious course to attack the right of a municipality to a deputy reeve was to move to quash the by-law passed for the holding of the election under s. 48, see *supra*, p. 55. In the latter case a preliminary objection was taken that the right of the municipality to a deputy reeve could not be questioned unless due notice was given to the municipality that it might come in and defend. Britton, J., overruled the objection as the act is silent as to the giving of any such notice, but he pointed out that the effect might be to quash a municipal by-law passed under s. 48 behind the back of the municipality.

The right to a deputy reeve is governed by s. 51, *supra*, p. 53. The mode of computing the names was discussed by Britton, J., in Re ex rel. Sullivan v. Church and he laid down the principle that no scrutiny was intended beyond that of seeing that the name of any elector is not counted more than once. That *prima facie* the determination of the council must stand. If it is wrong the onus of shewing error is on the attacking party. He rejected all evidence as to tenants who had moved away, persons who had died, etc.

See also R. v. Trevenen, 1819, 2 B. and Ald. 339, where a relator who concurred in the election though then ignorant of the objection was held incompetent, and R. v. Payne 1818, 2 Ch. 369, where the relator as legal adviser to the defendant had advised him that his election was valid.

On the other hand it is no objection to a relator that he is moved by a strong party spirit. R. v. Benney, 1831, 1 B. and Ald. 684, and concurrence in an election was not held fatal in R. v. Morris, 1803, 3 East 213.

The motives of a relator are not material. R. ex rel. Moore v. Hamill, 1904, 7 O. L. R. at 603, following Wheler v. Gibbs, 1880, 4 S. C. R. 430. R. v. Lofthouse, *supra*, was followed by Falconbridge, C.J., in R. ex rel. McLeod v. Bathurst, 1903, 5 O. L. R. 573, where a relator complaining of certain irregularities by voting for a councillor who was in the same class with the other respondents was held to have acquiesced in and become a party to the irregularity complained of and therefore could not be heard to complain. R. v. Lofthouse was also followed in R. ex rel. Tolmie v. Campbell, 1902, 4 O. L. R. 25, where a relator complaining of double voting was held disqualified because he had encouraged voters to vote more than once and only complained after his unexpected defeat. The relator, a candidate, was present when the ballots were being counted and concurred in the rejection of a certain ballot by the returning officer. Excluding the ballot in question the vote was a tie and the returning officer cast his vote for the respondent. The ballot was improperly rejected but the relator was held not entitled to institute proceedings, following R. ex rel. Regis v. Cusac, *supra;* R. ex rel. Park v. Street, 1905, 1 W. L. R. 202.

The Validity of an Election. — An election is not defined in the Act. It has been repeatedly held that an election commences with nomination, see notes to s. 63 *supra*. It may end with the declaration of the returning officer made under s. 68 (3) or under s. 127 or in case of a

recount with the declaration made under s. 129 (8). In case of proceedings to contest by a Judge's order under s. 174. Several elections may commence at the same nomination meeting as where mayor and aldermen for different wards are to be elected. Some of these may end on nomination day, defers when the declarations under ss. 127 and 129 are made or the order under s. 174.

Right of Member to Hold His Seat.—The ground for bringing the proceedings authorized by Part IV. was first given by Edw. VII. c. 18, s. 32. The right to hold a seat although acquired by a valid election may be subsequently lost. For example s. 53 enumerates certain disqualifications and provides that the persons so disqualified, besides being ineligible to be elected which would affect the validity of the election, shall not be entitled to sit or vote in council or members of council who vote for an improper diversion of sinking fund becomes disqualified under s. 303 (5), and members who vote for borrowing a sum beyond the authorized limit are disqualified under s. 319 (3). Members convicted of having knowingly committed any offence under the Liquor License Act, R. S. O. 1914, c. 215, by s. 64, forfeit and vacate their seats and become ineligible to be elected or to sit or vote, under s. 64 of said Act and at common law a councillor's seat may become vacant if he is elected to and accepts an incompatible office, if for example, being an alderman, he should without resigning be elected and accept the office of mayor. R. v. Bangor, 1886, 18 Q. B. D. 349; 56 L. J. Q. B. 326; (C.A.) on appeal Pritchard v. Bangor, 1888, 13 App. Cas. 241; 57 L. J. Q. B. 313 (H.L.). In the Court of Appeal, Lord Esher said, "A long series of decisions upheld and enunciated the position that where two offices are incompatible a man is not prevented from being a candidate for one of the offices merely because he holds the other whether it be superior in rank or power or not. But the way the principle acts is, that a man on being elected and on accepting the second office thereupon vacates the first and can properly be said to have been legally elected to the second." But this common law principle may be modified in Ontario by the provisions of s. 154 *supra;* see notes to s. 154.

Where a seat becomes vacant under the provisions of 152 because of the imprisonment, insolvency or absence of a councillor the proceedings under Part IV. do not apply; see notes to s. 152.

Right of a Local Municipality to a Deputy Reeve.—The number of deputy reeves is prescribed by s. 51. Acquiescence in the election which would otherwise disqualify a person from being a relator is by s.-s. 2 not a ground of disqualification.

N.B.—Cases where right to a deputy reeve is in question: R. ex rel. Sharpe v. Beck, 13 O. W. R. 457, 539; R. ex rel. Sullivan v. Church, 1914, 26 O. W. R. 375.

162.—(1) If within six weeks after an election, or one month after the acceptance of office by a member of a council a person entitled to be a relator shows by affidavit reasonable ground for supposing that the election was not legal, or was not conducted according to law, or that the person declared elected was not duly elected, or for contesting the validity of the election, or if within six weeks after the facts come to the knowledge of a person entitled to be a relator he shows by affidavit reasonable ground for supposing that a member of a council has forfeited his seat or become disqualified since his elec-

tion, the Judge or the Master in Chambers, as the case may be, shall give his fiat, authorizing the relator, upon entering into a recognizance as hereinafter provided, and the same being allowed as sufficient, to serve a notice of motion to determine the matter.

(2) The recognizance shall be entered into before the Judge or Master in Chambers granting the fiat or before a commissioner for taking affidavits, by the relator in the sum of $200 and by two sureties, to be allowed as sufficient by the Judge or Master in Chambers upon affidavit of justification, each in the sum of $100; and shall be conditioned to prosecute the motion with effect and to pay to the person against whom it is made any costs which may be adjudged to him against the relator.

(3) When the recognizance has been allowed as sufficient, the Judge or Master in Chambers by whom it is allowed shall note upon it and upon the fiat allowing service of the notice of motion, the words *"Recognizance allowed"* and shall initial the same.

(4) Where the proceedings are taken before a Judge of the High Court or before the Master in Chambers they shall be entitled in the High Court; and where they are taken before a Judge of a County or District Court they shall be entitled in that Court. 3 Edw. VII. c. 19, s. 220, *redrafted.* 3 & 4 Geo. V. c. 43, s. 162 (1-4).

TIME WITHIN WHICH PROCEEDINGS CAN BE INSTITUTED.

(*a*) **Within Six Weeks after an Election.**—The Municipal Corporations Act (Imp.), 45 and 46 Vict. c. 50, s. 88, provides "within twenty-one days after the day on which the election was held." This wording was followed in the Municipal Act, R. S. M. c. 133, s. 197, and the Winnipeg charter. The language of this section is to be contrasted with that of s. 129, providing for a recount which is "within fourteen days after the declaration by the clerk of the result of the election and with that of the Winnipeg charter in the same connection which is "at any time within fourteen days from the time the ballot papers are received by the clerk." The question under 162 is when does an election end? It would seem that the summing up and declaration of the result by the returning officer on the day following the polling day as provided in s. 126 was a material part of the election, and it certainly is the date when the summing up discloses that two or more candidates have an equal number of votes for then the clerk under s. 127 must give a casting vote.

In computing the six weeks the day on which the election ends must be excluded and the application can be made at any time within the six weeks commencing on the following day. A part of a day will not be considered.

(*b*) **Within One Month after the Acceptance of Office.**—The Municipal Corporations Act (Imp.), 45 and 46 V. c. 50, s. 34, requires every qualified person elected to "accept the office by making and subscribing the declaration" or be liable to a fine. S. 242 requires every person elected a member of council to take the declaration before acting and s. 244 *infra* provides a penalty for refusing the office or not making and filing the declaration. It is therefore plain that becoming a candidate and being declared elected do not amount to acceptance of the office. Formal acceptance is made by taking the prescribed declaration which indeed contains a promise to "execute the office" and this has been expressly decided in R. ex rel. Clancy v. McIntosh, 46 U. C. R. 98, which was followed in R. ex rel. Felitz v. Howland, 1886, 11 P. R. 264, where acts claimed to amount to informal acceptance, as declaring at a public meeting that having been elected he would fulfil the duties, and attending at the city hall after his predecessor had vacated office and being introduced as mayor and addressing the officials as to their duties were held not to amount to formal aceptance. The statute required formal aceptance by the statutory declaration and accordingly the respondent's contention that the proceedings were too late, not having been commenced within one month of the informal acceptance was overruled.

Within one month after means that the application may be made within the calendar month commencing the day following that on which the declaration is made and filed: see Interpretation Act, and article on Computation of Time.

While the proceedings are to be entitled in the Supreme or County Court they are not proceedings in the Court, but proceedings before the Judge as *persona designata*, and a judgment when given is *sui generis:* see s. 178 and R. ex rel. Grant v. Coleman, 1882, 7 A. R. at 624.

Within Six Weeks after the Facts Come to the Knowledge of a Relator.—That is facts shewing reasonable ground for supposing that a member of council has (1) forfeited his seat, see notes to s. 53, *supra;* or (2) become disqualified since his election, see notes to s. 53, *supra.*

When Time Ends.—The relator's application may be made at any time up to midnight on the last day. And under "the Interpretation Act," R. S. O. 1914, c. 1, s. 28 (*h*), it is provided: if the time limited by any Act, for any proceeding or for the doing of anything under its provisions expires or falls upon a holiday, the time so limited shall extend to, and such thing may be done on the day next following which is not a holiday. As to "holiday," see the same Act, s. 29 (1), and generally see article on Computation of Time.

Proceedings after Time is up in Cases Within Part IV.—In R. ex rel. Clancy v. St. Jean, 1881, 46 U. C. R. 77, it was held that a voter in another ward who could not be a relator in proceedings under Part IV. might nevertheless apply on information for a writ of *quo warranto* apart from Part IV., to unseat a member of council; see also R. ex rel. Coleman v. O'Hare, 2 P. R. 16, and the title *quo warranto, infra,* and on principle an elector in one local municipality in a county might by *quo warranto* contest the right of another local municipality in the same county to a deputy reeve.

Reasonable Ground for Supposing that the Election was not Legal, etc.—A Judge has a wide discretion to grant or refuse a fiat. It is for him to decide if the grounds set up are reasonable. A reasonable doubt is not sufficient. All the circumstances of the application should be considered. In R. v. Cousins, 1873, L. R. 8 Q. B., 42 L. J. Q. B. 124, which was an application for leave to file an information, Blackburn, J., said:—"When the object is to turn out a person from an office, especially an annual office, if he is the right man to be in the place, and no one else can be improperly out, and no harm can be done, we cannot, in our discretion, grant leave to file an information."

If the material discloses a mere irregularity without material result or where the application is merely vexatious. (See 10 Hals. 134).

The material placed before the Judge need not disclose all the grounds on which the relator intends to rely: R. ex rel. Clark v. McMullen, 9 U. C. R. 467.

There may be two or more relators, and an information will be granted at the instance of any who are qualified though the others are incompetent: 10 Hals. p. 135.

In R. v. Ward, 1873, L. R. 8 Q. B. 210, 42 L. J. Q. B. 126, Blackburn, J., cited the rule laid down by Lord Mansfield in R. v. Stacey, 1785, 1 T. R. 1, which was as follows:—"I remember when it was so much the practice of the Court to grant *quo warranto* informations as of course, that it was held prudent never to shew cause against the rule for fear of disclosing the grounds on which the party went. But now, since these matters have come more under consideration, it is no longer a motion of course; and the Court are bound to consider all the circumstances of the case before they disturb the peace and quiet of our corporations," and Blackburn, J., added that the principle so laid down in 1785 had been acted on ever since, and he proceeded to review the authorities, including R. v. Cousins, *supra*.

In R. ex rel. Warr v. Walsh, 1903, 5 O. L. R. at 272, Meredith, C.J., apparently considered that R. v. Ward and R. v. Cousins laid down principles shewing that a Judge has a very wide discretion on an application for a fiat, though he did not find it necessary to consider whether or not that discretion could be exercised on the return of the motion.

Allowing Recognizance as Sufficient.—This has to be done before the fiat is granted, and when the usual recognizance has been entered into by the relator and his bail or sureties with the statutory affidavit of justification, the security is completed and it is the Judge's duty to allow it as sufficient: R. ex rel. Harwood v. Fournier, 1892, 14 P. R. 463 N., followed in R. ex rel. Walton v. Freeborn, 1901, 2 O. L. R. 165. Notwithstanding s.-s. 3, the words "recognizance allowed" may be noted at any time if by oversight they were not noted when it was allowed. *Ibid.*

There is no necessity for the signatures to the recognizance of the persons to be bound by it, and where a recognizance has been allowed as sufficient there is no appeal: R. ex rel. Mangan v. Fleming, 1892, 14 P. R. 458.

Where there are several respondents under s. 166 the recognizance may provide for "such costs as may be awarded to the said defendants against the relator," when they will be payable to the defendants jointly or the recognizance may be made in favor of the defendants "or any of them," but there is no clear authority for this change: R. ex rel. Warner v. Skelton, 1911, 23 O. L. R. 182.

Setting Aside Proceedings after Fiat Granted.—In R. ex rel. McFarlane v. Coulter, 1902, 4 O. L. R. 520, Street, J., held that there was no appeal from any interlocutory proceedings. In that case the Judge, after granting a fiat, set aside the relator's whole proceedings. Street, J., expressed no opinion as to the merits of the order, pointing out as the statute then stood no power to make it was expressly given. The learned Judge considered that R. ex rel. Grant v. Coleman, 1881, 8 P. R. 497, 7 A. R. 619, was no longer law.

The question came up again in R. ex rel. Boyce v. Porter, 1915, 33 O. L. R. 575, where the defendants moved before the County Court Judge who granted the fiats to set them aside. He refused, holding that he had no power so to do and dismissed the defendants' motions but gave them leave to appeal. The appeal was based on ss. 161 (2), 162 (1) and 163. In the affidavit the relator did not describe his interest except by reference to the proposed nature of motion and said only that he had "an interest in the election as an elector." The fiat was not in general terms but ordered that the relator, upon filing the statutory recognizance, "be at liberty to serve the said notice of motion." In the Appellate Division, Riddell, J., Falconbridge, C.J.K.B., agreeing, held that assuming that the County Court Judge acted as *persona designata*, an appeal lay with his consent under Judges Orders Enforcement Act, R. S. O. 1914, c. 79, and that the appeal should be allowed with costs. Latchford and Kelly, J.J., held that c. 79 did not apply, the latter using the following language:—"To hold that c. 79 can be invoked to support the bringing on of this appeal would be to permit an appeal in cases where it is expressly pro-

hibited by the Municipal Acts, especially would this be so where the proceedings are instituted before a Judge of the Supreme Court whose decision is, by s. 179 (1), made final, but who would have it in his power if c. 79 has application to defeat the express terms of s. 179 (1) as to finality by granting leave to appeal from his own decision. But it may be argued that the limitations of appeals by s. 179 (1) applies only to an order or decision finally disposing of the matters in issue, and not to decisions of matters of an interlocutory nature. If that were so, we should have the anomalous situation of possible appeals to a Divisional Court from interlocutory orders, when no such appeal lies from an order or decision determining the question in issue in the proceedings." The appeals were therefore dismissed, the Court being equally divided. As the question now stands, there is no appeal even by leave in interlocutory matters: R. ex rel. Grant v. Coleman, 7 A. R. 619, *supra*, and Re Moore and March, 20 O. L. R. 67, were referred to.

The judgment of Riddell, J., contains a valuable history of the former practice. If a Judge in interlocutory proceedings withdraws the fiat there is no appeal, and apparently no remedy however erroneous his action may be. Query, would a writ of prohibition lie where a *persona designata* was acting on a wrong principle?

Material Required.—(Falconbridge, C.J.K.B., and Riddell, J., in the App. Div. ex rel. Boyce v. Porter, 1915, 33 O. L. R. 575, held that it was necessary to shew somewhere in the material before the Judge on granting a fiat that the relator had a right to interpose, though it might not be necessary to establish the statute by affidavit, citing R. ex rel. Bartliffe v. O'Reilly, 8 A. R. 617), and the omission to do so is not an irregularity, but the omission of a prerequisite to the granting of a fiat and a ground for setting aside all proceedings based upon it, citing R. ex rel. Chauncey v. Billings, 12 P. R. 404, at 407; R. ex rel. O'Reilly v. Charlton, 1874, 10 U. C. L. J. N. S. 105; R. ex rel. Percy v. Worth, 1893, 23 O. R. 688. But apparently a Judge may grant a new fiat on new material.

Authorizing the Relator to Serve a Notice of Motion.—The proposed notice of motion may be submitted to the Judge and the fiat may expressly authorize the very notice which is to be served, but apparently a fiat in general terms would be good. See remarks of Riddell, J., in R. ex rel. Boyce v. Porter, 1915, 33 O. L. R. at 577. As to the contents and amendment of notice of motion, see notes to s. 163.

163. The relator in his notice of motion shall set forth his name in full, his occupation and place of residence, and the interest which he has in the election, whether as candidate or as an elector, and shall state specifically under distinct heads all the grounds of objection to the validity of the election complained of, and in favour of the validity of the election of himself or of any other person, where the relator claims that he or that such person was duly elected, or the grounds of forfeiture or disqualification, as the case may be. 3 Edw. VII. c. 19, s. 221 (2), *redrafted*. 3 & 4 Geo. V. c. 43, s. 163.

FORM OF NOTICE OF MOTION.

Amending a Notice of Motion.—The form of notice of motion considered in R. ex rel, Morton v. Roberts, 1912, 26 O. L. R. 263, was as follows:—"Take notice that by leave of His Honour Judge Monck, Junior Judge of the County Court of the county of Wentworth, a motion will be

made on behalf or the above-named John E. Morton, of the township of Barton, in the county of Wentworth, dairyman, and an elector entitled to vote at a municipal election in the said township of Barton, before the presiding Judge in Chambers at the Court House in the city of Hamilton, on the 8th day after the day of service of this notice on you (excluding the day of service), at the hour of eleven o'clock in the forenoon, or so soon thereafter as the motion can be heard, for an order declaring that the said Frank E. Rymol, the above-named defendant, hath lost his right to hold his seat as deputy-reeve of the township of Barton, and has become disqualified since his election to hold his said seat, he having since his said election sold and disposed of the property on which he qualified, and not being otherwise qualified or possessing the necessary property qualification required by the Consolidated Municipal Act, 1903, and amendments thereto."

It appeared from the material filed that the respondent had not taken the necessary statutory declaration required under s. 242.

Riddell, J., pointed out that s. 221 (2) of the then Act (now 163), makes no reference to a case in which the validity of the election is not complained of and no claim is made for the election of some one else as in that case, and he held that the notice of motion might be amended by setting up the omission to make the statutory declaration. He further held that s. 226 (now 168) did not apply, or if it did it was eminently a case where "the Judge in his discretion" should "entertain any substantial ground of objection to the right to hold the seat."

The Municipal Elections (Corrupt, etc., Practices) Act (Imp.), 1884, 47 and 48 Vict. c. 70, s. 12, provides that an election petition may be amended for the purpose of complaining of an illegal practice with leave within the time within which a petition complaining of an election on that ground can be presented.

In the absence of a similar provision as to the amendment of a notice of motion under Part IV., it would appear that a Judge might, within the time for applying under s. 162, grant leave to serve an amended notice. The course followed by Riddell, J., in R. ex rel. Morton v. Roberts, *supra*, in allowing the amendment at the trial, would indicate that he applied to motions under Part IV. the practice and procedure of the Supreme Court as to amendment of notice of motion under s. 186.

In R. ex rel. Roberts v. Ponsford, 1902, 3 O. L. R. 410, a motion for "Tuesday, the 24th." Tuesday being in fact the 25th. was amended

In R. ex rel. Percy v. Worth, 1893, 23 O. R. 688, a notice of motion which did not shew any interest in the relator was allowed after an affidavit was filed shewing the relator's interest. See also R. ex rel. O'Reilly v. Charlton, 1874, 6 P. R. 254.

Appeals.—Right to refused. See R. ex rel. Grant v. Coleman, 7 A. R. at 625.

164. Before serving the notice of motion, the relator shall file all the affidavits and material upon which he intends to move, except where oral evidence is to be taken, and in that case he shall name in the notice the witnesses whom he proposes to examine. 3 Edw. VII. c. 19, s. 222, *amended*. 3 & 4 Geo. V. c. 43, s. 164.

This section is identical with Consolidated Rule 1041, which, with other rules, were finally made part of the Act. In R. ex rel. Mangan v. Fleming, 1892, 14 P. R. 458, the relator filed a copy of an affidavit in support of his application for a fiat, and having obtained it served a notice of motion which stated that in support of the motion the testimony of certain named witnesses would be relied on, and that the affidavit of the relator would be read as well, and also stated that such affidavit was filed. Ferguson, J., held that it was not a fatal objection to the service of the notice of motion that the affidavit used in obtaining the fiat was not then

immediately filed and that an affidavit used for the purpose of procuring the fiat is not necessarily an affidavit on which the relator "intends to move," and he added:—"The literal reading of Rule 1041 favours the contention of the relator that a case where *viva voce* evidence is to be taken is an exception to the rule requiring all the affidavits and material to be filed (that is all upon which the relator intends to move) before the service of the notice of motion. But I do not think this the true meaning. I am of the opinion that, notwithstanding the apparent exception, the relator must file the affidavits and material to be used in support of his motion before serving the notice of motion. . . . The omission to file them does not, however, I think, constitute a good reason for setting aside the service of the notice. The effect simply is, I think, that he cannot read affidavits or material not so filed in support of the motion, and in this case the relator says he does not want to read anything of the sort. Even when affidavits and material are filed they must be mentioned or referred to in the notice of motion or they cannot be read in support of the motion. Mentioning an affidavit or other material in the notice of motion when there is no such paper or none such filed, does not, so far as I can see, vitiate the motion. The mover may, nevertheless, proceed as best he can upon the material he has properly before the Court."

In R. ex rel. Ivison v. Irwin, 1902, 4 O. L. R. 192, the notice of motion mentioned affidavits and also gave the names of witnesses. It was contended that the relator was precluded from supplementing his affidavit evidence by calling witnesses to give *viva voce* evidence, but this was overruled, following R. ex rel. Mangan v. Fleming, *supra*, and a witness whose affdavit was read was allowed to supplement it by parol testimony.

165. The notice of motion shall be served within two weeks from the date of the fiat, unless upon a motion to allow substituted service the Judge or Master in Chambers otherwise orders, and not less than seven clear days before the day on which the motion is returnable, and shall be served personally, unless the person to be served avoids personal service, in which case an order may be made for substituted service. 3 Edw. VII. c. 19, ss. 221 (1) and 223, *amended*. 3 & 4 Geo. V. c. 43, s. 165.

Where a notice of motion in *quo warranto*, to contest the validity of the election of respondents as aldermen, was allowed, by fiat of a Master, to be served upon the respondents, and was served on the 15th of February (seven clear days being required) for "Tuesday, the 24th day of February," the 24th of February being a Monday. Afterwards the relator served upon the respondents a notice to the effect that the day on which the motion would be made was Tuesday, the 25th of February. But this notice was not a seven clear days' notice. Held, that the notice of motion was good and sufficient for Tuesday, the 25th February, and that the sureties upon the relator's recognizance would have no ground of objection because of the proceedings not being properly prosecuted: R. ex rel. Roberts v. Ponsford, 1902, 3 O. L. R. 410.

166. Where the relator alleges that he or some other person was duly elected, the motion shall be to try the validity of the election complained of and of the alleged election of the relator or other person. 3 Edw. VII. c. 19, s. 224, *amended*. 3 & 4 Geo. V. c. 43, s. 166.

The declaration that a person has been elected completes his election, and before the relator or another can be declared elected the validity of the election complained of must be determined, and if it is found invalid there must be a further determination that the election of the relator or another was invalid. See s. 163.

The order in such a case may provide for the removal of the respondent and the admission of the person duly elected. See s. 174.

This section renders it necessary for the relator to claim the seat for another person than the respondent or the Court has no jurisdiction to try the validity of the election of that other. Where the seat is claimed for another then the motion must be (1) to try the validity of the election of the respondent, and (2) if the respondent is found not to have been validly elected to try the validity of the election of the other person alleged in the notice to have been elected.

If the notice of motion does not claim the seat for another, and it appears in evidence that another was elected, an order cannot be made for his admission to the seat without an amendment of the notice of motion made on the application of the relator. The Judge has power to grant such an amendment. See p. 218, *supra*. For authorities, see R. ex rel. Percy v. Worth, 23 O. R. 688. See also notes to ss. 168 and 174.

167. Where the grounds of objection apply to two or more persons elected or sitting as members of a council, the relator may proceed by one motion against all of them. 3 Edw. VII. c. 19, s. 225, *amended;* 3 & 4 Geo. V. c. 43, s. 167.

In R. ex rel. St. Louis v. Reaume et al., 1895, 26 O. R. 460, the Chancellor said of this section, when it was urged as a reason for listening to no objection which was not common to all the cases, that it "is merely a convenient guide for procedure so that cases having so much in common that they can conveniently be tried together may be combined in one proceeding—with the double advantage of economy and expedition."

In R. ex rel. Burnham v. Hagerman & Beamish, 1900, 31 O. R. 636, Street, J., in a case in which there was no common question, held that the two respondents could not be joined in one motion, basing his opinion upon the analogy of the proceeding under the Municipal Act to the common law *quo warranto*, which was criminal in its nature.

Middleton, J., in R. ex rel. Warner v. Skelton et al., 1911, 23 O. L. R. at 185, thought that the section authorizes proceeding against more than one person in the one motion only when "the grounds of objection," that is all the grounds set out in the notice, "apply equally to two or more persons elected."

See also R. ex rel. Cavers v. Kelly, 1906, 7 O. W. R. 280; R. ex rel. Seymour v. Plant, 1904, 7 O. L. R. 467, and R. ex rel. Moore v. Hamill, 1904, 7 O. L. R. 600. (Motions to unseat a mayor and four councillors as disqualified under s. 302) R. ex rel. Armour v. Peddie, 1907, 9 O. W. R. 393, 14 O. L. R. 339. (Unsuccessful motion to set aside election of reeve and council because clerk made declaration of election at the wrong place). R. ex rel Black v. Campbell, 1909, 18 O. L. R. 269. (Unsuccessful motion to unseat mayor and councillors because of use of wrong Act at election). R. ex rel. Milligan v. Harrison, 1908, 16 O. L. R. 475. (Unsuccessful motion to unseat controllers who had all taken irregular declarations of qualification in the same form).

Different orders may be made in respect of different respondents. R. ex rel. St. Louis v. Reaume, 1895, 26 O. R. 460.

In R. ex rel. O'Shea v. Letherby, 1908, 16 O. L. R. 581, the Master in Chambers considered in addition to the objection common to all the respondents, individual objections not common, but see R. ex rel. Warner v. Skelton, *supra*.

Costs where several respondents are joined are payable to them jointly and not to one only. See notes to s. 162 (2).

The notice of motion may include (particularizing them) claims:

(1) That the election was invalid, and that no person was duly elected. S. 162.

(2) That the respondent was not duly elected. S. 162.

(3) That the relator or some person other than the respondent was duly elected. S. 166.

(4) That the person duly elected has become disqualified or has forfeited his seat. S. 162.

168. On the hearing of the motion the relator shall not be allowed to object to the election of the person complained of or to support the election of himself or of any person alleged to have been duly elected or to attack the right of any member to sit on any ground not specified in the notice of motion, but the Judge or the Master in Chambers may entertain any substantial ground of objection to or in support of the validity of the election of either or any of the parties which may appear in evidence before him. 3 Edw. VII. c. 19, s. 226, *amended.* Cons. Rule 1042, 1888. 3 & 4 Geo. V. c. 43, s. 168.

169. Where more motions than one are made to try the validity of the election, or the right to sit of the same person, all of them shall be made returnable, and unless otherwise directed by a Judge of the High Court, shall be heard and determined by the Judge or Master in Chambers before whom the motion, notice of which was first served, is returnable, and one order upon all, or a separate order upon one or more of them may be made, as he may deem proper. 3 Edw. VII. c. 19, s. 227, *amended.* 3 & 4 Geo. V. c. 43, s. 169.

Several Motions against One Defendant.—A Judge of the Supreme Court, the Master in Chambers and the Judge of the County Court have equal jurisdiction and authority with the others of them and there would in the absence of this section be no power in a Judge of the Supreme Court to prohibit or enjoin either of the others from proceeding with a trial of the validity of an election or the right of a person to a seat. See remarks of Armour, C.J., in re Regina ex rel. Hall v. Gowanlock, 1898, 29 O. R. at 443, which was decided before the words "unless otherwise directed by a Judge of the Supreme Court," were added. In the last mentioned case the Master in Chambers granted a fiat to relator Winton on the 16th day of March, a County Court Judge granted a fiat to relator Hall in respect of the same respondent's election. The solicitor for Hall was present on the return of the Winton motion and the Master then enlarged the Winton motion and made an order that Hall be at liberty to appear before him on the return of the Winton motion and take all necessary steps to prosecute his motion in conjunction with the Winton motion. On the return of the motions the solicitor for Hall stated he had no instructions and the Master adjourned the Winton motion till

the 2nd of April, the Hall motion before the County Court Judge being returnable on the 1st of April. On the 1st of April McMahon, J., a Judge of the Supreme Court, upon application of the defendant, made an order prohibiting the County Court Judge from further proceeding to try the validity of the election. Affidavits were then produced by relator Hall before the County Court Judge tending to shew that the proceedings of relator Winton were collusive. The County Court Judge was proceeding to try the case and thereupon counsel for the defendant produced and served him with the order of prohibition. The prohibition was continued by Ferguson, J., and an appeal was taken. Armour, C.J., said: "The proper course for the defendant to have taken was by notice of motion in the County Court addressed to and served on Winton and Hall calling upon them to shew cause why the motion before the County Court Judge should not be set aside or be made returnable before the Master in Chambers, and upon this motion collusion in the first notice of motion could have been tried and disposed of. . . . Such course being taken and no collusion being shewn in the first proceedings, the learned Judge of the County Court will no doubt make the proceedings before him returnable before the Master in Chambers and we ought not to presume that he will not do his duty in this regard.

> "If this course had been taken, and it was in my opinion the proper course, the proceedings taken by way of prohibition would have been doubtless unnecessary, and it ought not to have been taken, the other course being open, and certainly not to the absolute prohibition of Hall proceeding with his suit.
>
> "No judicial knowledge of the first notice of motion was brought to the Judge of the County Court till the second notice of motion was returnable, and personal knowledge is of no effect in such a motion."

In view of the amendment it would appear that the defendant should still take the course suggested by Armour, C.J., of moving before the Judge issuing the second fiat. If he decides that the first proceedings are collusive or for any reason declines to make the second motion returnable before the Judge who granted the first fiat an application on notice to both relators may be made before a Judge of the Supreme Court for a direction as to which Judge shall try the case.

Collusive Proceedings. — In R. ex rel. Patterson v. Vance, 1871, 5 P. R. 334, relator Patterson obtained summons (under the former procedure) returnable before a County Court Judge and later relator Riddel, the unsuccessful candidate, obtained another summons returnable before a Judge of the Supreme Court. Vance applied in Chambers for a summons to set aside Riddel's writ, or to make it returnable before the County Judge and Riddel obtained a summons to set aside Patterson's writ on the ground of collusion and for irregularities. Both summons came on together and the former was disposed of first by Mr. Dalton who overruled the objection that Riddel could not be heard to object to proceedings to which he was no party, saying that a voter and candidate could set up that the proceedings of the relator were not in good faith but really intended to favor the sitting member, because this shews that his interests are unfairly prejudiced, but he cannot object to irregularities in the relator's proceedings.

In R. ex rel. Forward v. Detlor, 1868, 4 P. R. 197, judgment given in favor of Detlor on the relation of another relator was ignored on the ground that there was collusion and that therefore the judgment was no bar to the second application. See also R. ex rel. McLean v. Watson, 1855, 1 C. L. J. N. S. 71.

This section may be usefully compared with rule 47 of the Crown Office (Eng.), under which the consolidation of several orders *nisi* may be ordered when the right to the same office is in question in *quo warranto* proceedings which is as follows:

Rule 47.—Where several orders *nisi* for informations in the nature of *quo warranto* have been granted against several persons for the usurpation of the same offices, and all upon the same grounds of objection, the Court may order such orders to be consolidated and only one information

to be filed in respect of all of them, or may order all proceedings to be stayed upon all but one until judgment be given in that one, provided always that no order be made to consolidate or stay any proceedings against any defendant unless he give an undertaking to disclaim, if judgment be given for the Crown upon the information which proceeds.

English Law and Practice.—By the 4th s. of 9 Anne c. 25 it is provided that if it shall appear to the Court that the several rights of diverse persons to the said offices or franchises may properly be determined on one information, the Court may give leave to exhibit one such information against several persons in order to try their respective rights to such offices or franchises and such persons shall appear and plead or of the same term in which the information shall be filed unless the Court shall give time to plead.

R. ex rel. Ingham v. Orde, 1830, 8 Ad. & El. 420 n., was a case where an order *nisi against* Orde on the relation of Denham was set aside and a second rule *nisi* on the relation of Ingham was granted on reading affidavits filed on the previous occasion and affidavits impeaching them and tending to shew that the qualification of Orde was merely colorable. The Court discharged the second rule without hearing any answer to it on the merits, but gave no costs because it had been the error of the Court in granting the second rule *nisi*.

In R. v. Alderson, R. v. Goddard, R. v. Potter, 1839, 11 Ad. & El. 3, three rules *nisi* had been obtained against three several aldermen. The relator was in low circumstances and in the employment of the attorney prosecuting the rules and that attorney had employed the same agents in London to instruct counsel for and against the rules. A burgess moved that the management of the prosecutions might be transferred to him, alleging that he had an interest, and collusion. Lord Denman, C.J., said: "There is very imperfect evidence of collusion in this case; and it may be that the parties originally applying for the informations intended *bona fide* to try the question of law. At the same time the mere circumstance of a person connected with a political party in the borough acting as attorney on both sides is so striking that we ought not to suffer such a state of things without strong proof that no improper consequence could ensue. Here the actual relator appears to be in bad circumstances and under the control of the party acting as attorney. I do not see what unfair advantage can be contemplated by these parties; but it is so important in proceedings of this kind that no suspicion should attach to them, that we think it the safest course to forbid the carrying on of the prosecutions by the original relator and to make the rules absolute for giving the management of them to the party now applying.

170. The Judge or Master in Chambers may require the clerk of any municipality to produce before him or to forward under seal to the clerk of the county or district court for the purpose of production, such assessment rolls, collectors' rolls, ballot papers, books, voters' and other lists, and other records of the election and papers in his hands connected with or relating to it as the Judge or Master in Chambers may deem proper. 3 Edw. VII. c. 19, s. 228, *amended*. 3 & 4 Geo. V. c. 43, s. 170.

Preservation of Election Papers.—It is the clerk's duty to retain all ballot papers for one month and then, unless otherwise ordered, to destroy them, s. 146 (1). Inspection may be ordered, s. 147. Poll books, voters' lists, certificates and other election documents or papers must not be destroyed, under a penalty of $2,000 and imprisonment not exceeding one year: s. 139.

Production of Election Papers.—When an order is made for production by the clerk of any document in his possession relating to an election the production of it by him shall be evidence that it relates to the election and any endorsement appearing on any packet of ballot papers so produced shall be evidence that the contents are as stated: s. 148.

While the production of voters' lists, poll books, ballots, etc., in the manner authorized by this section combined with the provisions of s. 148 makes it a simple matter to get before the Court the original records of an election, it is to be noted that the records are not made evidence of their contents as has been done by statute in connection with other public records.

For example, entries in a poll book are not evidence of their contents. The production of a poll book containing a record that John Smith voted for mayor does not prove that John Smith voted.

If the poll clerk who kept the book and made the record is called he may, if he personally knew John Smith, prove that he voted. If he did not know John Smith all that he can prove is that a person giving the name John Smith voted and that he made an entry to that effect. It may be that he has no recollection of the person who appeared and voted at the time the entry was made, in which case looking at the record he could say that a person who gave the name of John Smith voted on the principle applied where a witness proves the execution of a document when he sees his name in his own handwriting as a witness, though he has absolutely no present recollection of the execution.

Where there is voting for mayor, controllers and aldermen at one time so that each voter may receive several ballots the poll clerk's evidence as to the ballots handed out may be practically worthless, particularly if the total number of ballots shewn by the poll book disagree with the number of ballots found in the ballot box at the close of the poll.

Even the oaths, statements and certificates contained in the poll book, or given as to the result of the election, are not evidence of the truth of their contents.

Even the certificate of the Judge on a recount under s. 129 is not evidence of the result therein stated and the ballots may be counted again in proceedings under Part IV. Section 129 (9) seems expressly drawn to prevent any of the proceedings on a recount from affecting proceedings under Part IV.

171. Where the motion is returnable before a Judge of the High Court he may direct that the evidence to be used on the hearing of the motion be taken orally in the presence of counsel for or after notice to all parties interested, before a special examiner or a Judge of a County or District Court, who shall return the evidence so taken to the proper officer of the High Court. 3 Edw. VII. c. 19, s. 229, *amended*. 3 & 4 Geo. V. c. 43, s. 171.

Oral Evidence.—The defendant may cross-examine all affiants whose affidavits have been filed as the practice in the High Court is applicable to *quo warranto* proceedings. R. ex rel. Roberts v. Ponsford, 1902, 22 C. L. T. Occ. N. 146, cited by MacMahon, J., in R. ex rel. Ivison v. Irwin, 1902, 4 O. C. R. at 197.

Where application is made at the trial to cross-examine affiants it is discretionary with the Judge to make the order; R. ex rel. Piddington v. Riddell, 1867, 4 P. R. 80, where Morrison, J., held he could only be warranted in doing so on the ground that he considered the facts sworn to be untrue. See also R. ex rel. Ross v. Taylor, 1902, 22 C. L. T. Occ. N. 183, and R. ex rel. Ivison v. Irwin, *supra*.

In R. ex rel. McFarlane v. Coulter, 1902, 4 O. L. R. 520, the County Court Judge set aside an appointment and subpœna to cross-examine affiants and later set aside the relator's whole proceedings. On appeal the Judge's decision on interlocutory matters was held to be final.

The question came up again in R. ex rel. Beck v. Sharp, 1908, 16 O. L. R. 267, where the provisions of s. 173 (1) were under consideration. Anglin, J., said, referring to s. 171, "the presence of this provision in the statute restricted as it is to motions returnable before a Judge of the High Court, indicates that where a motion is returnable before a Master in Chambers, or a Judge of the County Court, it was intended that all the oral evidence to be used on the hearing should be taken before the judicial officer trying the case. Cross-examination upon affidavit is, in my opinion, quite as much 'oral testimony' as original evidence given by a witness orally examined."

It was also held that cross-examination could only be held with leave and then only before the judicial officer to try the case. The general Rules of the Supreme Court as to examination on affidavits are excluded by the code of rules comprised in this Part IV. which are comprehensive and exhaustive to the extent to which they provide machinery or regulate procedure. *Ibid.*

Under Rule 208 of the Supreme Court, Ontario, the Master in Chambers has jurisdiction in *quo warranto* proceedings under this Part and may under this section direct a reference to a County Judge to take evidence. R. ex rel. Whyte v. McClay, 1889, 13 P. R. 96; R. ex rel. O'Shea v. Letherby, 1908, 16 O. L. R. at 587. These cases were on the wording of s. 219 (2) of Cons. Man. Act, 1903, now amended; see ss. 160 (*b*), and 161 (1), and it is arguable that under Part IV. a Judge of the Supreme Court only can direct a reference under this section. See citation from R. ex rel. Beck v. Sharp, *supra*, as to the exclusion of the general rules of the Supreme Court where the provisions of this part are definite and the jurisdiction of the Master in Chambers under this part is definitely defined and therefore should not be extended by an application of Rule 208.

172.—(1) The Judge or Master in Chambers, at any stage of the proceedings, may

(*a*) Add the returning officer or any deputy returning officer or other person as a party to the proceedings. 3 Edw. VII. c. 19, s. 230, *amended.*

(*b*) Allow any person entitled to be a relator to intervene and prosecute, or to defend, and may grant a reasonable time for that purpose.

(2) An intervening party shall be liable for or entitled to costs like any other party to the proceedings. 3 Edw. VII. c. 19, s. 231, *amended.* 3 & 4 Geo. V. c. 43, s. 172 (1-2).

Adding the Returning Officer or Deputy or other Person.—The reason for adding a party is that by his conduct he has or apparently has caused an invalid election or that it is alleged in the notice of motion that his conduct had such effect.

The corresponding provision of the Municipal Corporations Act, 1882, 45 and 46 Vict. (1) c. 50, s. 88 (2) is: "Any returning officer of whose conduct a petition complains may be made a respondent to the petition." Under this provision it was held that a returning officer was regularly made a respondent where his clerk printed and caused to be used ballots containing the name of a candidate who had withdrawn: Wilson v. Ingham, 1895, 64 L. J. Q. B. 775. The argument that the whole liability of the

returning officer was under the penal sections corresponding to sections 137 to 143 inclusive, was not sustained in spite of the dictum of Lord Selborne in Harmon v. Park, 1881, 6 Q. B. D. 323; 50 L. J. Q. B. 227, as follows: "As at present advised, I am inclined to doubt whether any act on the part of a returning officer which did not fall within the list of offences enumerated in section 11 of the Ballot Act could be treated as misconduct, so as to render him liable to be made a respondent in a municipal election petition."

The adding of the returning officer or other person enables costs to be awarded against such: see s. 176 (1). The party added under par. (*a*) will of course be added as a party defendant.

Allowing Intervening Party to Prosecute or Defend.—Before the words "prosecute or" were inserted Boyd, C., held that an intervener could not have the motion transferred into his hands there being no suggestion of collusion. R. ex rel. Marson v. Butler, 1897, 17 P. R. 382. Under the English practice Crown Office Rules, r. 46, a new relator may be substituted. R. v. Alderson, 11 A. & E. 3, where the same solicitor instructed counsel to appear on both sides, and R. v. Quayle, 9 Dowl. 548, where the first relator had to go away beyond seas on business. See also Re Kelly v. Macarow, 14 C. P. at 460. Apparently the intervening parties cannot be required to enter into a recognizance or to give security for costs.

The provision for the intervention of a defendant is based on the old law whereby, when the Court was convinced that important questions arose or were likely to arise which the defendant was unwilling to contest, another person interested was permitted to conduct the defence at his own risk as to costs; R. v. Dawes, 4 Burr. 2278; R. v. Marshall, 2 Chit. R. 370, and R. ex rel. Marson v. Butler, *supra*.

The intervening party must be a person entitled to be a relator. See s. 161 (2).

173.—(1) The Judge or Master in Chambers shall, in a summary manner, without formal pleadings, hear and determine the questions raised by or upon the motion, and, subject to s.-s. 2, may inquire into the facts on affidavit, by oral testimony, or by an issue framed by him and sent to be tried by a jury in any Court named by him, or by one or more of those means. 3 Edw. VII. c. 19, s. 232 (1), *amended*.

(2) Where a question is raised as to whether the candidate or any voter has been guilty of any violation of ss. 187 to 189, affidavit evidence shall not be used to prove the offence, but it shall be proved by oral evidence taken before the Judge or before a special examiner or a Judge of a County or District Court, upon an order of reference to him for that purpose by the Judge of the High Court, if the motion is returnable before a Judge of the High Court, or before the Master in Chambers or the Judge of the County or District Court if the motion is returnable before him. 3 Edw. VII. c. 19, s. 248, *amended*.

(3) Where the seat is claimed for any person, if a candidate is proved to have been guilty, himself or by any person on his behalf, of bribery or of a corrupt practice with respect to a voter who voted at the election, or if a voter, who is employed on behalf of such candidate and is disqualified under s.-s. 2 of s. 61, is proved to have voted, there shall be struck off the number of votes given for such candidate one vote for every such voter. *New.* 3 & 4 Geo. V. c. 43, s. 173 (1-3).

In R. ex rel. Thornton v. Dewar, 1895, 26 O. R. 512, Rose, J., held that no one can be found guilty of bribery under the Municipal Act unless the evidence discloses in him an intention to commit the offence and he added: "I decline to hold that a candidate desiring and intending to have a pure election can be made a *quasi* criminal by the act of an agent who without the knowledge or desire of the principal violates the statute to advance the election of such candidate. The acts which were relied upon here to shew bribery by the candidate were in no sense brought home to him personally. It was not shewn that they were done with his knowledge or consent, or under instructions which either expressly or impliedly warranted any such misconduct even if the evidence established it against persons who were in a general sense agents of the candidate. It would shock our sense of justice to be told that where a candidate had conducted the election contest with every endeavour to avoid any and all acts of impropriety he could be found guilty of bribery—be made liable to a penalty and rendered ineligible as a candidate at any municipal election for two years because some agent, acting to advance his interests as a candidate, should without his knowledge or consent, and possibly in direct opposition to his express orders, have paid a man to vote for him. . . . Thus, apparently, it was not intended that in municipal elections the election should be declared void by reason of acts of bribery by agents where the candidate was not personally guilty of such acts, and had the majority of votes legally cast, but the agents were made liable to be punished for their misconduct as provided by s. 214 (now 180). My learned brother Street in R. ex rel. Johns v. Stewart, 16 O. R. 583, seems to have thought personal misconduct on the part of the candidate essential to support a charge of bribery against him."

On the other hand, in Kaulbach v. McKean, 1905, 38 N. S. R. 38, under the Municipal Controverted Elections Act, R. S. N. S., 1900, c. 72, ss. 4, 6, 22 and 64, the full Court set aside the election of a municipal councillor for bribery by an agent. R. ex rel. Thornton v. Dewar was criticized and the general common law of Parliament that corrupt acts by agents will void an election was applied to municipal elections. But this decision was by Langley, J., based on the definition of corrupt practices which included acts recognized as corrupt practices by the common law of Parliament.

See notes to s. 171.

Oral testimony includes cross-examination on affidavits whether taken on or before the return of the motion.

Excepting where the motion is returnable before a Judge of the High Court all the oral evidence to be used on the hearing should be taken before the judicial officer trying the case. R. ex rel. Beck v. Sharp, 1908, 16 O. L. R. 267; R. ex rel. O'Shea v. Letherby, 1908, 16 O. L. R. 587.

Answers by affidavit to oral evidence of a corrupt practice given under s.-s. (2) cannot be given by affidavit: R. ex rel. Carr v. Cuthbert, 1901, 1 O. L. R. 211. This was a decision of the master at a time when the statute contained a heading preceding old s. 248 as follows: "Evidence as to corrupt practices to be taken *viva voce*." This was read into the section, applying Eastern Counties v. Marriage, 1860, 9 H. L. C. 32; Hammersmith v. Brand, 1869, L. R. 4 H. L. 171.

Shall Hear and Determine the Questions Raised by or Upon the Motion.—Old s. 232 (1) read instead of the above language as follows: "Shall hear and determine the validity of the election." The change is rendered necessary by the amendments which extended the statutory procedure to cases of disqualification or forfeiture arising subsequent to election.

Cross-examination of affiants may be had as of right before the commencement of the trial, as the practice in the High Court is applicable to *quo warranto* proceedings, s. 185 and R. ex rel. Roberts v. Ponsford, 1902, 3 O. L. R. 410 (D.C.). But cross-examination at the trial is within the discretion of the trial Judge or officer. R. ex rel. Ivison v. Irwin, 1902, 4 O. L. R. at 197 following R. ex rel. Ross v. Taylor, 1902, 22 C. L. T. Occ. N. 183 and R. ex rel. Piddington v. Riddell, 1867, 4 P. R. 80.

Irregularities in Proceedings.—Proceedings in *quo warranto* matters under the Municipal Act are not to be held irregular and void if they do not interfere with the just trial of the matter on the merits. R. ex rel. Linton v. Jackson, 1851, 2 C. L. Ch. 18; R. ex. rel. McManus v. Ferguson, 1865, 2 U. C. L. J. N. S. 19, and R. ex rel. Grant v. Coleman, 1882, 7 A. R. 619, at p. 625, all discussed in R. ex rel. Roberts v. Ponsford, *supra*, at p. 415.

Striking off Votes.—The provision in s.-s. 3 is new. It is evidently based on s. 85 of the Municipal Corporations Act, 1882, 45 and 46 Vict. c. 50 (Imp.) which provides that the votes of persons in respect of whom any corrupt practice is proved to have been committed at a municipal election shall be struck off on a scrutiny. A scrutiny under the Imperial Act only takes place when the seat is claimed for an unsuccessful candidate. The striking off is done by ascertaining from the poll book the number of the ballot cast by the guilty person and the ballot is then looked at and the vote given by it struck off. In the Finsbury case, 1892, Day's El. Cases 47, the petitioner in a single session had three votes struck off his own total. As numbered ballots with counterfoils the number being entered in the poll book are not used in any Canadian municipal system the plan provided in s.-s. 3 is necessary if votes are to be struck off at all. Note that in contrast with the provisions of the Imperial Act votes are only struck off when the candidate or some one on his behalf has been found guilty. It is not at all certain however that the vote struck off was actually given to the candidate from whose total it is to be taken. The s.-s. in reality provides a penalty where the candidate is guilty of a corrupt practice. As the striking off is only when the seat is claimed for another if the result is that a majority of the good votes allowed are for that other he may be awarded the seat. Even if the other person claiming the seat has not a majority the election will be void when s. 180 (1) applies.

There is no provision by which a candidate declared elected forfeits his seat by reason of votes cast in contravention of s. 61 (1).

Under the Imperial Act although the respondent may be unseated he can still continue the scrutiny with the object of preventing the petitioner from obtaining the seat. Rogers Vol. III., p. 333. It is plain from s.-s. 3 that votes may under its provisions be struck off the total of all candidates. It is therefore important where the seat is claimed for the relator or another for the defendant by his material in answer to set up as many cases as possible in which votes may be struck off his opponent.

174.—(1) Where the election complained of is adjudged to be invalid, the order shall provide that the person found not to have been duly elected be removed from the office, and if it is determined that any other person was duly elected that he be admitted forthwith to the office.

(2) Where it is determined that no other person was duly elected, or that a person duly elected has become disqualified or has forfeited his seat, the order shall provide for the removal from office of such last mentioned person and, except as provided by s. 157, for the holding of a new election. 3 Edw. VII. c. 19, s. 233, *amended;* 3 & 4 Geo. V. c. 43, s. 174 (1-2).

Onus on Relator.—Section 93 of the Municipal Corporations Act, 1882, 45 and 46 Vict. c. 50 (Imp.) dealing with the trial of municipal election petitions provides as follows:

(4) At the conclusion of the trial the election Court shall determine whether the person whose election is complained of or any or what other person, was duly elected, or whether the election was void. The same words are used in the Manitoba Municipal Act, R. S. M. 1913, c. 133, s. 222, where the procedure is by election petition or under the Imperial Act. In construing the latter section the Manitoba Court of Appeal unanimously held that the onus was on the petitioner and that he must affirmatively prove the charge in the petition that the respondent was not duly elected by a majority of the lawful votes before the Judge can make the order asked for in the prayer. Smith v. Baskerville, 1914, 24 M. R. 349, where the respondent was declared elected by a small majority and it was proven that there were more illegal votes cast than the majority but it could not be proven for whom they were cast. This was owing to the rule which forbids enquiry as to how a voter has voted even if he has voted illegally. See Re Lincoln, 1878, 4 A. R. 206; Re West Lorne, 1913, 47 S. C. R. 451. This difficulty does not arise under the Imperial Act where ballots can be traced by numbers. The situation presented in Smith v. Baskerville could not very well arise under the Imperial Act, but a very similar situation arose in Wilson v. Ingham, 1895, 64 L. J. Q. B. 775, where by mistake the ballot papers contained the name of a candidate Meek who had withdrawn. The vote was Scott, 243; Robson, 235; Ingham, 132; Hickeley, 129; Wilson, 128; Meek, 34. The four highest were to be elected. The returning officer declared Scott, Robson, Ingham and Hickeley elected; Wilson presented a petition against Ingham and Hickeley. The Court declared the election of the respondents void. The ground of decision was that it could not be said that the irregularity did not affect the result of the election, applying the 13th section of the Ballot Act, which reads as follows:

13. "No election shall be declared invalid by reason of a non-compliance with the rules contained in the first schedule to this Act, or any mistake in the use of the forms in the second schedule to this Act, if it appear to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election," and which is in effect the same as s. 150, *supra*, before the amendment of 3 and 4 Geo. V. c. 43, s. 150, also in effect the same as s. 176 of the Manitoba Municipal Act. Section 150 now reads in such a manner as to cast an onus on the plaintiff or relator similar to that stated in Smith v. Baskerville to affirmatively prove that the defendant was not duly elected or that the result was not affected by the irregularity. The effect of s. 150 in its present form was stated in an application to quash a by-law by Hodgins, J.A., as follows: "Under the present section it is sufficient to uphold the by-law that there is no proof that the result was affected by the non-compliance, mistake or irregularity. If the applicant does not prove it and it does not otherwise appear, then, provided the principles of the Act governed the conduct of the vote, the by-law stands. In other words, the onus upon those supporting the by-law is confined to shewing compliance with the principles laid down in the Act, while upon the applicant is laid the burden of shewing that the result was affected by the proved irregularities": Re Sharp and Holland Landing, 1915, 34 O. L. R. at 189

App. Div. In this report there would appear to be no distinction between the effect of irregularities at an election and at a voting on a by-law, whatever differences may exist between the two in other respects.

Before the amendment of 3 and 4 Geo. V., c. 43, while s. 204, corresponding with s. 13 of the Ballot Act, was in force, it was repeatedly held that the election must be set aside once the relator had established that it could not be said that the result of the election was not affected; for example, in R. ex rel. Ivison v. Irwin, 1902, 4 O. L. R. 192, Irwin had a majority of 101 votes according to the official count. It was shewn that a large number of the ballot papers had been tampered with. McMahon, J., applied s. 204, saying that it was impossible to say that the irregularities did not affect the result of the election, and Irwin was unseated.

In view of the change introduced by s. 150 in its present form, the task of upsetting an election except for corrupt practices brought home to the defendant is a formidable one. The remarks of Hodgins, J.A., in Re Sharp v. Holland Landing, *supra*, although referring to the quashing of a local option by-law, are of general value:—"Formerly proof of irregularities unsettled the basis on which the vote rested, and the Court had to be satisfied in some way that the result was not affected thereby. Now, when irregularities are proved, the Court is not concerned with their effect, subject always to compliance with the principles laid down in the Act, unless and until it is made to appear that those irregularities did not in fact affect the result. In my view the Legislature has at last so provided that the Courts will not in the future have to busy themselves annually in considering the mass of unfinished and unimportant suggested improprieties relied on to defeat every local option vote."

175. Where the election of all the members of a council is adjudged to be invalid, or where it is determined that all of them have become disqualified or have forfeited their seats, the order for their removal, and for the election of new members in their places or for the admission of others adjudged to be legally elected, and for an election to fill the remaining seats in the council, shall be directed to the clerk of the municipality or where there is no clerk to the sheriff of the county or district in which the municipality is situate, who shall have all the powers for causing the election to be held which a municipal council or any member or officer of it has in order to fill a vacancy in it. 3 Edw. VII. c. 19, s. 234, *amended*. 3 & 4 Geo. V. c. 43, s. 175.

All Members Unseated.—This section applies where combined motions are brought under s. 167, with the result that all the members of council are unseated. It does not apply where, as a result of separate motions based on different grounds, all the members are unseated, as the section has reference to a case where a single order for removal is made. In case half or less than half the members are unseated the elected members may order a new election. If less than half are unseated the clerk is required to cause a new election to be held. See s. 70. Section 159 applies where there has been no election.

Power to Order Election.—See s. 156, *supra*, also Bawkes v. Letherby, 1908, 17 O. L. R. 304, in which it was held that a warrant must be issued as the very foundation for the holding of an election.

176.—(1) Where an election is adjudged to be invalid owing to the improper refusal of the returning officer or of a deputy returning officer to receive a ballot paper tendered by or to give a ballot paper to an elector, or owing to such officer having put into the ballot box a ballot paper which was not lawfully received from an elector, the Judge or Master in Chambers may order that the costs of the proceedings to unseat the person declared elected, or any part of them, be paid by such returning or deputy returning officer.

(2) Nothing in this section shall affect any right of action against the returning officer or deputy returning officer or relieve him from any penalty to which he may be liable under this Act. 3 Edw. VII. c. 19, s. 235; 5 Edw. VII. c. 22, s. 10, *redrafted*. 3 & 4 Geo. V. c. 43, s. 176 (1-2).

Liability of Returning Officer to Pay Costs.—The section specifies three cases in which the returning officer may be ordered to pay costs. Before this section was enacted a returning officer was ordered to pay costs where he improperly closed the poll and then refused a vote: R. ex rel. Arnott v. Marchant, 2 C. L. Ch. 189, where a similar mistake occurred through ignorance, costs were not awarded against the returning officer: R. ex rel. Coupland v. Webster, 6 L. J. 89, and R. ex rel. Corbett v. Jull, 1869, 5 P. R. 41; see also R. ex rel. Jobarton v. Murvey, 5 L. J. 87.

It is submitted that as the section stands costs can only be imposed on the returning officer in the three cases mentioned. "May" in the section implies that the power is discretionary. The improper refusal of a single ballot or improper reception of an illegal ballot brings the returning officer within the section and in both cases only when the election is adjudged invalid by reason thereof.

Under the English practice where the conduct of the returning officer has given rise to the proceedings, he may be ordered to pay costs: Halifax Case, 1893, 4 O'M. & H. 205. The returning officer under s. 98 Municipal Corporations Act, 1882, 45 and 46 V., c. 50 (1), like any other party is liable to costs, but to be rendered liable must be made a party to the petition: Watts v. Hemming, 1907, 71 J. P. 504.

Right of Returning Officer to Costs.—See notes to s. 172.

Right of Action Against Returning Officer at Common Law.—The liability of the returning officer at common law depends on whether or not the acts or defaults in respect of which damages are claimed were done by him in a judicial or in a ministerial capacity. The leading case is Ashby v. White, 1703, 2 Lord Raymd. 938, 3 Lord Raymd. 320, where an elector whose vote was maliciously rejected was held by Lord Holt to be entitled to an action in respect of the injury though the candidate he wished to vote for was elected. On the other hand, if the returning officer acted *bona fide* in an effort properly to perform his duty he would not be liable: Tozer v. Child, 26 L. J. Q. B. 151. Notice has been held to be an essential ingredient of the cause of action: Cullen v. Morris, 2 Stark 577. The foregoing and other early cases were considered and reviewed by the Court of Common Pleas in the case of Pickering v. James, 1873, L. R. 8 C. P. 489, 42 L. J. C. P. 217. This was an action against a presiding officer at an election under the Ballot Act, 1872, for damage at common

law, and for penalties imposed by the Act for the breach of duty on the part of the presiding officer in delivering to voters ballot papers not having the official mark and for depositing ballot papers not having the official mark in the ballot box. The plaintiff succeeded. While the case depends on the express provisions of the Ballot Act it reveals the principles which will be applied under similar Acts. It was held that the duties in question were ministerial, and that therefore at common law an action lies if a person be aggrieved unless the statute prevents it. It was further held that the returning officer was liable, though the breach of duty be not wilful or malicious.

Pickering v. James was applied in the case Wilson v. Manes, 1896, 28 O. R. 419, 26 O. A. R. 398, which was an action against a returning officer for refusing to deliver a ballot paper; the plaintiff claimed penalties under the Municipal Act and damages at common law. Armour, C.J., directed that judgment be entered for $400 to be entered generally, or if the ultimate judgment of the Court should be that the plaintiff was entitled to recover either upon statute only or at common law only, then in respect of which it should be determined that the plaintiff was entitled to recover with full costs of suit. This decision was upheld by the Divisional Court, Meredith, C.J., considering that so far as the acts complained of were concerned the duties of the returning officer were merely ministerial, and being ministerial, the action lay for breach of duty without malice or negligence, and therefore held that the plaintiff was entitled to recover either under the Act or at common law. In the Court of Appeal the case was held to turn upon the proper interpretation of the word "wilful" in s. 168, new section. Burton, C.J.O., gave the word "wilful" the interpretation placed on it in In re Young and Harston's Contract, 1885, 31 Ch. D. 168, where Bowen, L.J., said, as follows:—"That is a word of familiar use in every branch of law, and although in some branches of the law it may have a special meaning, it generally, as used in Courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and is a free agent." The decision of the Court, McLennan dissenting, was that the defendant was liable both under the Act and at common law.

See ss. 137 to 143.

Remedies Cumulative.—Section 11 of the Ballot Act, 1872, provided that every returning officer should, in addition to any other penalty or liability, forfeit to any person aggrieved appeal sum. This section may be compared to s. 143, *supra*, from which it will be apparent that the remedies against a returning officer by a person aggrieved are cumulative.

In every case, however, the whole Act will have to be looked to; it may be that the Act will disclose the intention to exclude any remedy except the penalties provided by it; for a discussion of the general principle involved, see Atkinson v. Newcastle, L. R. 6 Ex. 404.

Judicial Acts of Returning Officer.—In R. v. Collins, 1876, 2 Q. B. D. 30, 46 L. J. Q. B. 257, on the trial of an issue on a *quo warranto*, it was held that the functions of the chairman in ascertaining the validity of votes was of a judicial character and could not be questioned in such a proceeding, but it was pointed out that if he acted corruptly different considerations would arise, and the same view was expressed in Akers v. Howard, 1886, 16 Q. B. D. 751, 55 L. J. Q. B. 273.

177.—(1) After the adjudication an order shall be drawn up, stating concisely the ground and effect of the decision.

(2) The order may be at any time amended by the Judge or Master in Chambers in any matter of form, and

shall have the same force and effect as a writ of mandamus formerly had in the like case. 3 Edw. VII. c. 19, s. 236, *amended.* 3 & 4 Geo. V. c. 43, s. 177 (1-2).

Amendment of Order.—Compare the provisions of this section with Cons. Rule s. 521 of the Supreme Court of Ontario, Holmested, p. 1143. When an order is amended, there should be no physical change made in the document, but the amendment should be noted in a convenient place: Cons. Rule 187. It has been held that a Judge has no power to amend his judgment when once issued: Holmested, 1145. This, of course, does not prevent formal amendments.

Shall have Effect as a Writ of Mandamus in Like Case.—The writ of mandamus is now abolished: Cons. Rule S. C. O. 1913, 623. The order has the effect that the writ had under the old practice. The old writ was "in form a command issued in the King's name from the King's Bench Division of the High Court only and addressed to any person, corporation or inferior Court of Judicature requiring them to do something therein specified, which appertains to their office, and which the Court holds to be consonant to right and justice. It is used principally for public purposes, and to enforce performance of public rights or duties. It enforces, however, some private rights when they are withheld by public officers:" Wharton's Law Lexicon.

178. The Judge or Master in Chambers forthwith after rendering his decision shall return the same with all things had before him touching the proceeding, to the proper officer of the Court, there to remain of record as a judgment of the Court; and the judgment may be enforced for the costs awarded by execution and in other respects in the same manner as an order of mandamus. 3 Edw. VII. c. 19, s. 237, *amended.* 3 & 4 Geo. V. c. 43, s. 178.

The Proper Officer of the Court.—Section 237 read, "to the proper officer of the Court in which the proceedings are entitled."

To Remain of Record as a Judgment of the Court.—Section 237 read, "as a judgment of the High Court." It was suggested by Patterson, J.A., in R. ex rel. Grant v. Coleman, 619, 7 O. A. R. 624, that the judgment is *sui generis,* and that as the statute then stood the Court was not to enforce the judgment, but that was made the province of the Judge. While the statute as amended does not contain many of the expressions on which, with others still remaining, Patterson, J.A., based his reasoning, (which was concurred in by the rest of the Court), it seems probable that it still applies so far at least as Judges of the High Court are concerned.

179.—(1) The decision of a Judge of the High Court shall be final, but an appeal shall lie from the decision or order of the Master in Chambers or of a Judge of a County or District Court to a Judge of the High Court whose decision shall be final.

(2) The practice and procedure on and in relation to the appeal shall be the same, as nearly as may be, as in the case of an appeal from a decision of the Master in Chambers in an action or proceeding in the High Court. 3 Edw. VII. c. 19, s. 219 (3), *redrafted*. 3 & 4 Geo. V. c. 43, s. 179 (1-2).

The Decision shall be Final.—Sub-section 4 of s. 51 of the Dominion Elections Act, as amended by s. 13 of 54 and 55 V. c. 20, contains a similar provision.

In the St. Ann's Election Case, 1906, 37 S. C. R. 563, Idington, J., in the Supreme Court, commenting on this provision, referred to the Norwich Election Case, 1870, L. R. 6 C. P. 147, 40 L. J. C. P. 58, where the effect of similar language was discussed by Bovill, C.J., as follows:

> "With regard to the sitting member, the determination is a determination necessarily as to his status, and Parliament has declared that that shall be final; but with regard to a mere candidate or petitioner there is no such enactment, there is no decision as to his status, the Judge simply finds that the matter is not proved against him. Therefore I am at a loss to see how, so far as he is concerned, anything which it is now proposed to go into can be considered in the nature of matter which has been already adjudicated upon. If a candidate is found guilty of bribery, having had the opportunity of being heard, no doubt effect is given, but expressly given by statute, to the report of the Judge; but there is no such enactment, nor any effect given to the case, where a Judge simply says by his report that it is not proved. If the case is declared not to be proved, it leaves the matter entirely open either for prosecution or to be dealt with in any other way, and no effect is given to the report in that form."

It is submitted that where the seat is claimed for another than the person declared elected, it is open to the defendant by recrimination to shew that the person for whom the seat is claimed is disentitled by reason of disqualification, corrupt practices or otherwise, and the decision of the Judge or Master in Chambers as to the status of such person is final, and the report may be made respecting him under s. 180, and he will be subject to the disqualification provided in that section. If the relator is not the person for whom the seat is claimed, the latter may find evidence being given against him though he is not a party to the proceedings: See Rogers, 1906, vol. III., p. 325. The Judge or Master in Chambers would probably add such a party to the proceedings under s. 172. See also Parties, *supra*.

For a similar provision as to finality of decision, see ss. 4 of s. 93 of the Municipal Corporations Act, 1882, 45 and 46 V. c. 50 (Imp.). The purpose of the Act seems to be that as regards members of councils who are declared elected in the first instance or who are seated by reason of a decision under Part IV., all questions affecting the validity of the seat shall be tested within a certain time and under certain conditions; and that after a certain time, under given circumstances, there shall be no further investigation as to the title to the seat, and the matter being one as to the status of the member, it is declared that if the matter has been determined by a Judge of the Supreme Court that shall be final to all intents and purposes. See remarks of Bovill, C.J., in the Norwich Election case.

Appeal from Interlocutory Order of Master.—Such an appeal was taken without objection in R. ex rel. Warner v. Skelton, 1911, 23 O. L. R. 186.

180.—(1) A candidate elected who is found to have been guilty of bribery, or of a corrupt practice, shall for-

feit his seat, and shall be ineligible as a candidate at any election for two years thereafter. 3 Edw. VII. c. 19, s. 249.

(2) The Judge or Master in Chambers shall report to the Clerk of the Municipality in which the offence was committed the name of every candidate who has been so found guilty, and the clerk shall enter his name in a book to be kept for that purpose. 3 Edw. VII. c. 19, ss. 252, 253, *amended.* 3 & 4 Geo. V. c. 43, s. 180.

Corrupt Practices by Candidate.—There is a distinction between the penalties imposed by ss. 187 to 192 and those imposed by s. 180. Apparently the only proceedings in which the penalties imposed by s. 180 can be enforced are proceedings under Part IV. by a relator.

> "One Court alone, the Election Court, can make the finding, and that finding can only be made by it once after the trial of the petition; one penalty alone, disqualification, follows from the finding. The candidate found guilty cannot, before any Court in any other proceeding or at any other time be put in peril for the same offence It is true he may be indicted for the crime of bribery in each specific case where bribery can be proved against him. But the penalties under the Election Act and those for the crime for which he may be indicted, are entirely different, and in no case could the proof of conviction under the Election Act avail to defeat any indictment brought against him for bribery or be received as evidence of his guilt." Per Davies, J., St. Ann's El. Case, 1906, 37 S. C. R. at 570.

Disqualification of Candidates.—A candidate the night before election took a sum of over $4,000 and divided it into several parcels of sums ranging from $250 to $1,500. He then, after midnight, visited all his committee rooms and gave to the chairman of each committee personally and secretly one of such parcels. Held, that the inference was irresistible that the money was intended for the corruption of the electors and he was properly held guilty of personal corruption and he was disqualified: St. Ann's Dom. El., 1906, 37 S. C. R. 563.

An unsuccessful candidate for whom a seat is claimed may be found guilty of bribery or a corrupt practice, but if it is found that he was not elected, he would not be liable to the penalty imposed by this section. This is anomalous. Why should a candidate who is elected be subject to a penalty to which an unsuccessful candidate is not subject?

A charge of corrupt practices must be established beyond a reasonable doubt and the failure of a candidate to act as a prudent man is not enough: Rudyk v. Shandro, 1915, 30 W. L. R. 689; 7 W. W. R. 1321; Lisgar Election Case, 1902, 14 M. R. 310; Londonderry Case, 1869, 1 O'M. & H. 274; Warrington Case, 1869, *ibid.* 42; North Victoria Case, 1874, Hodgins, 702.

When a charge is made of an offer not accepted of money to influence a voter, evidence is required to be particularly clear and conclusive: Lisgar Election Case, 1902, 14 M. R. 310; South Grey Case, 1871, Hodg. 52; Prescott Case, 1883, 1 Ont. Elect. Case, 88; Northallerton Case, 1869, 1 O'M. & H. 167. The following statements have been held too vague and indefinite: "If you come with us, we have lots of money. . . . Your side is poor and you need money, and if you want to come with us we will give you some money." Lisgar Election Case, 1902, 14 M. R. 310.

Disclaimer.

181.—(1) Any person elected may at any time after the election, and before it is complained of, deliver to the

clerk of the municipality a disclaimer signed by him, to the effect following:

"I, A. B., hereby disclaim all right to the office of for the of , in the county (or district) of , and all defence of any right I may have to the same.

Dated day of , 19 .

A. B."

3 Edw. VII. c. 19, s. 240, *amended.*
3 & 4 Geo. V. c. 43, s. 181 (1).

182. A person whose election is complained of, unless it is complained of on the ground of bribery or corrupt practices on his part, or a person whose seat is attacked on the ground that he has become disqualified or has forfeited his seat, may, within one week after service on him of the notice of motion, transmit by registered post, or deliver, if the proceedings are in the High Court, to the Clerk in Chambers, at Osgoode Hall, Toronto, or if the proceedings are in a County or District Court to the Judge of that Court, and to the relator or his solicitor, a disclaimer signed by him to the effect following:

" I, A. B., upon whom a notice of motion in the nature of a quo warranto has been served for the purpose of contesting my right to the office of for the of , in the county (or district) of , hereby disclaim the said office and all defence of any right I may have to the same.

Dated day of A. B."

3 Edw. VII. c. 19, s. 238, *amended.*
3 & 4 Geo. V. c. 43, s. 182.

183. A person disclaiming shall deliver a duplicate of his disclaimer to the clerk of the municipality, and the clerk shall forthwith communicate it to the council. 3 Edw. VII. c. 19, s. 242, *amended.* 3 & 4 Geo. V. c. 43, s. 183.

184.—(1) A disclaimer in accordance with s. 181 or 182 shall operate as a resignation. 3 Edw. VII. c. 19, s. 241, *last part.*

(2) A disclaimer in accordance with s. 181 shall relieve the person making it from all liability for costs. 3 Edw. VII. c. 19, s. 241, *first part.*

(3) Costs shall not be awarded against a person disclaiming under s. 182, unless he consented to his nomination or accepted the office. 3 Edw. VII. c. 19, s. 243, *amended.* 3 & 4 Geo. V. c. 43, s. 183 (1-3).

Shall Operate as a Resignation.—A resignation of a member of council takes effect only with the consent of a majority of the members present. See 155 as to resignation of warden; see s. 154 (1).

As a disclaimer has to be delivered to the clerk and by him forthwith communicated to council, it is arguable that the disclaimer, like a resignation, cannot become effective without the consent of a majority of council.

If the council refuses to consent, the Judge or Master may allow any person entitled to be a relator to intervene and defend under s. 172.

Even if the council consented, a person entitled to be a relator might be allowed to intervene and defend under s. 172. There may be good reasons for proceeding, e.g., to have the disclaiming candidate found guilty of corrupt practices and disqualified under s. 180 (1), or to have the relator, if a candidate, disqualified. Section 180 (1).

It is submitted that the motion does not abate merely because the defendant has ceased to hold office even where bribery and corrupt practices are not complained of, e.g., it may be necessary to ascertain whether or not some other person was elected.

Unless he Consented to his Nomination.—There is no provision in the Act requiring a candidate to consent to his nomination, but under s. 69 (4), in an urban municipality every candidate has to file a declaration in form 2 or be deemed to have resigned. This is in effect consenting to nomination. No consent is required in township elections nor in elections of wardens.

Rules of Practice.

185. The Judges of the Supreme Court may make rules regulating the practice and procedure in relation to proceedings under this Part, including the costs of and incidental to them, and as to matters not provided for in it, or by Rules of Court, the practice and procedure of the High Court shall be applicable. 3 Edw. VII. c. 19, s. 244, *redrafted.* 3 & 4 Geo. V. c. 43, s. 185.

No rules have been made under the authority of this section or of the sections which preceded it since the repeal of all rules not embodied in the Act by Cons. Rule No. 2 of 1897. See also the Judicature Act, ss. 149 and 150 of R. S. O. 1914, c. 56, and Holmested, 4th ed., p. 307. See 24 D. L. R. 118; 33 O. L. R. 575.

186. Proceedings for the removal from office of a person whose election is alleged to have been undue or illegal, or who is alleged not to have been duly elected, whether or not the seat is claimed by or on behalf of the relator or any other person, and proceedings to have the right of a person to sit in a council determined shall be had and taken under the provisions of this Part and not by *quo warranto* proceedings or by an action in any court. 3 Edw. VII. c. 19, s. 244*a*, *amended*. 3 & 4 Geo. V. c. 43, s. 186.

[*Note.—Old s. 251, allowing certain penalties to be recovered in the Division Court, struck out, as it only applied to penalties none of which was over $50. Under the new s. 187 the penalty has been increased to $200 and six months' imprisonment.*]

[*Note.—Old s. 256 providing that a prosecution for a corrupt practice must be commenced within 4 weeks after election, struck out so that Summary Convictions Act may apply, the limitation being 3 months.*]

The common law procedure. by an information in the nature of a writ of *quo warranto* or by writ of *quo warranto*, which formerly might be instituted. is now by reason of s. 146 of the Judicature Act, R. S. O. 1914, c. 56, to be brought by notice of motion by the Attorney-General *ex officio* or at the instance of a relator in the name of His Majesty. This procedure should be followed in all municipal cases which are not. provided for by Part IV. of this Act.

The prerogative writ of mandamus may be granted to compel a corporation to proceed to an election in a case where a seat is vacant, but a mandamus will not be granted where a person *de facto* holds the seat. Such a person must be ousted by proceedings under Part IV. It is said to be "an inflexible rule of corporation law that where an officer has been *de facto* elected and has accepted office and acted, this constitutes a case of plenarty unless the election be merely colorable. In such a case his title to the office is not to be tried by a mandamus. Per Coleridge, J., in R. v. Chester Corporation, 25 L. J. Q. 61, and the party whose title is impeached must be proceeded against by *quo warranto*, per Campbell, C.J., R. v. Chester Corporation, *supra*, and now in England, 587 of the Municipal Corporations Act, 1882, 42 and 46 V. c. 50, provides that a municipal election shall not be questioned on any of certain specified grounds. Section 225 of the same Act provides that an application for an information in the nature of a *quo warranto* shall not be made after twelve months from the time of disqualification.

An action for an injunction to restrain a person from acting in a municipal office or for a declaration that he usurps the office or is disqualified, or for a mandamus requiring the corporation to hold a new election on the ground that a person has forfeited his seat or was never entitled to it, is not an appropriate means of dealing with a case where a seat is *de facto* full.

Under s. 152 a seat becomes vacant by crime, insolvency, absence, etc., and it is the duty of the Council forthwith to declare the seat vacant, and s. 153 indicates that proceedings under Part IV. are not an alternate remedy. The cases within s. 152 are also within 186, in that they are

"proceedings to have the right of a person to sit in a council determined." and 186 provides that the only proceedings shall be under Part IV. This evidently means the only proceedings by which a seat can be declared vacant by a Court. Section 39 of the Municipal Corporations Act, 1882, 45 and 46 V. c. 56 (Imp.), is similar in its terms to s. 152, *supra*. A meeting of the corporation of Southampton was called to declare vacant the seat of a certain alderman alleged to be bankrupt. Jessel, M.R., upon being satisfied that the alderman was not bankrupt, under the authority of s.-s. 8 of s. 25 of the Judicature Act, 1873, s.-s. 17 of the Judicature Act, R. S. O. 1914, c. 56, granted an injunction in an action restraining the persons threatening to remove the alderman: Oslatt v. Southampton, 1880, 16 Ch. D. 143, 50 L. J. Ch. 31. The last mentioned case was considered by Street, J., in Chaplin v. Woodstock Public School Board, 1889, 17 O. R. 728, in refusing an injunction restraining members from acting; the board not having declared the seats vacant. Although the statute under consideration provided that the seat should *ipso facto* become vacant and that the remaining trustees should declare the seat vacant, the declaration not having been made the seats were held to be full, and *quo warranto* proceedings the only means by which they could be declared vacant by a Court: R. ex rel. Stewart v. Standish, 1884, 6 O. R. 408, was a case where the defendant was ousted where the board had declined to declare the seat vacant.

An injunction restraining sitting members from acting would seem to be at variance with the authorities: Stephenson v. Vokes, 1896, 27 O. R. 691, and the right to a seat at least on the ground that an election was invalid, cannot be raised properly on an application to quash a by-law: Re Vandyke v. Grimsby, 1906, 12 O. L. R. 211, *contra*, in the case of a disqualification arising after election: L'Abbe v. Blind River, 1904, 7 O. L. R. 230.

Summary.—It appears that an injunction may still be obtained in an action to prevent the council from declaring a seat vacant under s. 152, and that the right of a member of council to vote may be determined incidentally in an action.

PART V.

Bribery and Corrupt Practices.

187.—(1) Every person who:—

(*a*) Directly or indirectly, himself or by any other person on his behalf, gives, lends or agrees to give or lend, or offers or promises any money or valuable consideration, or promises to procure, or to endeavour to procure any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter, or to or for any person in order to induce any voter to vote, or refrain from voting or corruptly does any such act on account of any voter having voted or refrained from voting at an election; or

(*b*) Directly or indirectly, himself or by any other person on his behalf, gives or procures, or agrees to give or procure, or offers or promises any office, place or employment, or promises to procure or to endeavour to procure any office, place or employment to or for any voter, or to or for any other person in order to induce any voter to vote, or refrain from voting or corruptly does any such act on account of any voter having voted or refrained from voting at an election; or

(*c*) Directly or indirectly, himself or by any other person on his behalf, makes any such gift, loan, offer, promise, procurement or agreement, to or for any person, in order to induce such person to procure, or endeavour to procure the return of any candidate, or the vote of any voter, at an election, or—

(*d*) Upon or in consequence of any such gift, loan, offer, promise, procurement or agreement, pro-

cures or engages, promises or endeavours to procure the return of any candidate, or the vote of any voter at an election; or

(*e*) Advances or pays, or causes to be paid, money to or to the use of any other person, with the intent that such money or any part of it shall be expended in corrupt practices at an election, or who knowingly pays or causes to be paid money to any person in discharge or repayment of money wholly or in part expended in corrupt practices at an election; or

(*f*) Directly or indirectly, himself or by any other person on his behalf, on account of, and as payment for voting or for having voted, or for illegally agreeing or having agreed to vote for any candidate at an election, or on account of, and as payment for having illegally assisted or agreed to assist any candidate at an election, applies to such candidate, or to his agent, for the gift or loan of any money or valuable consideration, or for the promise of the gift or loan of any money or valuable consideration, or for any office, place or employment, or the promise of any office, place or employment; or

(*g*) Before or during an election, directly or indirectly, himself or by any other person on his behalf, receives, agrees or contracts for any money, gift, loan or valuable consideration, office, place or employment, for himself or any other person, for voting or agreeing to vote, or for refraining or agreeing to refrain from voting at an election; or

(*h*) After an election, directly or indirectly, himself or by any other person on his behalf, receives any money or valuable consideration for having voted or refrained from voting, or for having

induced any other person to vote or refrain from voting at an election; or

(*i*) In order to induce a person to allow himself to be nominated as a candidate, or to refrain from becoming a candidate, or to withdraw if he has become a candidate, gives or procures any office, place or employment, or agrees to give or procure or offers or promises to procure, or endeavours to procure any office, place or employment for such person, or for any other person,

shall be guilty of bribery, shall be disqualified from voting at any election for two years, and shall incur a penalty of $200, and shall also be liable to imprisonment for any term not exceeding six months. 8 Edw. VII. c. 3, s. 167, *part*. 3 & 4 Geo. V. c. 43, s. 187, *part*.

Introduction.—The offences defined in Part V. of the Act require consideration for the purposes, (1) of prosecutions under s. 492, *infra*, and (2) for the purpose of imposing penalties in proceedings under Part IV. of the Act, and in addition, (3) the acts mentioned in the definitions in Part V. may expose the persons guilty of them to criminal proceedings in certain cases.

Prosecutions under Part V.—The offences referred to in this Part may expose the person guilty of them to prosecution when a charge is based on s. 187 or 189 before a Police Magistrate or two Justices of the Peace under the Ontario Summary Convictions Act. See ss. 492 (2), *infra*, and when a charge is based on s. 188, the procedure is governed entirely by the Ontario Summary Convictions Act. See s. 192 (1), *infra*. The penalties go to the corporation unless the charge is laid by a private prosecutor in which case one-half goes to him: Section 492 (3).

Proceedings under Part IV.—When the offences referred to in this part are committed by a candidate or by any person on his behalf, one vote is to be struck off the votes given for such candidate: Section 173 (3), and a candidate elected who is found guilty forfeits his seat and becomes ineligible to be a candidate for two years: Section 180 (1). These consequences can only arise if proof of offence is given in proceedings under Part IV.

The same particularity in making a charge in such proceedings against a candidate for the purpose of disqualifying him, if elected, is not required as is necessary in ordinary penal actions. Particularity in informations in penal actions is required, according to Davies, J., in St. Ann's Election Case (Dom.), 1906, 37 S. C. R. p. 569, "to prevent a party sued from being put in peril twice for the same offence and to enable him to plead his prior conviction or acquittal or discharge, as the case may be, to any second action. Certainty in the particulars of the offence must therefore appear on the conviction or judgment. But in trials under 'the Controverted Elections Act' (and it is submitted under Part IV. of the Municipal Act), while the party incriminated and sought to be punished is entitled on every principle of justice to have full and clear particulars given him of the offence he is charged with, and is also entitled to have the evidence confined to the charge so made, the same reason does not exist for the particular certainty in the

statement of facts in the findings of the Election Court as does exist in a conviction or a judgment in a penal action.

"There must, of course, be a reasonable certainty in the finding of the statutory offence and the different elements necessary to constitute the offence must be found by the Election Court. But in the case of the 'Corrupt Act' of Bribery, that fact may depend upon one proved case as well as upon one hundred, and the penalty of disqualification follows alike in the one case as the other. The offence may be proved and found, even though the name or names of the elector or electors bribed may not be able to be given. Several acts of personal bribery do not, for the purpose of personal disqualification, constitute different offences." In the St. Ann's case, the allegations in the election petition were that the respondent had himself given and procured to be given money and value to electors and others to induce them to favor his election and vote for him for the purpose of having such monies and value employed in corrupt practices, and these allegations were held to be sufficient to cover the offence of personal corruption although the recipients of the monies were not named or known.

Criminal Proceedings.—The Criminal Code does not deal with offences in respect of municipal elections, but on the other hand, offences under criminal law of England, as it stood respectively on the 17th day of September, 1792, on the 19th day of November, 1858, and on the 15th day of July, 1870, except as changed by proper authority, is the law in Ontario, British Columbia and Manitoba respectively. See Criminal Code, ss. 10, 11 and 12, and in Saskatchewan, Alberta and the Territories the date is the same as for Manitoba.

Bribery is a misdemeanor at common law. "Wherever a person is bound by law to act without any view to his private emolument, and another by a corrupt contract engages such person, on condition of the payment or promise of money, or other lucrative consideration, to act in a manner in which he shall prescribe, *both* parties are by such contract guilty of bribery." "Wherever it is a crime to take, it is a crime to give. They are both reciprocal and in many cases, especially in bribery at elections to Parliament, the attempt is a crime; it is complete on his side who offers it." (Lord Mansfield in R. v. Vaughan, 1769, 4 Burr. 2500). The offer of a bribe was always a misdemeanor on the principle that every attempt to commit a misdemeanor is itself a misdemeanor: R. v. Schofield, Cald. 397.

An information was granted on the deposition of two persons, for the offering of a bribe by the defendant at an election: R. v. Isherwood, 2 Ld. Ken. 202. See Roscoe's Criminal Evidence, 10th ed., 343; R. v. Pitt, 3 Burr; R. v. Plympton, 2 Ld. Ray. 1377, and 4 A. & E., 2nd ed., P. 909.

The Dominion Parliament has not made it a crime to do any of the acts forbidden by Part V., but the criminal character of bribery at any rate is clear at common law; the common law not having proved adequate to check the evil of bribery, heavy penalties have been imposed by statute in England and other jurisdictions where the common law prevails.

Treating.—The Ontario Municipal Act contains no provision dealing with treating such as is found in the Corrupt and Illegal Practices Prevention Act, 1883, 46 & 47 V. c. 51, s. 1 (Imp.), and is also to be found in s. 169 of the Ontario Election Act, R. S. O. 1914, c. 8, and in other Canadian Election Acts. The giving by an election agent of drinks of whiskey to five or six persons regardless of their politics, some of whom were not voters and none of whom received a drink before they voted, was held to be not within s. 227 of the Elections Act, R. S. Sask. 1909, c. 3; Hamm v. Bashford, 1916, 33 W. L. R. 473, 9 W. W. R. 1044. Treating not being specifically dealt with in Part V., must be done under circumstances which will bring the offence within s. 189 in order to make it illegal.

It is doubtful if a drink of any kind could be considered valuable consideration or a gift within the meaning of the section. The same principle would apply to the giving of cigars or refreshments of any kind. Even if the giving of the drink or cigar is the giving of valuable consideration

within the meaning of s. 187, there is this fundamental difference between bribery and treating, that in bribery the essence of the offence is a corrupt contract or bargain, while in treating all the essential characteristics of a contract would have to be implied. Then it is to be noted that different considerations apply to treating because men treat as a matter of social custom but do not ordinarily give sums of money except pursuant to contract.

Wills, J., in the Bodmin Case, 1 O'M. & H. 122, refers to what he supposed was the reason for the introduction in the English Statute as to corrupt treating, as follows:—

> "It would seem to have been usual in former times, and no doubt was the practice, at least up to the year 1854, when the Corrupt Practices Act was passed, without any improper design upon the voters, and with a view to profusion, which some might dignify by the name of hospitality, to give every voter who came up pledged for a candidate at the election, or who voted for a candidate, refreshment, either by opening a common table at some inn, where the voters breakfasted before they went to the poll, or where they had refreshments before they left the town after polling, and before they returned to their homes. . . . I cannot help thinking that that was the sort of corrupt practice with which—whether corrupt or not—the Legislature was dealing in the 23rd section of the statute."

By any other Person on his Behalf—Agency.—Section 100, s.-s. 3, Municipal Corporations Act, 1882, 45 and 46 V. c. 50 (Imp.), provides that the rules and principles with regard to agency observed in the case of Parliamentary election petitions shall, subject to the provisions of the Act, be observed in the case of Municipal election petitions. The Parliamentary Elections Act, 1868, s. 26 (Imp.), in turn provides that the principles on which election committees had acted prior to the Act shall be observed. There is no other express reference to agency. The Courts in England have therefore applied the principles of agency laid down by election committees. It is in the light of the principles so laid down that the expression "by any other person on his behalf," which also appears in the Imperial Acts, has been interpreted. The situation under the Ontario Act is somewhat different. The Act is silent as to agency, excepting for the phrase "by any other person on his behalf," in s. 187, and the phrase "by any person on his behalf," in s. 173. There is no provision making the principles laid down by Imperial election committees as to agency applicable and as a result it has been held in a series of cases ending with R. ex rel. Thornton v. Dewar, *supra*, but not without difference of opinion, that a candidate must have personal knowledge of the corrupt acts in order to be found guilty or disqualified. In the recent case of R. ex rel. Mitchell v. McKenzie, 1915, 33 O. L. R. 196, the employees of a company were held by the District Court Judge to have been the agents of the respondent in committing illegal acts in connection with the election on the ground as stated, that "it is inconceivable that the respondent was not aware of these activities on the part of the power company and its employees in his behalf, and he has not been called as a witness to give evidence as to any objection on his part as to their activities." On appeal, Sutherland, J., without discussing the authorities, said: "I have not been able, after a careful perusal of the evidence, to see that any of the alleged illegal acts were brought to the knowledge of the respondent. . . . I am of the opinion that, in so far as the judgment disqualifies the respondent, it should be set aside." There would, therefore, appear to be a fundamental difference between agency under the Ontario Act and agency under the Imperial Act. In Ontario, the illegal acts contemplated must be brought to the knowledge of the candidate or other person who is charged with having committed them "by any other person."

General Promises.—In re Leahy and Lakefield, 1906, 8 O. W. R. 743, Meredith C.J., refused to find that general promises made in connection with a local option campaign amounted to bribery within this section. The promises consisted in statements that a temperance hotel would be erected, that free stabling would be furnished, and that a free

reading room and games would be provided, saying: 'I do not know that it can be said even that what was done was ethically wrong, and I certainly think it cannot be said it was bribery. There was no personal advantage promised to any one."

General Treating. — In re Gerow and Pickering, 1906, 12 O. L. R. 545, V., who termed himself a "whiskey man," in order to "get even" with a local hotelkeeper and "put him out of business" attempted to procure the passage of a local option by-law by "treating" voters. Meredith, C.J., quashed the by-law, saying:

> "In dealing with this case, I think I should apply the same principle as is applied in Parliamentary election cases, where what is called general bribery, bribery at common law, has been proved to have taken place. Where such bribery is proved to have taken place, although the candidate has had nothing to do with it,—the bribery may have come from unknown sources, as one of the cases says,—if it is of such a general character as to lead to the conclusion that there has not been a free expression of the will of the electors, then the election is to be avoided.
>
> "Now, I think that, having regard to the avowed purposes of this man, Vanstone, and the admissions which he has made, the proper conclusion is that he corrupted so widely that there could not have been a free and fair expression of the will of the electors.
>
> "The majority no doubt was large, but the means adopted to secure votes were upon a pretty large scale also, and they were used upon what may have been a large number of those who were entitled to vote."

On appeal, the Divisional Court reversed the judgment. Falconbridge, C.J.K.B., on the ground that there was no condition of general drunkenness proven so as to produce obvious demoralization to an extent which might influence an election. Britton, J., said:

> "As to general bribery in the form of treating, it was not proved.
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> "Treating of one man to influence his vote would affect the vote, but where general treating is relied upon, a very different state of things must be shewn.
>
> "Baron Martin, in the Bradford Case, 1 O'M. & H. at pp. 39, 4 and 41, states what is necessary to establish the general charge. There was no such thing here as 'treating in all directions on purpose to influence voters.'
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> "Mr. Justice Keogh, in the Drogheda Case, 1869, 1 O'M. & H. 252, at p. 259, says: 'To put general intimidation upon a parallel with general bribery or general treating, it must be shewn to spread over such an extent of ground, and to permeate through the community to such an extent that the tribunal considering the case is satisfied, if it be so, that freedom of election has ceased to exist in consequence."

System of Corruption—Evidence of Previous Crime.—In Shelburne and Queen's Election Case, 1906, 37 S. C. R. at 611, the bald proof of a single irregular and improper payment by the respondent made years before the alleged statutory offence being tried in that case, and having reference to another and a different election, and the prosecution sought to go into full details of the payment in order to shew a system. This he was not allowed to do, the Court following and applying R. v. Bond, 1906, 2 K. B. 389, 75 L. J. K. B. 693.

187 (*a*) and (*b*) make certain acts offences if done to induce a voter to vote or to refrain from voting, and make the same acts offences if done *corruptly* on account of a voter having voted or refrained from voting. This distinction does not appear in the subsequent definitions. It would therefore appear that if any of the acts mentioned in 187 (*a*) and (*b*) are done before the voter has voted, they constitute bribery, and the same act if done after he has voted is not bribery unless it is shewn to have been done corruptly: Rogers, 18th ed., vol. III., p. 368, citing Bradford, 1869,

1 O'M. & H. 36, and Limerick, 1869, *ibid.* 261. Ignorance or honesty of intention will not avail if the act is done before the voting. It is an element of the offence that the act must be done in order to induce the voter to vote or to refrain from voting. This involves an intention on the part of the person offering the inducement, so that if an act does not proceed from such an intention to induce, the offence is not complete. Such an intention may be inferred where gifts are made by a candidate to one who at the time is exerting his influence on the candidate's behalf in the absence of any other explanation: R. ex rel. Johns v. Stewart, 1888, 16 O. R. 583. This was a finding on a *quo warranto* summons and the defendant was held guilty of bribery and forfeited his seat. Street, J., held that the payments which had been made before the voting were "corruptly" made, probably meaning only that they were made to induce the recipients to vote. "Corruptly." as used in s. 187 (*a*) and (*b*), which are identical with the provisions of the Corrupt Practices Prevention Act, 1854, 17 and 18 V. c. 102 (Imp.), which is applicable to municipal elections, has not been uniformly interpreted by the Courts in England. In Cooper v. Slade, 1856, L. J. Q. B. at 329, Alderson, B., said: "We think the word 'corruptly' has a definite meaning. If, for instance, there had been a previous unlawful promise conditional on the voter voting, or if there had been a previous understanding to that effect, or a corrupt bargain for the future, we think the case would have been within the statute. But we are clearly of opinion that merely paying travelling expenses honestly, with no previous engagement, is not prohibited." And the same view was taken in Stroud Election Case, 1874, 2 O'M. & H. 184. On the other hand, Lush, J., in the Horwich Election Cose, 3 O'M. & H. p. 71, held "the payment of money as a reward for having voted, is corrupt in itself; it tends to destroy the independence of the voter and is demoralizing in its influence on all the parties concerned." If the former view is correct, the payment after voting pursuant to prearrangement is within the first part of the section in that it is on "agreeing to give," "a promising to give," and the latter part of the section is redundant. If on the other hand the view of Lush, J., is correct, the latter part of the section treats a new and substantial offence of giving, etc., money to a voter on account of his having voted or refrained from voting. The latter interpretation of the section seems to render the word "corruptly" almost redundant. Its use, however, in s. 187 (1*a*) and (1*b*), is to be compared with its use in the sections of the Imperial Act dealing with treating, e.g.: "Every elector who corruptly accepts or takes any such meat, drink, entertainment or provision shall also be guilty of treating." It has been repeatedly held that "corruptly" in the treating sections does not mean wickedly or immorally or dishonestly, but with the object and intention of doing that which the law forbids. It means the intentional infringement of the law.

Payments to Scrutineers and Canvassers.—The authorities have been carefully reviewed by Riddell, J., in R. ex rel. Fitzgerald v. Stapleford, 1913, 29 O. L. R. 133, as follows:—

> "The first case is that of one Bryson. He was a voter who had not been taking very much interest in the election — he had on previous occasions acted as scrutineer for Stapleford and had been paid for it. The morning of the election Stapleford asked him to act as scrutineer for him at No. 2, and he did so. Both parties say that of course he was to be paid—that, from the general course of dealing in this village. Bryson, being engaged as a scrutineer, was entitled to be paid. Nothing was said about payment; but this is of no importance: R. ex rel. Sabourin v. Berthiaume, 1913, 4 O. W. N. 1201, is well decided and should be followed. Two or three days after the election, Stapleford paid Bryson $2 'for scrutineer,' 'for acting as scrutineer.' Bryson voted at the election; and Stapleford knew that he had a vote when he asked him to act as scrutineer, which was about the time the poll opened—close to 9 o'clock. He was not given a voters' list, but had to go down to the clerk's office afterwards and get one.
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> "The section of the statute referred to in support of the application is s. 245 (2): 'Every person who . . . makes any . . .

promise or agreement' to pay 'any person in order to induce such person to . . . endeavour to procure . . . the return of any person to serve in any municipal council . . . shall be deemed guilty of bribery.' (Now 187 (1c).

"That the respondent did promise and agree to pay Bryson for acting as scrutineer is undoubted; and the only question is whether this was done 'in order to induce' Bryson 'to endeavour to procure his return.

"Had it not been for recent legislation, I should have held, without much hesitation, that the payments of scrutineers, or the engagement of them on an agreement, express or implied, to pay them, is in itself a corrupt practice. They are put at the poll to watch; and, while it is said not always to be the case that an elector votes as he prays, it must generally be that an elector will vote as he watches.

"In the Bewdley Case, 1869, 1 O'M. & H. 16, Mr. Justice Blackburn, at p. 20 considers the effect of treating 'watchers,' and says: 'In the first place, it indirectly influences the men, whether voters or not; if they are not voters, it indirectly influences all their friends and other voters. In the second place, when it is given to voters, it would, in all human probability, lead to an expenditure by them in public houses and elsewhere, which would indirectly influence voters.' The learned Judge accordingly held this to be a corrupt practice.

"The difference in customs of the two countries renders inapplicable much of the learned Judge's second reason—it is not the custom in Ontario, as it seems to be thought to be in England, that a labouring man, as of course, spends in a public house money paid to him. But in the first reason I entirely agree; and it would be carrying judicial nescience to an absurd extreme to affect not to know that the hiring of a man to represent one at the polls implies that man doing all he can for his employer, including casting his vote, if he has one. A scrutineer who would act otherwise would be thought a 'mighty mean man.'

"This case was approved in our own Supreme Court in Cimon v. Perrault, 1881, 5 S. C. R. 133; see p. 145; the Nottingham Case, 1869, 1 O'M. & H. 246, may also be looked at.

"Whether a payment to one as a canvasser is a corrupt practice under the Election Acts has been the subject of many decisions. In R. ex rel. Johns v. Stewart, 1888, 16 O. R. 583, Mr. Justice Street held that the payment to members of certain committees of the level sum of $2 each, irrespective of the time they devoted to the work and without inquiry as to whether they had in fact worked at all, was a corrupt act under the Municipal Act, R. S. O. 1887, c. 184, s. 109 (2), corresponding to the present s. 245 (2).

"In the East Toronto Case, 1871, H. E. C. 70, the West Toronto Case, 1871, H. E. C. 97, the Lennox Case, 1884, 1 Ont. Elec. Cas. 41, it was held no violation of the Act to employ voters as canvassers. The judgment of Mr. Justice Armour to the contrary in the North Ontario Case, 1879, H. E. C. 785, 801, while it was approved in the Supreme Court, 1880, 4 S. C. R. 430, by Taschereau and Gwynne, JJ., failed to obtain the approval of this majority. If I may be allowed to say so, this decision has ever been a matter of regret; no one at all familiar with election methods can fail to know the danger of paying voters for services, real or alleged, as canvassers. These decisions prevent me from holding that a payment to a voter who is for such payment to endeavour to effect the election of his employer is necessarily corrupt.

"The cases do not cover the position of a scrutineer, and I should have had no difficulty in following my own judgment in the absence of express authority. But it seems to me that the Legislature has indicated a different view.

"In the Act of 1903, 3 Edw. VII., c. 19, s. 179 (2), the clerk of the municipality is prohibited from voting; but (3) all deputy returning officers and poll clerks are entitled to vote. An amendment was passed in 1905, 5 Edw. VII., c. 22, s. 8, which adds s.-s. (4): 'No person employed and paid by a candidate to act as scrutineer, or for any other purpose in connection with municipal elections, shall

be entitled to vote at such election.' (Now s. 61). There is no section invalidating the election in consequence of such a person voting—and it seems clear that the Legislature recognized the innocence of a hiring and paying by a candidate of a voter as scrutineer, but put him in the same category as the clerk. The Legislature has said in effect: 'You may hire and pay a scrutineer; but that scrutineer shall not vote.' Nothing would have been easier than to declare the paying of a voter as scrutineer, a corrupt act, but this is not done.

"I do not find anything to indicate that Bryson was not in good faith paid simply as a scrutineer, and, while I may be permitted to say that I regret the result of the legislation, I think that it clears this act of the implication that it is a corrupt practice."

Apparently corroboration is required where the recipient of the bribe is directly contradicted by the giver: Carey v. Smith, 1903, 5 O. L. R. at 211.

Shall Incur a Penalty.—Section 159 (2) of the Election Act, provided:

"Every person so offending shall, on conviction, incur a penalty of $200 and shall also be imprisoned for a term of six months with or without hard labor."

As this subsection stood in the Election Act of 1892, s. 151, it simply provided that any person so offending should "incur a penalty of $200."

It was held that the language of s. 159 (2) was to take the penalties out of the category of those which might be recovered by action under s. 195 of the Act which provided that all penalties imposed by the Act should be recoverable by any one who sued for the same in any Court, and that only one proceeding was contemplated in respect of penalties imposed by s. 159 (2), and that was one in which both the penalty might be recovered and the imprisonment imposed. The words "on conviction" precede both consequences which are to follow therefrom. It was pointed out that the words did not import a prior conviction for the offence precedent to an action for the recovery of penalties. Per Osler, J.A., in Asseltine v. Shibley, 1905, 9 O. L. R. 327.

So far as the Municipal Act is concerned, the only proceeding in which a penalty can be recovered is one under the Ontario Summary Convictions Act: See s. 498, *supra*.

Proof of Election.—A regular election should be proved in a prosecution under Part V.: Reed v. Lamb, 1862, 6 H. & N. 75.

(2) The actual personal expenses of a candidate, his reasonable expenses for actual professional services performed, and *bona fide* payments for the fair cost of printing and advertising and other lawful and reasonable expenses in connection with the election, incurred by the candidate or any agent in good faith and without any corrupt intent, shall be deemed to be expenses lawfully incurred, and the payment thereof shall not be a contravention of this Act. 8 Edw. VII. c. 3, s. 167, *part*. 3 & 4 Geo. V. c. 43, s. 187, *part*.

Lawful Expenses.—The Imperial Act contains many provisions as to expenses and requires a return to be made to the town clerk respecting expenses: Municipal Election Corrupt Practices Act, 1884, 47 and 48 V. c. 70. This Act limits the amount which may be spent in connection with the election of a councillor to twenty-five pounds, and if the number

of electors exceeds five hundred, an additional amount of three pence for each elector above the first five hundred. Many expenses are forbidden as to bands, torches, flags, banners, ribbons, etc. The purposes for which persons can be employed about the election are specified and all other employment is made illegal. There is no provision corresponding to the above s.-s. 2, which seems designed to open the door to expenditure without limit, being made in good faith and without any corrupt intent. Thus "the fair cost of printing" does not limit the amount to be paid, but requires the candidate only to pay what the printing is fairly worth, and the same remarks apply to the other items. The use of the word "reasonable" implies probably . . . payment (1) to be only for things reasonably necessary in connection with an election, and also (2) to be of such an amount with regard to the service rendered or thing furnished as to be a reasonable payment therefor. Unreasonable payments, i.e., excessive in amount or for unnecessary things might come within s.-s. 1 and would of themselves be a ground for inferring a corrupt intent. Of course any of the payments referred to in s.-s. 2, if made with corrupt intent would be within s.-s. 1.

188.—(1) A candidate who himself or by any other person on his behalf and every other person who:—

(*a*) Hires or promises to pay or pays for a conveyance to carry a voter to or near or from or on the way to or from a polling place; or

(*b*) Pays the travelling or other expenses of a voter in going to or returning from a polling place;

and every person who for a valuable consideration provides or furnishes a conveyance knowing that it is to be used to carry a voter other than the hirer to, or near, or from, or on the way to or from a polling place shall be guilty of a corrupt practice and shall incur a penalty of $100, and, if a voter, shall be disqualified from voting at the election; but this sub-section shall not apply to the carrying of voters to the poll in a conveyance used by the candidate personally on polling day.

(2) Every person who provides or furnishes transportation free of charge or at a diminished rate to a voter to, or near, or from, or on the way to or from a polling place, and whether passes or tickets or the like are or are not supplied, shall be guilty of a corrupt practice and shall incur a penalty of $100, and, if a voter, shall be disqualified from voting at the election.

(3) "Conveyance," for the purposes of this section, shall include a horse, team, carriage, cab, vehicle, boat or

vessel. 8 Edw. VII. c. 3, s. 171. 3 & 4 Geo. V. c. 43, s. 188 (1-3).

Liverymen sending their conveyances to friends of both parties gratis on election day without prearrangement with candidates or agents, held not within R. S. O. 1897, c. 7. Osler, J.A., said:

> "If it should be thought that this is like an evasion of the Act, I can only say that doing something which the Act has not forbidden, though it may lead to a result which it is the object of the Act to avoid, is neither a breach nor an evasion of the Act, so as to bring the party within the penalties. The remedy, if one be thought necessary, is in the hands of the Legislature and would seem to be simple, namely, to prohibit livery keepers or persons who keep vehicles for hire from voluntarily offering them for use, or knowingly permitting them to be used for the purpose of carrying voters to the poll at an election." Re Lennox Election, 1903, 6 O. L. R. 203 C. A.

The provisions of this section are very similar to those of s. 4, Municipal Elections (Corrupt, etc., Practices) Act, 1884, 47 and 48 V. c. 70 (Imp.), under which it has been held that a man may lend his carriage or car for the purpose of bringing voters to the poll and may pay the driver and furnish the gasoline, and that he may even send the car by train to the place where needed and pay the freight. Hartlepool Petition "Times," May 4th, 1910. Sub-section 2 now strikes at these practices.

Hiring Halls, etc.—"The candidate is not restricted to his purely personal expenses, but may (if there is no intent thereby to influence voters, or to induce others to procure his return) hire rooms for committees and meetings, and employ men to act as canvassers, to distribute cards and placards, and to perform similar services in connection with the election." East Toronto, 1871, Hodgins, 70, Richards, C.J.

189.—(1) Every person who, directly or indirectly, himself, or by any other person on his behalf, uses or threatens to use force, violence, or restraint, or inflicts or threatens to inflict injury, damage, harm or loss, or in any manner practises intimidation upon or against a voter in order to induce or compel him to vote, or refrain from voting, or on account of his having voted or refrained from voting, or who, by abduction, duress, or false or fraudulent pretence, device or contrivance, impedes, prevents or otherwise interferes with the free exercise of the franchise of a voter, or thereby compels, induces or prevails upon a voter to vote or refrain from voting, shall be guilty of a corrupt practice and shall be disqualified from voting for two years and shall incur a penalty of $200, and shall also be liable to imprisonment for any term not exceeding one year.

Restraint and Menace Discussed.—Muskoka case, 1875, Hodgins, 458 at 467.

(2) It shall be a false pretence within the meaning of this section to represent to a voter, directly or indirectly, that the ballot to be used or the mode of voting at an election is not secret. 8 Edw. VII. c. 3, s. 173. 3 & 4 Geo. V. c. 43, s. 189 (1-2).

Comparison with Imperial Provisions.—Section 2 of the Corrupt and Illegal Practices Prevention Act, 1883, 46 and 47 V. c. 51 (Imp.), which applies to both parliamentary and municipal elections, contains the phrase "temporal or spiritual injury" where the Ontario Act has simply "injury" and reads, "any fraudulent device or contrivance," where the Ontario Act reads "false or fraudulent pretence, device or contrivance." The Imperial Act has "impede or prevent the free exercise, etc.," where the Ontario Act has "impedes, prevents or otherwise interferes with, etc."

Nature of Undue Influence.—"In order to bring a case within this section, it must be shewn that the loss or damage inflicted or threatened is of a substantial nature. What may be called a mere precarious loss would not necessarily be sufficient:" Per Blackburn, J., North Norfolk Case, 1 O'M. & H. 241.

Fraudulent Device or Contrivance.—A candidate's agent, arranging with a deputy returning officer to spoil the ballots of certain persons was thus characterized by Ritchie, C.J.:—

> "I can hardly conceive a more fraudulent device or contrivance in the language of the 95th section of the Dominion Elections Act, 'to impede, prevent, or interfere with the free exercise of the franchise of the voters.' This being so, there clearly has been a violation of that section by the terms of which the party guilty of such violation is to be deemed to have committed the offence of undue influence:" Soulanges Election Case, 1885, 10 S. C. R. 652 to 664.

At a public meeting a candidate's agent to intimidate certain persons and to prevent them from voting threatened them with punishment if they voted. The election was avoided on the ground of threats to voters and attempts at intimidation: Soulanges Election Case, *supra*, p. 665, but see title "Agency" above for rule with respect to municipal elections.

A mere attempt to intimidate, though unsuccessful, is within the section: Willes, J., in Northallerton Case, 1869, 1 O'M. & H. 173.

Serving a notice on a deputy returning officer openly and in the presence of the voters requiring him to reject the votes, there being no ground for rejecting the votes even if the notice is given *bona fide*, is within the section: Soulanges Case, *supra*.

Clergymen of all churches and denominations alike have all the freedom and liberty that can belong to laymen, but no other—the fullest and freest discussion of the fitness of the candidates. But while there may be full and free discussion, solicitation, advice and persuasion the law says, in language not to be mistaken, and not to be disregarded, there shall be no undue influence or intimidation to force an elector to vote or to restrain him from voting in a particular manner. So a clergyman has no right in the pulpit or out, by threatening any damage temporal or spiritual, to restrain the liberty of a voter so as to compel or frighten him into voting or abstaining from voting otherwise than he freely wills. If he does, in the eye of the law this is undue influence: See remarks of Ritchie, J., in Charlevoix Election Case, 1877, 1 S. C. R. at p. 222. In this case it was held that, under the circumstances shewn, the clergy were the agents of the respondent. One of the statements made was "that he who should vote for M. Tremblay would be guilty of a grave sin, and if he died after so voting, he would not be entitled to the services of a priest." The Court followed the Mayo, 1857, W. & D. 1 Longford, 1870, 2 O'M. & H. 16, and Galway, 1869, 1 O'M. & H. 307.

In the Northallerton Case, 1869, 1 O'M. & H. 168, two persons threatened a Baptist minister that they would give up their pews in his chapel if he voted as he wished to do. This was held intimidation.

In the North Norfolk Case, 1869, 1 O'M. & H. 241, Blackburn, J., said, "the landlord had a perfect right to choose his tenant and turn him out, but if the landlord threatens or does inflict that turning out of his tenant for his vote, that is inflicting harm and loss within the meaning of the Act."

In the Lichfield Case, 1869, 1 O'M. & H. 28, Willes, J., said, "the law cannot strike at the existence of influence. It is the nature of influence with which alone the law can deal."

As to threats to withdraw custom: North Durham Case, 1874, 2 O'M. & H. 159.

Force, violence or restraint, for an example see North Norfolk Case, 1869, 1 O'M. & H. 241.

In the Windsor Case, 1874, 2 O'M. & H. 91, the threats were made during the election, but after a previous election the respondent had terminated the leases of twenty persons who voted against him. This was held not to be an offence in respect of the second election.

Discharge of employees held undue influence. Westbury Case, 1869, 1 O'M. & H. 50.

Calling out after a voter had voted "We shall know him and remember him another day" reprehensible, but not within the section: Lichfield Case, 1880, 3 O'M. & H. 136.

Taking a voter to an island and by a trick leaving him there held undue influence. North Ontario case, Hodgins 785.

Fraudulent Pretence or Device.—Falsely stating that a candidate had lost hope of success and was requesting his friends to support a third candidate, not a fraudulent device. East Northumberland Case, Hodgins 387. Issuing cards intimating that votes for a certain candidate would be lost, held not fraudulent. But in a later case, Stepney, 1886, 4 O'M. & H. 55, it was held that as regards such fraudulent devices there must be some proof that an election was impeded or prevented before the offence can be said to have been committed. It is to be noted there are two classes of misconduct aimed at by the section, the first consisting of using or threatening to use force to induce, with regard to which it is immaterial whether or not the voter was induced to vote or to refrain, and the second, consisting of successfully impeding the voter by a fraudulent contrivance with regard to which it must be shewn that some elector was actually impeded. Stepney Case, *supra*.

The word "pretence" in sub-sec. 2 was probably inserted because of the decision in the Down Case, 1880, 3 O'M. & H. 122, where a candidate's agent sent out many printed announcements that the Ballot Act was a farce, and that he could ascertain how each elector voted. The Judges were evenly divided as to whether or not this was a fraudulent device and an election was upheld.

Keeping or sending voters away by a trick or design or making them drunk and thereby interfering with their voting would be within the section North Ontario Case, Hodgins 785.

Undue Influence.—The most recent case in this connection is R. ex rel. Mitchell v. McKenzie, 1915, 33 O. L. R. 196. The finding of the District Court Judge was that the respondent was guilty of a corrupt practice within the meaning of s. 189 under the following circumstances: "In this case I must find that the facts are that McKenzie, upon the public platform, at the meeting of the electors of Fort Frances, held on the 31st December last, called for the purpose of discussing public issues, just prior to the municipal election, stated upon the public platform that he heard that Mr. Backus was going to cut off the lights of Fort Frances, and that he had gone to him and interceded and got him to agree not to cut them off before the election, as it might be considered an election dodge; and that Mr. Backus had stated to him that, if Mr. Christie was elected, the lights of the town would be turned off. And in the finding of these facts, I am taking practically verbatim the evidence of the

Reverend Mr. Anderson, called by the respondent. In considering this branch of the relator's case it is necessary to consider the general conditions surrounding the election, which I have already set out. We have, at a large meeting of the public ratepayers called in view of the election, a statement made by a candidate that, if his opponent is elected, their lights will be cut off, and one of the ratepayers promptly characterises the statement as a threat. And the candidate as promptly replies that 'it is not a threat, it is a fact'—thus emphasising the threat rather than modifying its effect. Properly to understand the effect of this statement, we must take into account the surrounding circumstances. Here we have a candidate who is a prominent official in the employ of the power company, presumed to have confidential relations with the company, even if he had not stated that the president was his authority for the statement, telling the ratepayers, seventy-five per cent. or over of whom were dependent on this power for their light, that, if his opponent were elected, their lights would be cut off, and inferentially that, if they voted for him, they would still be able to bask in the power company's light. What was the respondent's object in making the statement unless to influence votes and what stronger reason could be given for supporting the speaker?" On appeal, Sutherland, J., said as follows: "The District Court Judge has set forth the facts and his conclusions and the application of the law thereto very fully, as will appear by further reference thereto. There can be little or no doubt, upon the evidence, that the question of the relations between the power company and the municipality was one of the main issues in the municipal election contest. There can be no doubt either that the question whether the ratepayers were wise in continuing to have litigation with the power company, or whether it was not better to endeavour to adjust in an amicable way their differences with it, also was a matter which was being publicly discussed.

"While it is most important that nothing in the way of threat or intimidation should be used by a candidate in an election, and the electors subjected to improper influences thereby, it is also important that candidates should have a reasonable amount of freedom to discuss fully and frankly the issues in which all electors are at the time concerned. It is true that some of those present at the meeting at which the language referred to is alleged to have been used by the respondent, seemed to understand him to be threatening the electors with the consequences which might ensue, in case he were not, but his opponent were, elected.

"Where the version of what the respondent said, as found by the Judge, is supported by evidence which he had a right to believe, it is to be noticed that the respondent denies that he used language exactly similar in import to what the Judge has found. McKenzie puts it in this way: 'I said that I was told that the lights would be turned off on the following Tuesday, but I interceded and asked the company not to shut off the light at least before the election, for it would be interpreted as an election dodge. But, if they persisted in electing a council that were fighting the power company on every technicality that would arise, it was not unlikely the lights would be shut off.'

"And again: 'Q. Now wasn't this what you said? 'This is not a threat' (after the word threat was used), 'but I discussed it with Mr. Backus, and he decided not to cut off the lights on Monday night, but to wait until the following Tuesday?' A. I said, 'It is not a threat, I am discussing facts.'

'Q. You had discussed this matter with Mr. Backus? A. Yes.

'Q. Mr. Backus had threatened to cut off the lights? A. Yes.

'Q. If you weren't elected? A. No, sir. If a settlement of the bill for lights was not made, he intended to shut off the lights.

'Q. You thought it was your duty to let the audience know? A. Yes.'

"The power of disqualification exercisable by a Judge is one which, as it seems to me, should only be exercised, in a plain case, upon very clearly proved facts. I confess I have had some little difficulty in arriving at the conclusion I have in this matter, and in consequence have some hesitation in coming to a different conclusion from that arrived at by the District Court Judge, who may perhaps, having seen the witnesses, be

in a somewhat better position than I am to estimate fully the effect of their evidence. Nevertheless, I have come to the conclusion that 'the words used by the respondent, in the light of all the facts set out in the evidence, were not such as could properly be determined to be a threat under the section of the Act in question. I am not at all sure that they come under the meaning of the section at all."

Boycotting.—The evidence of boycotting must be specific in order to come within this section, and accordingly Meredith, C.J., in Re Leahy and Lakefield, 1906, 8 O. W. R. 743, held that the general allegation by an affiant that he heard persons supporting a by-law make certain statements as to withdrawing trade, and his belief that that influenced voters even though there had been no direct contradiction of it, is an unsatisfactory way of proving the charge made, and he refused upon that evidence to come to the conclusion that acts in the nature of a boycott, so as to justify the quashing of the by-law, were shewn to have been committed.

190. The clerk shall furnish every deputy returning officer with at least two copies of ss. 187 to 189, and the deputy returning officer shall post the same in conspicuous places at the polling place. 3 Edw. VII. c. 19, s. 258, *amended*. 3 & 4 Geo. V. c. 43, s. 190.

Notwithstanding the imperative language of a corresponding s. 907 R. S. M. 1914, c. 133, the Municipal Act, Cumberland, C.C.J., held the provision was directory only, following West Gwillimbury v. Simcoe, 20 Gr. 211, where Blake, V.C., said that he thought it would be a most unwise exercise of his discretion to quash a by-law for a mistake of the clerk in not posting up the notices as required: Re Brandon Election, 1911, 20 M. R. 705.

191.—(1) No person shall be excused from answering any question put to him in an action or proceeding touching or concerning an election, or the conduct of any person thereat, or in relation thereto, on the ground of any privilege, or on the ground that the answer will tend to criminate him, or subject him to any penalty under this Act.

(2) No answer given by any person claiming to be excused on the ground of privilege, or on the ground that such answer will tend to criminate him or subject him to any penalty under this Act, shall be used in any proceeding thereunder against such person, if the Judge or officer before whom he is examined gives to the witness a certificate that he claimed the right to be excused on either of such grounds, and made full and true answer, to the satisfaction of the Judge. 3 Edw. VII. c. 19, s. 255, *amended*. 3 & 4 Geo. V. c. 43, s. 191.

When no penalty recoverable.

192. No pecuniary penalty shall be recoverable for bribery or a corrupt practice if it appears that the person charged and another person or other persons were together guilty of the act charged, either as giver and receiver, or as accomplices or otherwise, and that the person charged has previously *bona fide* prosecuted such other person or persons or any of them for the offence; but this provision shall not apply if the Judge before whom the person claiming the benefit of it is charged, certifies that it clearly appears to him that the person so charged took the first step towards the commission of the offence, and that he was in fact the principal offender. 3 Edw. VII. c. 19, s. 257, *amended.* 3 & 4 Geo. V. c. 43, s. 192.

Section 94 (5) of the Manitoba Corrupt Practices Act, 1882, 45 and 46 V. c. 59 (Imp.), provides that if the witness answers, he shall be entitled to receive a certificate to that effect, and sub-sec. 6 provides that on the production of the certificate by the witness on subsequent proceedings against him the Court shall stay the proceedings. He may notwithstanding the certificate be proceeded against for perjury in respect of his evidence.

Under s. 191, the Judge has a discretion to refuse a certificate and the witness is still subject to prosecution, the only protection given being that the answer of the witness cannot be used against him.

The rule laid down by this section is substantially the same as the rule in Ex parte Reynolds, 1882, 20 Ch. D. 294, 51 L. J. Ch.

PART VI.

Meetings of Municipal Councils.

First Meeting of Council.

193.—(1) The first meeting of every council, except a county council, shall be held on the second Monday in January of the year for which the council is elected, at eleven o'clock in the forenoon; and the first meeting of every county council shall be held on the fourth Tuesday of the same month, at two o'clock in the afternoon, but the council of any county may by by-law provide that the first meeting shall be held at half-past seven o'clock in the evening, instead of two o'clock in the afternoon. 3 Edw. VII. c. 19, s. 259, *amended.* 7 Geo. V. c. 42, s. 1.

(2) No business shall be proceeded with at the first meeting until after the declarations of office and qualification have been made by all the members who present themselves for that purpose. 3 Edw. VII. c. 19, s. 260, *amended.*

(3) A council shall be deemed to be organized within the meaning of this Act when the declarations of office and qualification have been made by a *majority of the members,* and it may be organized and business may be proceeded with notwithstanding the failure of any of the other members to make such declarations. *New.* 3 & 4 Geo. V. c. 43, s. 193 (1-3).

194. A member of a county council shall not take his seat until he has filed with the clerk of the county council a certificate, Form 15, under the hand of the clerk of the municipality for which he was elected and the seal of the corporation. 6 Edw. VII. c. 35, s. 2, *amended.* 3 & 4 Geo. V. c. 43, s. 194.

FORM 15.

CERTIFICATE OF CLERK AS TO ELECTION OF REEVES AND DEPUTY REEVES.

I, A.B., of Clerk of the Corporation of the town (township or village, as the case may be) of in the County of do hereby, under my hand and the seal of the said Corporation, certify that C.D., of Esquire (or as the case may be), was duly elected reeve (or first deputy reeve, or second deputy reeve, or third deputy reeve, as the case may be) of the said town (township or village, as the case may be), and has made and subscribed the declaration of office and qualification as such reeve (or first deputy reeve, or second deputy reeve, or third deputy reeve, as the case may be).

A.B.

6 Edw. VII. c. 35, s. 3.
3 & 4 Geo. V. c. 43, Form 15.

195.—(1) In each year at the first meeting of a county council at which a majority of all the members is present they shall organize as a council and elect one of the members to be warden.

Organize.—This has the same meaning as in s. 193 (3).

If there is a clerk the first business is to provide by resolution the manner in which a warden is to be elected (s.-s. 3), and then to elect a warden. If there is no clerk, s. 195 (2) provides the first procedure and then the resolution regarding election and the election of a warden should follow.

If there is no quorum at the first meeting the procedure prescribed by this section must be followed at the first meeting at which there is a quorum.

Note same applies under 193 (3).

(2) The clerk shall preside, or if there is no clerk the members present shall select a member to preside, and the person so elected may vote as a member.

(3) Subject to subsection 4 and to section 206 the warden shall be elected in the manner provided by resolution of the council passed prior to the election.

The manner of election must involve voting.

This follows from s.-s. (4) which provides the procedure in case of an equality of votes and the mode of voting is fixed by s. 206. It follows that the resolution as to manner of election is limited to providing for the mode of nomination of persons to be warden.

It might require a nomination to have two seconders or require a nomination to be made by representatives of several town-

ships. It might fix a time for receiving nominations and for withdrawal or it might provide for one nomination to be made at a time and for each to be voted on as made, the first person nominated to get a majority to be elected.

The resolution could not provide for a two-thirds majority to be necessary to elect, as s.-s. 4 contemplates a bare majority.

(4) In case of an equality of votes the reeve, or in his absence the deputy reeve, or if there are more deputy reeves than one, the first deputy reeve, of the municipality which for the preceding year had the largest equalized assessment, shall have a second or casting vote. 6 Edw. VII. c. 35, s. 4, *amended*. 3 & 4 Geo. V. c. 43, s. 195 (1-4).

Organization of Councils of Local Municipality.—Organization simply means the procedure of taking the declarations of office and qualification by a majority of the members. Section 193 (3).

Members of a council are not competent to transact any business before the council is organized. Sec. 193 (2).

Defective declarations of qualification may be rectified. R. ex rel. Milligan v. Harrison, 1908, 16 O. L. R. 475, where Meredith, C.J., refused to unseat two controllers who had taken declarations to the effect that they were qualified at the time of taking the declarations but not stating that they were qualified at the time of election, as it was admitted that they were competent to make a proper declaration, and an order was made that upon their making and filing declarations in the proper form, the applications against them, would be dismissed.

As to the effect of failure to make the declaration, see s. 244.

In R. ex rel. Martin v. Watson, 1906, 11 O. L. R. 336, a candidate who was in fact qualified filed a defective declaration under s. 69. He was elected and took a good declaration under s. 242, and took his seat. Teetzel, J., said:

> "The first declaration being on its face sufficient in form, and having in view its limited purpose, and the respondent being in fact duly qualified for the election and having been elected, I think it is too late, after the election, to contend that the misstatement regarding the qualifying property mentioned in the first declaration is a ground for setting aside the election which is otherwise free from objection."

The declaration required by s. 242 is a pre-requisite to the discharge of the duties of the office. R. ex rel. Clancy v. St. Jean, 1881, 46 U. C. R. 77.

Organization of County Councils.—If there is no clerk, the certificates required by sec. 194 cannot be filed, and the county council cannot be organized. This appears to be a *casus omissus*. Provision has been made in s. 195 (2) for the appointment of a presiding officer for the first meeting of a county council when there is no clerk. Possibly the certificates could be filed with him. The members of old council cannot act after their successors have been declared elected. If s. 194 is merely directory, failure to file the certificates will at most constitute an irregularity. This would seem to be the correct view for it has been held that votes of councillors cannot be challenged for defective certificates: R. ex rel. McManus v. Ferguson, 2 C. L. J. 19. The certificates in this case did not state that the member "had made and subscribed the declarations of office and qualification," but only that he had taken or made the declaration of office.

Acts of Members who Take and File Declarations but who are afterwards Declared not to have been Duly Elected.—Section 102 of the Municipal Corporations Act, etc. (Imp.), provides as follows:—

"Where a candidate who has been elected to a corporate office is, by a certificate of an Election Court or a decision of the High Court, declared not to have been duly elected, acts done by him in execution of the office, before the time when the certificate or decision is certified to the town clerk, shall not be invalidated by reason of that declaration."

And ss. 41 (1) and 42 (1) of the same Act provide:

"41 (1). If any person acts in a corporate office without having made the declaration by this Act required, or without being qualified at the time of making the declaration, or after ceasing to be qualified, or after becoming disqualified, he shall for each offence be liable to a fine not exceeding fifty pounds, recoverable by action.

"(2) A person being in fact enrolled in the burgess roll shall not be liable to a fine for acting in a corporate office on the ground only that he was not entitled to be enrolled therein.

"42 (1) The acts and proceedings of a person in possession of a corporate office, and acting therein, shall, notwithstanding his disqualification or want of qualification, be as valid and effectual as if he had been qualified.

"(2) An election of a person to a corporate office shall not be liable to be questioned by reason of a defect in the title, or want of title, of the person before whom the election was had, if that person was then in actual possession of, or acting in, the office giving the right to preside at the election.

"(3) A burgess roll shall not be liable to be questioned by reason of a defect in the title, or want of title, of the mayor or any revising authority by whom it is revised, if he was then in actual possession and exercise of the office of mayor or revising authority."

There are no similar provisions in the Ontario Act. In Re Vandyke and Grimsby, 1906, 12 O. L. R. 211, on a motion to quash a by-law, one objection was that the council which finally passed the by-law was not legally elected and that the persons who assumed to be members thereof were mere usurpers of office. Teetzel, J., overruling the objection, said:—

"As to the second objection, I do not think it necessary to express any opinion upon the validity of the election of the members of the council who finally passed the by-law. Whether legally elected or not, they were, in fact, returned as duly elected by the clerk, who acted as returning officer under s.-s. 4 of s. 129, and they took the oath of office.

"Being *de facto* members of council, the validity of their legislative acts cannot be impeached on the ground that their election was invalid in law.

"In Scadding v. Lorant, 1851, 3 H. L. Cas. 418, it was held that a rate for the relief of the poor which was legally made in other respects was not rendered invalid by the circumstance that some of the vestrymen who concurred in making it were vestrymen *de facto* and not *de jure*.

"At p. 447 the Lord Chancellor observes, 'With regard to the competency of the vestrymen, who were vestrymen *de facto*, not vestrymen *de jure*, to make the rate, your Lordships will see at once the importance of that objection, when you consider how many public officers and persons there are who are charged with very important duties and whose title to the office on the part of the public cannot be ascertained at the time. You will at once see to what it would lead if the validity of their acts when in such office depended upon the propriety of their election. It might tend, if doubts were cast upon them, to consequences of the most disastrous kind.'

"See also Brice on *Ultra Vires*, 3rd ed., 304 and 613; and Dillon on Municipal Corporations, 4th ed., s. 276."

An appeal was dismissed by the D. C.

Members de jure, Members de facto and Usurpers.—A member *de jure* is one who holds office by full legal right. This involves due elec-

tion or due appointment and due qualification to be elected or appointed and full compliance with all conditions precedent to the right to sit and act, and also implies the absence of any disqualification which may operate as a condition subsequent.

A Member de facto.—The definition given by Chief Justice Butler in State v. Carroll, 38 Conn. 499, 9 Am. Rep. 409, is as follows:—

> "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised; first, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like; third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such."

Bona Fide Action of De Facto Council.—In Bell v. Burlington, 1915, 34 O. L. R. 410, Boyd, C., refused to set aside the *bona fide* action of a *de facto* council ratifying an assessment and imposing taxes on territory which at the time was not actually within their jurisdiction, following Pontiac v. Ross, and Gill v. Jackson, 1856, 14 U. C. R. 119.

A Usurper is one who acts without any color of right. His acts are wholly void.

Election of Warden.—The fact that some local municipalities are unrepresented is not a reason for not proceeding with the election as soon as there is a majority of all the members present. See Ouelette v. Cantin, 1911, 40 Que. S. C. 92, decided under a section similar to s. 195 (1).

In re Hawk and Ballard, 3 C. P. 241, a councillor was excluded from voting upon the election of reeve under a similar section on the ground that he had not been duly elected. The other councillors then proceeded without taking the declarations to elect a reeve. It was held that the councillor excluded should have been allowed to vote with the others as it was not for the latter to determine the validity of his election and that in any event the election was invalid because proceeded with before the declarations had been taken, but see R. ex rel. Morton v. Roberts, *supra*, p. 217.

In R. ex rel. Hyde v. Barnhart, 7 L. J. 126, the council was comprised of five members. Two met and qualified at the proper time but could not proceed to elect because a majority was not present. Two days later the other three met and elected a reeve. The election was held legal in the absence of proof of fraud.

In R. ex rel. Heenan v. Murray, 1864, 3 P. R. 345, an organization meeting held at 6 o'clock in the evening, was held to be a sufficient compliance with a provision similar to s. 193 (1). In this case two members of council in order to block the election retired with a view to leaving less than a majority present. The clerk, however, while they were retiring and were able to hear, declared the resolution carried and the reeve was held to be duly elected. Hagarty, J., upheld the method of election by resolution, saying, "We all know that in representative bodies, the great majority of resolutions are passed without formal voting by yeas and nays."

Equality of votes means equality of valid votes and notwithstanding ss. 42 and 102 of the Municipal Corporations Act (Imp.) given *supra*, the vote of a councillor on the election of mayor was subsequently disallowed: Nell v. Longbottom, 1894, 1 Q. B. 767; 63 L. J. Q. B. 490; and

the vote of a councillor who had an interest in a contract with the corporation was also disallowed: Bland v. Buchanan, 1901, 2 K. B. 75; 70 L. J. K. B. 466. But it has been suggested that these decisions would not stand in the Court of Appeal. At any rate in Ontario where there are no sections corresponding to 42 and 102 of the Imperial Act, it is submitted that the decisions apply. In Bland v. Buchanan, *supra*, it was recognized that there would be an equality of votes if the impeached vote should be disallowed, and accordingly a conditional casting vote was given. This procedure was commended and in the result, the election was upheld by reason of this casting vote notwithstanding the disallowance of the impeached vote. Channel, J., said on this point:—

> "As to the casting vote, there seems to be no authority on the point. But it was a very practical businesslike view for the mayor to say, as in effect he did: 'In order to prevent any question hereafter—as I do not know whether I have a casting vote or not—if I have I declare it is given for so and so; and if it should be decided that I have a casting vote, then it will be a good one.'
>
> "In my opinion on general principles that course might be allowed to be taken. It is a very convenient course, and I see nothing in the statute which prevents that being done. I am of opinion that the casting vote should be allowed."

In R. ex rel. McManus v. Ferguson, 2 C. L. J. '19, a vote on the election of warden was improperly rejected, and a new election was ordered on the ground that if recorded it might and probably would have influenced the result of the election.

In R. ex rel. Evans v. Starratt, 7 C. P. 19, it was held that a majority of the whole council must vote at the election of warden.

As to voting on election of warden, see s. 206, *infra*.

Proceedings to Set Aside Election of Warden.—Part IV. of the Act does not apply to elections of wardens. Apparently Part IV. would apply to similar elections by councils under ss. 158 or 159, because in the cases mentioned in those sections "the validity of the election of a member of a council," within the meaning of Part IV., s. 161, is called in question. Section 219 of 3 Edw. VII., c. 19, which s. 161 is an amendment, made Part IV., applied to elections of wardens. But see s. 186.

Under the Imperial Act the validity of the election of a mayor is tried on an election petition in the same manner as the election of a councillor, although a mayor is elected by council in a manner similar to that provided by s. 195. See Bland v. Buchanan, *supra*, for an instance in which procedure by petition was resorted to. In the absence of a provision in the Municipal Act, the election of warden can only be contested in the manner laid down in the Judicature Act, R. S. O. 1914, c. 56, s. 149, which provides that where special provision is not made in the Municipal Act and it is intended to call in question the right of any person claiming to be a municipal officer to the office which he claims to hold, exercise or occupy as such officer, the matter shall be tried and determined by the Judge of the County Court of the county in which the duties are to be performed in a summary way and the proceedings shall be the same as nearly as may be as those provided for trying and determining a complaint respecting the validity or mode of conducting the elections of school trustees in an urban municipality, excepting that such Judge shall have the same power to award costs to either party to the proceedings as he would have had if the same were a proceeding in the County Court.

The Public Schools Act, R. S. O. 1914, c. 266, s. 64, prescribes the following procedure:—

CONTROVERTED ELECTIONS.

> "(1) Every complaint respecting the validity or mode of conducting the election of a trustee or the return made by a returning officer in an urban municipality or in a township for which a township board has been established shall be made to the Judge of the County or District Court within twenty days after such election, and he shall, within a reasonable time, in a summary manner, hear and determine the complaint, and may cause the assessment rolls, collectors' rolls, poll books and other records of the election to be brought

before him, and may inquire into the facts by oral testimony or upon affidavit and may cause such persons as he may deem expedient to appear before him and give evidence.

"(2) The Judge may confirm the election or set it aside, or declare that some other candidate was duly elected, or may order a new election, and may order the person found by him not to have been elected to be removed; and if the Judge determines that any other person was duly elected he may order such person to be admitted; and if the Judge determines that no person was duly elected he shall order a new election to be held, and he shall in all cases report his decision to the secretary of the board: 9 Edw. VII., c. 89, s. 64."

Place of Meeting.

196. The first meeting of a county council shall be held at the county hall if there is one, and if there is none, at the court house. 3 Edw. VII. c. 19, s. 264. 3 & 4 Geo. V. c. 43, s. 196.

197. The subsequent meetings of the county council, and all meetings of every other council shall be held at such place as the council from time to time appoints. 3 Edw. VII. c. 19, s. 265. 3 & 4 Geo. V. c. 43, s. 197.

Internal Regulations.—See cases cited in Re Kelly & Toronto Junction, 1904, 8 O. L. R. at 165.

It would be a serious matter to declare judicially that the by-law of some rural municipality was invalid because some minute point in parliamentary practice had been overlooked.

As to matters of internal regulation the Mayor is the judge subject to the appellate jurisdiction of the council: ibid.

198.—(1) The council of a county in which an urban municipality lies may hold its meetings, keep its public offices and transact all the business of the corporation and of its officers and servants within such municipality, and may acquire or rent and hold such real estate therein and erect such buildings thereon as may be convenient for such purpose.

(2) The council of a township shall have the like power in respect of an adjacent urban municipality or township in the same county. 6 Edw. VII. c. 34, s. 13, *redrafted*. 3 & 4 Geo. V. c. 43, s. 198 (1-2).

Meetings of Councils cannot be held out of the Municipality without Statutory Authority.—In Anderson v. South Van-

couver, 1911, 45 S. C. R. 425, 20 W. L. R. 434, 1 W. W. R. 729, a council held its meetings outside of the municipality, and at such meetings appointed a Court of Revision which also held its sittings outside of the municipality. A tax sale purchaser of lands sold for arrears of taxes based on proceedings at these meetings, was held to have no title as the proceedings were wholly without legal effect. Idington, J., whose judgment was concurred in by Sir Charles Fitzpatrick, C.J., said:—

"The municipality was incorporated in 1892, and derived its powers from, and was thenceforward subject to, the provisions of the 'Municipal Act' of 1892, of which s. 103, defining the jurisdiction of municipal councils, is as follows:—

"103. The jurisdiction of every council shall be confined to the municipality the council represents, except where authority beyond the same is expressly given.

"It has been said this is merely objective. In a sense that is true, but it does not cover the whole truth. If nothing else had been enacted and the council had bought (as an exercise of a power clearly given to erect or procure a town-hall for corporate use) a hall outside the municipality's limits and sought to constitute that the municipal town-hall and seat of the corporation's business, does any one suppose they could have levied a rate to pay therefor? Or from the strictly objective point of view, could the council have acquired title to this land outside the limits of the municipality?

"I had always supposed such councils could not, except where expressly authorized by statute, buy a foot of land outside the municipal limits, for a graveyard, or a sand-pit, or a toll-bar, or anything else, no matter how urgently needed.

"If the councillors, or reeve and councillors, of such a municipality had done so I have no doubt they could have been personally made to return into the municipal treasury its funds so used.

"If they could not buy, no more could they rent.

"Indeed, the power of acquisition, outside the municipal limits, was actually given later for some of these specified purposes, but none to acquire town-hall or seat or home for the council to use.

"The discharge of their duties at home, in some chosen seat there, is implied in the legal history of such corporations; and in reading the language of statutory enactments creating them or empowering them, such history must be duly regarded. Thus read both sense and colour or a shade of meaning are given to the language of restriction just quoted. And along with that there must never be disregarded the oft-repeated legal principle that corporations being but the creatures of statute have no power but what the statute has given, and much less has the council or other body, the statute gives and directs as a means of corporate activity.

"The presumption is entirely in favour of the legislative or administrative acts of such a corporation being confined within its territorial limits unless where, by reason of some necessary implication requiring it, in order to enable it effectually to discharge the duties its constituent Act has cast upon it to do, something must be done beyond such limits.

"On the 7th of May, in the year 1892, the council then in office held a meeting within the municipality's limits at which a resolution was carried that the next meeting be held at the office of Shannon and McLaughlin, on the 21st inst., at 1 p.m. This place was on Hastings Street, in an adjoining municipality.

"It thus began a long course of illegal conduct. Of that I have not a shadow of a doubt. The only doubt I have in that regard is whether illegal acts so done were nullities or mere irregularities.

"The council had to appoint the assessor, and, when he had done his work, had to constitute a Court of Revision by naming five of its members, if more than five, to be the Court of Revision.

"This council consisted of a reeve and five councillors.

"The language of the Act then in force is not as clear as it might be. It provides apparently for the council revising the roll, but that, being read in connection with other sections, I think merely means it

shall see that duty is discharged by the methods given in the Act, which consist of the council constituting a proper Court, and, as provided by s. 157, appointing a time and place for the hearing of all complaints against the assessment.

"It will be observed this power seems to indicate a power to name a place. Does that enable it to name a place outside the municipality for holding a Court of Revision? I think not. The nature of the Court, the duties it has to discharge, the nature of the complaints to be heard and means of hearing and adjudicating upon them properly, as well as facilities furnished for the members of the Court, and for those concerned being in attendance with witnesses for whom no conduct money was to be allowed but only a *per diem* allowance, all seem to forbid the thought of the Court being held outside of the limits of the municipality, for if it could go a mile beyond it could go twenty or more. And when the council is given power to name the place, of which notice has to be published, it must be held to be bound to name a place within said limits.

"But, in each year in question, these appointments of persons to form the Court and of naming a place and time for their doing so were all directed by a council sitting outside its jurisdiction. Until the statute was changed such meetings could have no authority, and then only on complying with the conditions precedent to such authority, as given in later years of the period in question, to enable them to hold such sittings. This condition never was complied with. Hence their appointment of the members to hold the Court and their selection of a time and place for its sitting were all illegal.

"The next duty falling upon the council was to receive the roll and see that it had been duly revised and certified. Anything done in this regard was done in the same illegal fashion. And the rate by-laws all seem to have been passed in the like disregard of the law at sittings outside the municipality's limits; unless in the later years when the Act was changed, to which I will presently refer, we can presume authority.

"In 1897 the council, from a resolution I accidentally notice, seems merely to have directed the clerk to advertise the time, and possibly did so in other years.

"An attempt was made in argument to shew that, as the council and Court of Revision consisted of same members, the power given by legislation to the council on so resolving to fix meetings outside it, impliedly rested thereby in the Court of Revision. But this is an error of fact as well as law, for the council consisted of six members and this Court of only five of them.

"The Courts of Revision in question all sat outside the municipality. They are supposed to be Courts of Justice, but to try thus to enable the members thereof to sit outside the jurisdiction given them seems to be something very like constituting Courts of Injustice.

"I know not how it operated in the peculiar circumstances of this municipality, nor do I, as a matter of law, here need to care. But I am quite sure that to sanction as legal, such a proceeding as the constitution of these Courts of such methods, and the giving of directions involved in the councils fixing a place outside their jurisdiction as the only one for them to sit, would be fraught with danger to our municipal systems which are nearly all, in their main features, and especially in this regard, after the same pattern.

"To hold such a thing legal would be, in the results, intolerable. To hold it a mere irregularity would be to open the door to reckless spirits, of whom there exist only too many willing to take the risk. Indeed, our admirable municipal systems depend on all such men being sharply taught law and order.

"In this connection I may say that if any one who had made a study of our whole frame of government were asked to point out in what single feature it is most distinguishable from all forms that have gone before, he would put his finger on the distribution and decentralization of its powers and the localization thereof so as to bring each part, in such measure as may be practicable, as near to the people to be served as it is possible to do.

"Such is the spirit of our frame of government and of the municipal part thereof especially. It would be grossly violating it to enable any bare quorum of five or six busy or lazy men to throw aside the law.

"Courts of Revision framed after this pattern were, from experience in Ontario, found possible of improvement.

"The weaknesses of the pattern need not be intensified by countenancing such a departure from law and custom as respondents try to maintain here.

"Let us look at the powers given for summoning witnesses and getting documentary and other evidence before such a Court sitting where it never was intended to sit. How could it be enforced, or he suffering from disobedience of the witness get relief?

"On the 11th of April, 1894, the council was given a power it had not hitherto possessed by the enactment of the following:—

"The 'Municipal Act, 1892,' is hereby amended by inserting the following as s. 83*a*:—

"83*a*. All meetings of a municipal council shall take place within the limits of the municipality, except when the council have unanimously resolved that it would be more convenient to hold such meetings, or some of them, outside the limits of the municipality.

"This, in 1897, by c. 30, s. 2, was substituted by the following:—

"28. All meetings of a municipal council shall take place within the limits of the municipality, except when the council have resolved that it would be more convenient to hold such meetings, or some of them, outside the limits of the municipality.

"The council of the municipality in question never acted on either of these provisions. Legislators might doubt, but this council was undaunted. Their then clerk improperly seeks in his evidence to say they did resolve, but when challenged in cross-examination, he is forced to admit the minute book contains all the resolutions, yet no such resolution exists but the one of 1892 above quoted, and which could have no relation to this new power.

"We are asked to presume they did, though it nowhere appears on the record which they were bound by statute to keep and permit any one to inspect.

"Then we are asked to presume it existed in the procedure by-law, which is not produced.

"A curiously worded provision exists in s. 137, prohibiting a resolution or by-law of council from being in force for more than a year. I suspect this (which was no doubt intended to restrain councillors, for a year, from trying improperly to bind their successors), gave rise to the succession of procedure by-laws, but why are none of them produced, or if lost, why is the loss not proven and contents not shewn by secondary evidence? It was incumbent on respondent, if possible, to have proved thereby acts done in such an unusual way had at least the sanction of such a by-law. Good faith if nothing else in this regard made it desirable.

"An inspection of the minute book, in order to see if it could give rise to a right to act on legal presumption, so far from helping me in that regard destroys any possibility of my doing so. The book is, on the whole, well kept and shews the minutes of each previous meeting were read and confirmed or corrected, except in the case of minutes of special meetings which were read along with those of the preceding regular meeting.

"The provisions for the council's meeting outside the limits of the municipality were not intended to create or sanction such an abuse as the Court of Revision also doing so, but to meet emergencies which are easily conceivable. Indeed, I observe that in England the power of some councils meeting within or without its seat of jurisdiction has been given by the 'Municipal Corporations Act.'

"That sort of legislation tends to shew the supposed need of special enactment in that regard, and, if we can conceive of such an irregularity being tolerated there, possibly it prevents us from having judicial authority directly bearing on the point.

"The Courts of Revision, however, are, when duly constituted, Courts of an inferior and essentially local jurisdiction confined to that jurisdiction.

"We are thus driven to answer the inquiry of whether or not the acts of these councils, and especially of these Courts, done whilst sitting beyond their territorial limits, must be held null.

"Except the case of The Queen v. Inhabitants of Totness, and the general principles laid down in Paley, we are not referred to authority. Relying thereon, it seems clear the Courts of Revision could not act out of their jurisdiction, and acts so done must be held invalid.

"The council had no authority to direct them to act elsewhere, though they may have presumed to do so, and hence I think their acts null, and, consequently, all that rested upon same also null.

"The assessment rolls never were duly completed. The act of ratifying them and constituting them legal when once passed by the Court of Revision has never operated. It only ratified that supposed to have been done in the course of a due exercise of power.

"All the other curative provisions are of no effect, for it was not competent for the council to do what followed.

"The competency of the council is a condition precedent to the application of the curative Acts invoked.

"And if we try to suppose there was a *de facto* Court of Revision its acts beyond its jurisdiction are still null.

"The analogy to be drawn from acts of a council improperly or imperfectly constituted, yet to be held valid because a council *de facto*, does not apply here. The Court of Revision, although constituted of some of the members of the council, is essentially another body acting within its own rights and powers which it can neither limit nor extend, and over which, when constituted, the council has no power save naming place for its sitting, which I have already dealt with and shewn must be a place where by law it could sit.

"The council could, after the Act was amended, resolve to sit outside, but was never given power to direct its Courts of Revision to so sit.

"The council never attempted, even when the law permitted it to exercise a power, to sit elsewhere. It is quite clear it did not try to do so on the few occasions it sat within the municipal limits. And when sitting outside, without such authority, it could not give itself authority for sitting there.

"The case in many features is so curious I tried to find light from many sources. I found the acts of corporators when not all summoned and that in due form (and place being impliedly in question), as in the cases of Rex v. May, 5 Burr. 2681; Smyth v. Darley, 2 H. L. Cas. 789; Musgrave v. Nevinson, 2 Lord Raymond 1358; Rex v. Hill, 4 B. & C. 426; Rex v. Langhorn, 4 A. & E. 538; Rex v. Mayor of Liverpool, 2 Burr. 723, and others cited in these, were held null.

"Incidentally the meeting place is only referred to as the proper or usual place and seemingly essential part of the foundation on which to rest acts of a corporation as such. But in the Musgrave Case above, a case of meeting in a tavern instead of the moot-hall was held bad.

"In the American municipal cases there seems a dearth of precedent as to the place of meeting, and I have found only one case where the revising Court outside the municipal limits was the direct cause of holding taxes imposed void. The Supreme Court of Kansas, in The Board of Commissioners of Marion County v. Baker, 25 Kan. 258, had the very point presented to it and held the sale void.

"Dillon, in s. 264, or 505 of 5th edition, refers to cases that imply the doing so would be void, and Elliott on Public Corporations, 2nd ed., page 171, cites substantially the same cases.

"But in the larger field of private corporations there is abundant authority to shew the corporation must not sit or attempt to act as such, outside its parent State, which is looked upon as its home and limit of jurisdiction, and acts done elsewhere are void.

"See the cases of Miller v. Ewer, 27 Me. 509; Ormsby v. Vermont Mining Co. (1874), 56 N. Y. 623; (11 Sickels Reports) in appeal at 625, and numerous like cases where other authorities are cited, and the curious can trace out the law there in such regard.

"Of course some cases exist of directors being upheld in acting beyond the state, but that is put upon the ground that they are only agents of the corporation, and so within the leading case of the Bank of Augusta v. Earle, 5 Burr. 2681, entitling corporations to act abroad in the sense there in question.

"Of course the analogy between the private and the public corporation is not close, but there is much less to be said or implied in favour of a local representative body going beyond its jurisdiction than for a business concern.

"I think the appeal should be allowed with costs throughout."

Duff, J., dealing with s. 83*a*, referred to by Idington, J., said:—

"It will be convenient to discuss what the enactment means by prescribing, as a condition of the legality of meetings so held, that the council shall have 'unanimously resolved that it would be more convenient, etc.' Mr. Justice Clement thinks this provision does not require any act on the part of the council beyond the act of holding the meetings coupled with 'unanimity of sentiment' on the part of the members of the council that such a course is convenient; and that the existence of this 'unanimity of sentiment' could be inferred from the fact that the meetings, as in this case, uniformly took place outside the municipality. The Chief Justice of the Court of Appeal seems to take the same view. I think that view cannot be sustained. It is to be observed that what the statute requires is not that the members of the council as individuals shall unanimously 'resolve,' but that the council shall 'resolve.' A 'resolve'—to adhere to the words of the Act—by the council as a body is necessary. I do not think a representative body in the exercise of legislative powers whether plenary or subordinate, can 'resolve' in a practical sense upon a matter such as that which the section deals with without giving collective expression in some form to a decision upon it. I think it is clear that, before they can take advantage of this provision, they must, as a council, express a judgment that it is more convenient to hold their meetings outside the municipality and they must express that judgment while professing to act as the council of the municipality and in circumstances in which the law permits them as the organ of the municipality to transact business.

"It is beyond dispute that if the council had, in that sense, passed upon the question of holding meetings outside the municipality some record of their determination upon it ought to have appeared in the minute book in which their proceedings were recorded ('Municipal Act, 1892,' c. 33, s. 97); and I have not the slightest doubt that it would have appeared there. There is no record of any action having been taken in that direction in 1895 or 1896 except the record of the adjournment of the initial meeting in each year. At each of those meetings the council adjourned to meet in Vancouver; but in either case nothing was said about subsequent meetings. These were held at regular intervals of a month without a thought, apparently, of the provisions of the 'Municipal Act.' I am not able to escape the conclusion that the proceedings which took place at these meetings could not in law take effect as the proceedings of the municipal council. . . . . The next point is whether, notwithstanding the absence of legal validity in the proceedings referred to, the appellant is precluded, by reason of certain statutory provisions, from relying on the objections he raises. Clement, J., thinks he is precluded by s. 126 (3) of c. 33 'Municipal Act, 1892;' R. S. B. C. 1897, c. 144, s. 86 (2); which continued in force until 1899. That section reads as follows:

"In case no application to quash a by-law is made within one month next after the publication thereof in the British Columbia Gazette, and notice as provided in s. 125 of this Act, the by-law, or so much thereof as is not the subject of any such application, or not quashed upon such application, so far as the same ordains,

prescribes, or directs anything within the proper competence of the council to ordain, prescribe, or direct, shall, notwithstanding any want of substance or form, either in the by-law itself, or in the time or manner of passing the same, be a valid by-law.

"In my judgment this enactment applies only to by-laws passed by the council as a council on an occasion when it could lawfully transact business as the legislative organ of the municipality. It has, I think, nothing whatever to do with proceedings so fundamentally defective as those we have to consider in this appeal."

May Acquire.—See s. 6 and s. 373 (2).

199.—(1) The ordinary meetings of every council shall be open, and no person shall be excluded therefrom except for improper conduct.

(2) The head or other presiding officer may expel or exclude from any meeting any person who has been guilty of improper conduct at such meeting. 3 Edw. VII. c. 19, s. 267, *amended*. 3 & 4 Geo. V. c. 43, s. 199 (1-2).

200.—(1) A majority of the whole number of members required to constitute a council shall be necessary to form a quorum. 3 Edw. VII. c. 19, s. 268.

(2) Where a council consists of only five members, the concurrent votes of at least three of them shall be necessary to carry any resolution or other measure. 3 Edw. VII. c. 19, s. 269. 3 & 4 Geo. V. c. 43, s. 200 (1-2).

201.—(1) The head of the council shall preside at all meetings, and may at any time summon a special meeting; and it shall be his duty to do so when requested in writing by a majority of the members.

(2) In the absence of the head of the council or if his office is vacant, a special meeting may be summoned by the clerk upon a requisition signed by a majority of the members. 3 Edw. VII. c. 19, s. 270, *amended*. 3 & 4 Geo. V. c. 43, s. 201 (1-2).

202. If there is no by-law or resolution fixing the place of meeting, a special meeting shall be held at the place where the then last meeting was held, and a special meeting may be either open or closed as in the opinion of the

council expressed by resolution in writing the public interest requires. 3 Edw. VII. c. 19, s. 271. 3 & 4 Geo. V. c. 43, s. 202.

203. In the absence of the head of the council, or if his office is vacant, the council may from among the members appoint a presiding officer, who during such absence or vacancy shall have all the powers of the head of the council. 3 Edw. VII. c. 19, s. 72. 3 & 4 Geo. V. c. 43, s. 203.

204. If the person who ought to preside at any meeting does not attend within fifteen minutes after the hour appointed, the members present may appoint a presiding officer from among themselves, and he shall have the same authority as the absent person would have had if present. 3 Edw. VII. c. 19, s. 273. 3 & 4 Geo. V. c. 43, s. 204.

205. The head of the council, or the presiding officer, except where he is disqualified to vote by reason of interest or otherwise, may vote with the other members on all questions; and, except where otherwise expressly provided by this Act, any question on which there is an equality of votes shall be deemed to be negatived. 3 Edw. VII. c. 19, s. 274. 3 & 4 Geo. V. c. 43, s. 205.

206.—(1) Where a division is taken upon the election of a warden or other presiding officer, upon the appointment of an officer of the corporation or upon a by-law, resolution or for any other purpose, each member present shall announce his vote openly and individually, and the clerk shall record it.

(2) No vote shall be taken by ballot or by any other method of secret voting, and every vote so taken shall be of no effect. 3 Edw. VII. c. 19, s. 274*a*. 3 & 4 Geo. V. c. 43, s. 206 (1-2).

207. No member of a council shall vote on any by-law appointing him to any office in the gift of the council or

fixing or providing his remuneration for any service to the corporation but this shall not apply to allowances for attendance at meetings of the council or its committees. 4 Edw. VII. c. 22, s. 17, *amended*. 3 & 4 Geo. V. c. 43, s. 207.

208. A council may adjourn its meetings from time to time. 3 Edw. VII. c. 19, s. 275. 3 & 4 Geo. V. c. 43, s. 208.

Defamatory Statements by Aldermen at Council Meeting.—An alderman has a right as such at a council meeting to say anything however false which he honestly believes to be true. The occasion is one of qualified privilege. Pittard v. Oliver, 1891, 1 Q. B. 474; 60 L. J. Q. B. 219, where Fry, L.J., stated that it was very desirable that where discussions as to the character of individuals take place at board meetings such discussions should be conducted in camera. See also Purcell v. Sowler, 1877, L. R. 2 C. P. D. 315; 46 L. J. C. P. 308, and Ward v. McBride, 1911, 24 O. L. R. 555. The qualified privilege however is not lost by reason of there being present newspaper reporters or others. Hopewell v. Kennedy, 1904, 9 O. L. R. 43.

Fair and Accurate Reports of Proceedings at Council Meetings are Privileged.—See the Libel and Slander Act, R. S. O. 1914, c. 71, s. 10.

Ordinary Meetings.—The power of the council as to meetings is to be found in s. 250.

Every council may pass such by-laws and make such regulations . . . as may be deemed expedient and are not contrary to law, and for governing the proceedings of the council, the conduct of its members and the calling of meetings.

The procedure at meetings should be laid down by by-law or regulation passed under s. 250 and the notices to be given and the times of meeting should be provided for in the same manner. There is no provision in the statute requiring any meetings except the first and those necessary when the presentation of a petition casts a special statutory duty of some sort on the council, as under s. 13.

Duties and Powers of Presiding Officers.

(1) To preside at all meetings; s. 201 (1);
(2) To expel persons for improper conduct; s. 199;
(3) To vote with other members on all questions; s. 205;
(4) If there be a procedure by-law, to perform the duties and exercise the powers therein stated;
(5) At common law unless the procedure by-law otherwise provides:
  (*a*) To preserve order;
  (*b*) To decide whether motions are in order;
  (*c*) To regulate discussion;
  (*d*) To put questions;
  (*e*) To declare the result;
  (*f*) To check and sign minutes;
  (*g*) To declare meeting at an end, and generally to decide all questions pertaining to the meeting requiring immediate decision, but in all, subject to the approval of the council which excepting where the statute otherwise provides, has full authority to govern the method of its proceedings.

Duty to Give Casting Vote.—Under s. 205 the head or presiding officer may vote with the other members and all questions on which there is an equality of votes are deemed to be negatived. But note that equality

of votes means equality of valid votes. Bland v. Buchanan, *infra*. Clearly the presiding officer is under no duty to vote unless he wishes and unless there is a division, in which case it becomes his duty as a member of council under s. 206 (1) to announce his vote.

In Manitoba s. 269 R. S. M. 1913, c. 133, requires every member present to vote when a question is put—excepting the head or chairman unless a majority of the council then present excuse him. As there is no penalty provided in case a member refuses to vote he would simply be subject to the censure of the council. The better course for a member to follow would be to retire before the question was put if he did not intend to vote.

Section 270 of the same Act says that the head or chairman is not to vote except when there is an equality of votes exclusive of his own, in which case he "shall have a casting vote."

This language is so different from that used in Manitoba, s. 269, which says that every member shall vote, that it is clear the intention of the Legislature could not have been to make it imperative that the head or chairman shall vote in the case mentioned. The Legislature has simply given him a vote without directing that he shall vote.

In this connection note the provisions of Manitoba, s. 142, which says that the returning officer, where there is an equality of votes, "shall give a vote." The Legislature has, since the foregoing was written, amended s. 270 by striking out "have" and inserting "give" in its place.

Manitoba, s. 268, provides that a disputed question shall be decided by a majority of the votes of the councillors present. Compare this with Ontario, s. 205.

Under the English Municipal Corporations Act there is a provision similar to that in former Manitoba s. 270, that an officer shall have a casting vote. R. v. Waugh, ex parte Crome, Times, June 2nd, 1892, and R. v. Mayor of Reigate, ex parte Barnes, Times, Feb. 7th, 1893, are cases in which the officer in question refused to give a casting vote.

Note that Ontario s. 195 (4) provides that one reeve on the election of a warden shall have a second or casting vote. Contrast this sub-section with the provisions of 127, which imperatively require a returning officer to "give a vote." A conditional casting vote might be given by the reeve under 195 (4) as was done in Bland v. Buchanan, *supra*.

Duty of Members to Vote.—It is the duty of every member of council to attend council meetings and by s. 206 to vote. Section 16 of the Procedure By-law of the City of Toronto provides that every member present shall vote unless the council excuses him, and if he persists in refusing to vote, he is to be recorded as voting in the negative.

The Municipal Act, R. S. M. 1913, c. 133, s. 289, provides that every member present except the head, shall vote unless a majority of the council then present, excuse him.

If no member requires the vote to be recorded it is immaterial whether a member votes or not, but once the division is taken it becomes the duty of every member present to announce his vote openly and individually, Members who do not wish to vote should retire before a division is taken. The practice of the House of Commons is to suspend members who vote with the yeas or nays and who afterwards when a division is taken refuse to vote in the customary manner. The rule of the Senate requires a senator to give his reasons for not voting and the speaker then submits the question: "shall the senator, for the reasons assigned by him, be excused from voting?" See Bourinot; Parliamentary Procedure, s. 504.

(The duty to vote is subject to the prohibition in s. 207 and to the general principle of law that a member cannot give a valid vote on any matter in which he has a personal interest. The rule has been stated as follows:—

> "A member of a municipal council is disqualified from voting in proceedings involving his personal or pecuniary interests; and an ordinance or resolution passed by the concurrence of one or more members so disqualified is void."

See in re L'Abbe and Blind River, 1904, 7 O. L. R. 230, 3 O. W. R. 162, where a by-law was enacted which had been passed by the casting vote of a reeve who had a pecuniary interest in the passing. The interest, how-

ever, must be different in kind from that of the community in general, not merely a difference in degree of interest. Elliot v. St. Catharines, 1908, 18 O. L. R. 57, 13 O. W. R. 89, where a vote by a councillor whose property was especially to be benefited by the local improvement by-law in question was held good. Also see the cases collected *infra*, under title *Grounds for Quashing By-laws.*

Open Meetings.—Ordinarily all Courts must be open to the public though a Judge may for good and sufficient reason order that the public or a section of the public shall be temporarily excluded.

In England meetings of parish councils are open to the public unless the council otherwise direct. There is no similar provision as to District or Borough or County Council. See The Local Authorities (Admission of the Press to Meetings) Act, 1908, 8 Edw. 7, c. 43.

This Act was passed in consequence of the decision in Tenby Corpn. v. Mason, 1908, 1 Ch. 457, 77 L. J. Ch. 230, where the request of a member of the public, a reporter, to be present at a council meeting on the ground that like a Court it was open to the public, was denied.

In the absence of express statutory enactment meetings of councils are not open even to ratepayers.

In Tenby Corporation v. Mason referred to above, Mason, a burgess, who was also proprietor of a newspaper and acted as reporter, claimed the right to attend meetings of the Borough Council. His reports were frequently inaccurate and the council decided to exclude him. He continued to assert the right to be present and the corporation brought an action for a declaration that they had the right to exclude him from council meetings and for an injunction. He rested his right to be present on two grounds (1) that he was a burgess of the corporation; (2) that he was a reporter. The Court of Appeal decided against him on both grounds. Buckley, L.J., said:—

> "Where there is a governing body, a deliberative body, which is to control the interests and affairs of a large body of constituents, is there *prima facie* any right in a constituent to say, "I will be present at the deliberations of the deliberative body"? I think not. Whether it be the House of Commons deliberating upon the interests of all the subjects of the realm, or whether it be a board such as that of the London and North Western Railway Co., governing the interests of a large body of shareholders, or whether it be a meeting of the benchers of one of the Inns of Court, to determine a question of the management of the property of the Inn or the government of the members and so forth, it seems to me *prima facie* the constituent is not entitled to say, "I will be present at the deliberations of the governing body." It may be in the interest of the body governed that the deliberation shall not be held in public. The persons whose duty it is to determine questions of policy and questions of government ought to be placed in such a position that they can express their views freely without the risk of their becoming public to the disadvantage perhaps of the body whose affairs they have to govern. *Prima facie* the constituent has no right of access to meetings of the deliberative body. Here the corporation with which we have to deal is in a sense a public body. It is the municipal corporation of this borough. It is a public body governing the affairs of those members of the public who are burgesses of the borough, but it is not public in the largest sense of the word. It is more analogous to the board of the London and North-Western Railway Co., or the Benchers of an Inn of Court, governing domestic affairs. They are governing the affairs of the borough. It seems to me, that the burgess is not entitled to say, "I will come in and I will hear your deliberations." But all this must be controlled, no doubt, by anything which is found in the statute which governs the corporation. If there is anything in the statute that must prevail."

Meetings of Boards of Control and Committees are not open, as there is nothing in the Act so providing.

Reporters and the public generally are in the same position in the absence of statutory provisions similar to those enacted in England in consequence of Tenby Corporation v. Mason.'

Improper Conduct.—Improper conduct means conduct which offers any obstruction to the deliberations or proper action of the council. The power of exclusion is necessary during sittings for self-preservation. The right to remove for self-security is to be distinguished from the right to inflict punishment. There is no power given to do the latter but whenever the violation of order amounts to a breach of the peace or other legal offence, recourse may be had to the ordinary tribunals. A member of a council can be expelled or excluded under s.-s. 2 for improper conduct.

This section confers the power on the head or presiding officer. At common law the power of expulsion for obstruction by a member or non-member can be exercised by a legislative body during its sitting by resolution requiring its head or other officer to expel the obstructor and on principle a council has such power as necessary for self-preservation.

See Doyle v. Falconer, 36 L. J. P. C. 33.

If the person guilty of improper conduct refuses to leave the council meeting when requested so to do the force necsssary to remove him may be used, and if he resists and lays hands on those who are removing him he commits an assault and may be at once arrested by a police officer and taken into custody.

See Lucas v. Mason, L. R. 10 Ex. 251.

The head of the council in his capacity of magistrate, may, where the person guilty of improper conduct has committed a legal offence which warrants arrest, cause the offender at once to be arrested.

See Part XVIII. Admin. of Justice, s. 350.

Section 201 of the Criminal Code makes it an offence punishable on summary conviction by a penalty not exceeding fifty dollars, to wilfully disturb any assemblage of persons met for any moral, social or benevolent purpose. A meeting of electors called by a candidate is not within the section. R. v. Lavoie, 6 Can. Cr. Cas. 39, and a council meeting would not be within it.

Quorum.—While the Act fixes a quorum at a majority of the whole council, this is but a statement of the common law as to the government of corporations.

Section 193 (3): Majority.—The leading case on this subject is R. v. Bellringer, 1792, 4 T. R. 811, where a charter required that the Mayor and Common Council or the major part of them should elect, and the Common Council was a definite body consisting of thirty-six, it was held that a majority of the whole number must meet to form an elective assembly, and if this corporation be so reduced, as if so many had not remained, no election can be had.

Lord Kenyon, C.J., said that the defendants' arguments supposed that any number of corporators, however small that number may be, were competent to act for the corporation, and that all acts done by a majority of the Council though reduced, are valid. The cases cited are all one way, that there must be a major part of the whole number constituted by the charter in order to make the elections, and do the other acts under it. Lord Mansfield observed upon the distinction which exists between corporations consisting of a definite and indefinite number, that in the latter a major part of those who are existing at the time is competent to do the act, but that where the body is definite, as in this case, there must be a major part of the whole number. . . . It is not necessary indeed that they should all concur in any act done, but they must be present, and the business at such a meeting is in law a business by the whole. Another decision bearing on the same subject which has been quoted with approval is R. v. Miller, 6 T. R. 268. It was held that an integral part of a corporation composed of a definite number, when required to vote at the election of a corporate officer, a majority of such definite part must attend. Similarly in R. v. Devonshire, 1 B. & C. 611, where the charter of a corporation provided that "when any one or more of the electors should die, it should be lawful to the other electors or the greater part of the same to elect another member, etc." Held, that a majority of the entire body of the corporation, and not merely of those then existing, must be present to make a good election under that clause. Abbott, C.J., said:

"It has been decided that where by the provisions of any charter, an election is to be made by a body consisting of a definite number or the major part of them, a good assembly cannot be had without the presence of such a number of persons as will constitute a majority of so many of the entire number as may happen at the time to be existing. This has been taken as a general and established rule of corporation law, the reason being that where a corporate body exists by charter, composed of a certain definite number of individuals, it cannot be supposed that it was intended that the powers given to a body consisting of such a defined number of persons should be exercised by a much smaller number."

Irregularities at Council Meetings.—In re Wilson and Ingersoll, 1894, 25 O. R. 439, a procedure by-law enacted as follows:—

"That every by-law shall receive three several readings previous to its being passed: but no by-law for raising money, or which in its operation shall have a tendency to increase the burdens of the people, shall be finally passed on the day on which it is introduced, except by a two-thirds' vote of the whole council."

A by-law which was within the foregoing provision was read three times on one day but not finally passed by a two-thirds' vote. The next evening when other councilors were present it was read a third time and passed. A motion was made to quash the by-law, and Robertson, J., held that while it was competent to the council to have introduced, read and passed a new by-law in exactly the same terms, the council could not pick up the old defeated by-law and re-read it a third time and pass it.

In Dwyre v. Ottawa, 1898, 25 A. R. 121, a procedure by-law required all work exceeding $200 in value to be done by contract after tenders had been called for. The council, notwithstanding this, entered into a series of contracts without calling for tenders. Robertson, J., made an interim order restraining the council from proceeding with the contracts, but this was set aside by the Court of Appeal. Osler, J.A., thus dealt with the matter:

"The plaintiff is therefore confined to the single objection, that the contracts . . . are illegal, because they were made in contravention of the 51st and 52nd clauses of city by-law 1,073, 'By-law for the regulation of committees and other matters.' This is a by-law passed under the authority of s. 283 of the Municipal Act, which enacts that every council may make regulations not specifically provided for by the Act, and not contrary to law, for governing the proceedings of the council, the conduct of its members, the appointing and calling of special meetings of the council, and generally such other regulations as the good of the inhabitants of the municipality requires, and may repeal, alter, and amend its by-laws save as by the Act restricted. The 51st clause of the by-law, under the heading 'Tenders,' provides that all work and materials exceeding in value $200 shall be done and provided by contract, and after tenders have been advertised for at least ten days, or called for in any other manner which the extent and importance of the work may, in the discretion of the committee having charge of the matter, render necessary.

"In case of an emergency, rendering it necessary to dispense with this rule, such dispensation shall require the sanction of a majority of the committee having charge of the matter. Such case is to be entered in the minutes of the committee and reported to the council at its next meeting, with reasons for dispensing with the rule.

"Clause 52 provides certain regulations to be observed in regard to tenders.

"Clause 53. Notwithstanding anything in the two preceding clauses, the council may, by resolution to be passed by a majority of the whole council, direct that any particular work may be done by day labour instead of by contract.

"By s. 18, s.-s. (1), it is the duty of the Board of Works to consider and report on all matters relating to sewers, drains, streets and thoroughfares.

"It was argued on behalf of the defendants that the 51st clause was intended to govern the proceedings of the committee and not of the council as a whole. Something may be said in favour of that view, particularly as there is nothing in the by-law which explicitly restrains the council from taking up in council business which they have for the sake of convenience delegated to be disposed of in general by a committee of their body.

"But, waiving that question, it is clear, that it was in the power of the council by a bare majority, since no restriction requiring more than a bare majority is imposed upon them by the by-law itself, to repeal the by-law or any particular clause or clauses of it. It was equally within their power to repeal it *pro hac vice* by overriding it by a by-law inconsistent with any regulation imposed by it.

"Having that power, it appears to me that even had the plaintiff proved that no such by-law had been passed it would have been inexpedient and out of the usual course of the Court to interfere by injunction, considering that the defect was merely in a matter relating to the internal regulation of the council, that it could easily be remedied or the objection removed by the passage of a by-law, that the inconvenience to the public caused by stopping the work in the state in which it then was would be enormous, and that the loss and injury to the defendants in the event of the failure of the plaintiff to maintain his action would be altogether disproportionate to any relief the latter was likely to obtain were he successful: Elwes v. Payne, 1879, 12 Ch. D. 468, at p. 479; Mitchell v. Henry, 1880, 15 Ch. D. 181, at p. 191.

"The plaintiff has not proved the absence of such a by-law. He has, on the contrary, shewn that contracts have been entered into for the construction of the works. We are not to assume that they have been entered into or authorized otherwise than in accordance with the provisions of 282nd section of the Municipal Act, viz., under the authority of a by-law of the corporation: Waterous Engine Works Co. v. Palmerston, 1892, 21 S. C. R. at p. 576; Wigle v. Kingsville, 1897, 28 O. R. 378. If they were, the plaintiff's case necessarily fails, for reasons above mentioned. If they were not, it was for the plaintiff to make that clear, because in an attack of this kind he must, as it has been expressed, 'stop all the earths,' and ought to be confined to the precise objection he has taken, namely, that the council could not contract for the works in question otherwise than by tender.

"The case of Re Wilson and Ingersoll, 1894, 25 O. R. 439, cited by counsel for the plaintiff, is distinguishable on the ground that the by-law there in question had not been passed by the requisite majority, a two-thirds vote of the whole council, over the requirements of the general by-law regulating the proceedings of the council. The by-law would seem to have been held bad on some other grounds also. The case is not very clearly reported, and it is unnecessary to say whether I agree with it on the point for which it is cited."

Re Jones and London, 1899, 30 O. R. 583, was a motion to quash two by-laws on the ground of irregular procedure at the council meeting at which they were passed. Rose, J., thus dealt with the objection:

"The first objection is that the by-law should have been introduced on motion, and that notice of intention to introduce it should have been given; and the second part of the objection is that the by-law should not have received its three readings on one day. The rule of procedure under By-law 773 of the council provides as follows: 'Every by-law shall be introduced on motion for the first reading thereof, and shall receive three several readings, each on different days, previous to its being passed, except on urgent and extraordinary occasions, when it may be read twice or thrice on one day.'

"Rule 29 provides: 'Notice shall be given of all motions for introducing new matters . . . and no motion shall be discussed unless such notice has been given at the last regular meeting of the council.'

"Rule 11 provides: 'That the mayor or other presiding officer shall preserve order and decorum and decide questions of order subject to an appeal to council.'

"Rule 12 provides: 'When the mayor or other presiding officer is called on to decide a point of order or practice, he shall state the rule applicable to the case, without argument or comment.'

"And in Re Indian Zoedone Co., 1884, 26 Ch. D. at p. 77, in the Court of Appeal, the Earl of Selborne, L.C., stated that a chairman of a meeting 'has *prima facie* authority to decide all emergent questions which necessarily require decision at the time.'

"It seems to me that these were matters of internal regulation, and subject to the decision of the mayor, and that the only appellate tribunal was the council. The mayor determined that this was an urgent occasion; and in this I should agree, because it was manifest that if the by-law was not passed at that meeting, it could not be passed at all during that year. The mayor also determined in effect that this was not new matter, and that it was not necessary to give a notice of the intention to introduce the by-law. I do not know whether he was right or wrong. I do not know what is meant by 'new matter' in the by-law. I certainly do not consider myself competent to reverse him or the council upon the conclusion they came to, even if it were within my province to do so. I think it is not within my province, and that these objections fail."

Heffernan v. Walkerton, 1903, 6 O. L. R. 79, the D. C. refused to restrain a municipal council from acting on a by-law which had been passed in contravention of the provisions of the procedure by-law. Street, J., dissenting said:—

"The simple question to be determined upon the present appeal appears to be whether a municipal council, which has passed a by-law under section 326 of the Municipal Act for governing the proceedings of the council, is at liberty to disregard its provisions . . . In my opinion, the provisions of the By-law No. 675 are binding upon the council, and can be insisted upon by any member, and a by-law passed in disregard of its provisions, and of the protest of the minority, should not be supported when it is promptly attacked: see Dillon on Municipal Corporations, 4th ed., par. 309."

Britton, J., and Falconbridge, C.J.K.B., did not consider the objections fatal, Britton, J., saying:

"The plaintiff has no merits in this case; and, applying the words of the statute giving jurisdiction as to injunctions, I do not think this is a case in which 'it is just or convenient' that an order for an injunction should be made.

"The by-law which is challenged was as fully considered by the council, and by the same members, as if considered in committee of the whole. The money was on hand. The majority of the council of 1902 desired that this money should be paid. The action is defended; so it is evident that the council of 1903 does not sympathise with or concur in the plaintiff's action.

"The plaintiff technically has a right to bring an action; and he has done so instead of moving to quash the by-law . . . If there can be a case in which it can be said that there is any discretionary power on the part of the Court or a Judge as to granting or refusing an injunction, this is such a case . . . Unfortunately, the council did not comply with the by-law they had previously passed, in putting the by-law in question through its different stages.

"The plaintiff's examination as a judgment debtor is in, and it shews him to be a shifty man—not candid or frank; and that he will never, if he can avoid it, pay one penny of the judgment; and it seems to me perfectly clear upon the evidence that this action was not brought by him in the interest of the ratepayers, but purely as a personal matter."

In Re Kelly and Toronto Junction, 1904, 8 O. L. R. 162, a local option by-law was "read and passed as having its second reading," but without any motion that it be read a second time. The procedure by-law of the council contained a provision that in all unprovided cases the law of Parliament should be followed. One of the councillors present, Bond, protested that the by-law had not been passed in legal form but he declined

to state in what respect the procedure had not been according to legal form. In dismissing a motion to quash the by-law, Falconbridge, C.J.K.B., said:—

> "I find as a fact that the procedure which was adopted in this case is the usual procedure of the council, and I agree with the contention that these matters are matters of internal regulation and that the mayor was the judge thereof, subject to the appellate jurisdiction of the council. I fully appreciate the anxiety of counsel for the applicant to dissociate themselves (for the purposes of this argument) entirely from councillor Bond, who made a formal protest complaining of irregularities in the proceedings, but who declined to specify wherein such alleged irregularities consisted. If he had condescended to point out on the spot what his ground of complaint was, the irregularity, if any, could have been promptly cured.
>
> "I prefer the reasoning and the opinions expressed in Re Jones and City of London, 1899, 30 O. R. 583, to those of Re Wilson and Town of Ingersoll, 25 O. 439, so far as those cases are in conflict with each other, and so far as either of them is applicable to the case in hand.
>
> "I am of opinion that, as a matter of strict law, this application ought not to succeed. But if I had to exercise any discretion it would be in the same direction. It would be a serious matter to declare judicially that the by-law of some rural municipality was invalid because some minute point in parliamentary practice had been overlooked. The applicant allowed a long time to elapse after the final passing of the by-law before he chose to give notice of this application. The only answer or explanation that was vouchsafed on this point was that he had been a sufferer by the passing of the by-law, and therefore by the delay."

In Re Caldwell and Galt, 1905, 10 O. L. R. 619, Teetzel, J,. refused to quash a by-law because of departures from the requirements of the procedure by-law, saying:—

> "Being of opinion that the by-law is valid on its face and is the will of the majority of the council, and that none of the objections now raised were raised by any member of the council, and that the matters now objected to were matters of internal regulation, effect should not be given to such objections, founded as they are on extrinsic evidence as to regularity of procedure, unless there is such a manifest illegality that it would be unjust that the by-law should stand.
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> "See Re Jones and City of London, 1899, 30 O. R. 583, at p. 587, and cases there cited. See also In re Smith and City of Toronto, 1860, 10 C. P. 225; Re Milloy and Township of Onondaga, 1884, 6 O. R. 573; and Re Kelly and Town of Toronto Junction, 1904, 8 O. L. R. 162."

In Re Dewar and E. Williams, 1905, 10 O. L. R. 463, after a local option by-law has been passed by the electors, it was proposed at a meeting at which only four councillors were present to finally pass the by-law. Two members voted for and two against, so that the resolution was negatived. One of the councillors at once asked for a reconsideration and at a later meeting the by-law was finally passed by unanimous consent. There was no procedure by-law. A motion to quash was dismissed by the D. C. Boyd, C., said:—

> "The by-law is of proper form, and its validity is attacked on the sole ground that at a meeting of the council of the 9th January, upon a resolution being moved that the by-law pass, the council equally divided; so that, by the application of the statutory rule, the passage of the by-law was defeated. Section 274 says, 'any question on which there is an equality of votes shall be deemed to be negatived.' The meaning of that is, it is negatived or ended for the time being, but it is always of competence for the council to reconsider the question at a later meeting. As tersely put by the Chief Justice in Jersey City v. State, 1863, 30 N. J. L. 521, 529, 'the right of reconsidering lost measures inheres in every body possessing legislative powers:' See Sank v. City of Philadelphia, 1871, 8 Phila. 117, and

other cases in 21 Eng. & Am. Encyc. of Law, 2nd ed., p. 968, 'Ordinances.'

"It is not necessary, as was argued for the council in this case, to begin *de novo* by submitting the by-law to the electors; the electors had expressed already their approval of that particular by-law, and it only remained to pass it finally, which, as I read the statute in its present form, it was the duty of the council to do, if it was not petitioned against."

Anglin, J., referred to Re Wilson and Ingersoll, which was relied on by the applicant, as follows:—

"The authority of that case has been considerably shaken by comments upon it in Dwyre v. Ottawa, 1898, 25 A. R. 121, 128, and In re Kelly and Town of Toronto Junction, 1904, 8 O. L. R. 162, 167. It is not binding upon us as a Divisional Court, and, in so far as it may be inconsistent with the right of the municipal council to reconsider its refusal to pass the by-law on the 9th January, should, in my opinion, be overruled.

"Much might be said to support the view that the vote of the 9th January meant nothing more than a refusal to pass the by-law presently. It is obvious that had the motion been not 'that the by-law pass,' but 'that the by-law be rejected,' the same equal vote would have negatived its rejection. The attitude of councillor William Phillips, who voted against the passing of the by-law, but immediately after the vote had been taken gave notice of his intention to demand reconsideration at a future meeting of the council, indicates that such was his understanding of the vote which he gave.

"But even if the vote of the 9th January justified the declaration, which the reeve is said to have made, but which is not contained in the minutes of the council, that the by-law was lost, I agree that it was competent for the council at the special meeting of the 21st January to reconsider its action, to reverse it, and, without again introducing it and submitting it to the vote of the electors, to pass the by-law. The fullest right of reconsideration is generally recognized as one of the inherent rights of every deliberative body, unless such right is denied it or is limited by the power creating such body, or is relinquished, or is restricted by its own internal regulations. The Municipal Act contains no provision affecting the right of municipal councils to reconsider such a motion as that of the 9th January with which we are now dealing. Every municipal council is, by s. 326 of the Municipal Act, empowered to make regulations for governing its proceedings. There is before us no evidence that any such regulations have been adopted by the municipal council of the township of East Williams. It follows that the motion for reconsideration carried at the meeting of the 21st January, and the motion to pass the by-law which followed, were regular and effective."

Disqualification of Member from Voting by Interest.—In addition to the provisions of s. 207, the provisions of 53 (3) must be borne in mind by reason of which councillors who are shareholders of a company, lessees of the corporation, exempt from taxation, or proprietors of or otherwise interested in a newspaper, are forbidden to vote on any question affecting their dealings with the corporation.

Section 22 (3) of the Municipal Corporations Act (Imp.), similar to s. 207, is as follows:—

"A member of the council shall not vote or take part in the discussion of any matter before the council, or a committee, in which he has directly or indirectly, by himself or by his partner, any pecuniary interest."

The Municipal Act, R. S. M. 1913, c. 133, s. 272, goes even further, as follows:—

"No member of a council shall take part in the discussion of any question in which he has a personal and pecuniary interest beyond his interest as an ordinary ratepayer, nor shall he vote on the same;

but this section shall not apply to the appointment of a chairman or acting head of the council or to the naming of committees."

While ss. 55 and 56 of the same Act are as follows:—

"55. No person, while a member of the council or any municipality, shall be directly or indirectly a party to or interested in any contract or dealings with or on behalf of the municipality; provided, however, that no person being a member of a council shall be held to be disqualified from holding office by reason of his being a shareholder in any incorporated company having dealings or contracts with the council, or by reason of his having a lease of twenty-one years or upwards of any property from the municipality; but no such person shall vote in the council on any question affecting such dealings, contracts or lease, as the case may be: 2 Geo. V., c. 42, s. 6, part.

"56. Any person violating any of the provisions of the preceding section shall, *ipso facto*, forfeit his seat in the council, and, upon conviction for any such violation by any Justice of the Peace, shall be liable to a penalty of not less than fifty dollars nor more than one hundred dollars, and, in default of payment, to imprisonment for a period not less than fifteen and not more than thirty days: 2 Geo. V., c. 42, s. 6, part."

Legislative or Administrative Acts by Councils Passed by Votes of Councillors Disqualified by Interest.—In L'Abbe and Blind River, 1904, 7 O. L. R. 230, the D. C. quashed a by-law which has been carried by the casting vote of the reeve who had a pecuniary interest in the passage of the by-law, which reduced the number of licensees by reason of the fact that he was a mortgagee of licensed premises. The District Court Judge, in quashing the by-law, applied the principle:

"A member of a municipal council is disqualified from voting in proceedings involving his personal or pecuniary interests; and an ordinance or resolution, passed by the concurrence of one or more members so disqualified, is void."

In the D. C., Boyd, C., based the principle on the ancient rule which prevails in parliamentary procedure, and stated that the principle applied not only where there was a pecuniary interest but also in other cases where there was a reasonable probability that the interested person was likely to be biased. Meredith, J., held that a finding that the vote was affected by the interest was not necessary, and that it was sufficient there was interest and thus discussed the authorities:

"I have been able to find but one case, in our Courts, in which any such principle has been acted upon; and in that case the judgment was also based upon the ground that the by-law was passed for private, not in the public, interests; and the judgment is that of a single Judge only: In re Vashon and the Corporation of the Township of East Hawkesbury, 30 C. P. 194.

"In the case of Re Baird and the Corporation of the Village of Almonte, 1877, 41 U. C. R. 415, the subject was discussed, but both Courts based their judgment upon a statutable, and not upon a judicial disqualification; though Hagarty, C.J., seems to have thought that the latter ought to exist. The holding in that case was that the statute—the Municipal Act—expressly disqualified any shareholder of any company voting, in the council, on any question affecting the company, but it would be an extraordinary anomaly if there were disqualification of a shareholder because of the company's interest in the question, and none because of the same member's personal interest in it.

"If the Court is to stay its hand merely because the legislature has not expressly prohibited it, what flagrant breaches of duty might be committed, or attempted, by public trustees! There should be no encouragement to seeking public office for private ends."

Interest as Ratepayer does not Disqualify Councillor from Voting.—In Elliott v. St. Catharines, 1908, 18 O. L. R. 57, Anglin, J., following Re L'Abbe and Blind River, *supra*, granted an injunction to restrain the construction of a local improvement authorized by a by-law

carried by the vote of a councillor who had large holdings of property, which would be directly benefited by the work. On appeal, the injunction was dissolved by the D. C. Meredith, C.J., after discussing L'Abbe v. Blind River, *supra;* Re Baird and Almonte, 41 U. C. R. 415; Re Vashon and E. Hawkesbury, 30 C. P. 194, and Re McLean and Ops, 1880, 45 U. C. R. 325, said:—

> "The result of these cases is that there is a consensus of opinion that where the personal or pecuniary interest of the member is that of a ratepayer, in common with other ratepayers, or, as put by Osler, J.A., 'where, though he is personally interested, his interest is not different from that of the community in general,' the member is not disqualified.
>
> "The community of interest spoken of I understand to be a community in the kind, not in the degree, of the interest.
>
> "It remains to be considered whether this rule is applicable as was held in the McLean case, where the community of interest is not between all the ratepayers, but between all the ratepayers to be affected by the by-law, as is the case where the by-law is a drainage by-law or where, as in the case at bar, it is a local improvement by-law.
>
> "I see no reason for differing from the view taken in the McLean case. As I view it, the principle upon which the rule is founded is the same whether the by-law is one affecting all the ratepayers of the municipality or only those within a section of it."

Procedure when Interested Person Offers to Vote.—It has been suggested that the mayor or chairman, if clearly satisfied that a councillor has a pecuniary interest in a matter, would be justified in refusing to take his vote: Arnold, Municipal Corporations, 5th ed., p. 46. Under the Imperial Act an interested councillor incurs no penalty recoverable summarily for so voting nor can he apparently be removed by the council from his office, *ibid.*

The Municipal Act, R. S. M., 1913, c. 133, s. 56, given above, provides for a penalty and forfeiture of the seat. See s. 52, *supra*, p. . The Ontario Act has no corresponding provision.

Councils Acting Judicially with Interested Councillor Present, even Though not Voting.—A council on many occasions has to act judicially. On such occasions the mere presence of an interested councillor is sufficient to nullify the whole proceeding: In R. v. London County Council [1892], 1 Q. B. 190; 61 L. J. M. C. 75, a Divisional Court consisting of Lord Coleridge, C.J., and Sweet, J., considered two applications for rules *nisi* to shew cause why writs of mandamus should not issue commanding the council to hear and determine certain applications for licenses, and also why writs of *certiorari* should not issue to bring up resolutions of the council refusing such licenses. The facts were that members of council, who were members of the committee to which was delegated the duty of granting licenses to houses for music and dancing, and voted with the majority of the committee to refuse the licenses, on appeal to the full council, retained counsel to appear and oppose the granting of the licenses. The members in one case sat with the council during the hearing of the appeal, and in the other case assumed not to sit, but remained in the council chamber and talked with members who were acting. It was stated in the affidavits that as soon as it transpired that counsel were instructed on behalf of the three councillors, the chairman (Sir John Lubbock), said:

> "It is a very serious question whether a member of the council who has to act judicially can act in both capacities—in his judicial capacity and also as an opposing party—and I should rather recommend a gentleman in such a position not to record his vote";

and that therefore the three councillors left their places in the body of the room (though they did not actually leave the room), and neither spoke, nor voted, nor took any further part in the matter whatever.

The judgment of the Court contained the following observations:

"The county council are authorised to grant or refuse a license as they 'in their discretion shall think proper;' but the discretion is to be exercised, as Lord Halsbury put it in Sharpe v. Wakefield, 60 L. J. R. M. C. 76; L. R. 1891, A. C. 179, 'according to the rules of reason and justice.' In our judgment, when the London County Council are adjudicating as to whether a man is or is not to be deprived of his license, to use the words of Lord Justice Cotton in Leeson v. The General Council of Medical Education, 59 L. J. R. P. 238; L. R. 43 Ch. D. 379, 'though not in the ordinary sense judges, they have to decide judicially as to whether or not the complaint made is well founded.'

"In our judgment, when so acting, they are not emancipated from the ordinary principles upon which justice is administered in this kingdom, and which are, as it has been said, founded on its very essence.

"Then why is an adjudication, in which gentlemen have acted both as judges and accusers at the same time, to be upheld? There is a sequence of authority holding that it cannot be; and it suffices to quote a passage from the judgment of Lord Justice Cotton in the case above named, in which he says: 'Of course, the rule is very plain that no man can be plaintiff or prosecutor in any action, and at the same time sit in judgment to decide in that particular case—either in his own case, or in any case where he brings forward the accusation or complaint in which the order is made;' and yet this is precisely what in the present case the three councillors have done.

"But it was argued that after it had appeared that they were in fact both accusers and judges, they no longer took part in the deliberations of the council. This, however, will not avail, even if it were the fact; for Lord Denman, in the case above cited of The Queen v. The Justices of Hertfordshire, 6 Q. B. Rep. 753, held that a decision was vitiated by any one interested person taking part, it being enough for the purpose that one single interested person has formed part of the Court; and Mr. Justice Patteson, who followed Lord Denman, said: 'The question is, has an interested person taken any part at all?'

"The case of The Queen v. Meyer, L. R. 1 Q. B. D. 173, is also an authority as to this. Mr. Justice Blackburn, in delivering judgment, said: 'We cannot go into the question whether the interested Justice took no part in the matter—that is, in the discussion of the case. The question is, 'Was he so interested in the matter as that he ought not to have sat.' In this we agree."

As to the second case which was decided after the councillors had assumed to withdraw, the Court said:

"In our judgment, if members of a body such as the London County Council, consisting as it does of 139 persons, and sitting in a building like that at Spring Gardens, desire to retain counsel on their behalf to press accusations against applicants for licenses or others before the council, they should either absent themselves altogether from the precincts of the building, or sit in such a position with their counsel that it may be known to all as to who the real accusers are, and that they do not 'leave the bench' if they remain in the positions the three councillors did upon this occasion."

The applications were granted.

Notices of Meetings.—In R. v. Pulsford, 1828, 8 B. & C. 350, Lord Tenterden held that where certain powers are vested in a select few such as a council whose duty it is to attend meetings, a notice by the Mayor to the members to attend a meeting need not state the object for which the meeting is called, and an election at a meeting called by a notice of meeting which did not specify particular objects was held valid.

In Compagnie de Mayville v. Whitley, 1896, 1 Ch. 788; 65 L. J. Ch. 729, C.A., Lindley, L.J., dealt with the question as follows:

"The great point is that raised in respect of the necessity of giving notice when a directors' meeting is held—not only a notice of the meeting, but a notice of the business to be transacted at the meeting. I am not prepared to say as a matter of law that it is necessary. As a matter of prudence it is very often done, and it is a very wise thing to do; but it strikes me, as it struck Lord Tenterden as long ago as the case referred to—Rex v. Pulsford—that there is an immense difference between meetings of shareholders or corporators and meetings of those whose business it is to attend for the transaction of their affairs. Nothing is more common than for directors conducting a company's business to meet, say, once a week or once a month without giving notice at all either of the day or of what they are going to do. Being paid for their services, which they generally are—and they are in this company—it is the duty of the directors to go when there is any business to be done, and to attend to that business, whatever it is; and I cannot say that, as a matter of law, now for the first time, the business conducted at a directors' meeting is invalid because the directors have had no notice of the kind of business which may happen to come before them. Such a law would be extremely embarrassing to the transaction of the business of companies."

Notices Calling Council Meeting.—In Forbes v. Grimsby, 1903, 7 O. L. R. 137, Street, J., considered that in the absence of some rule requiring the object of the meeting to be stated in the notice calling it, it is unnecessary that the notice calling any meeting of a school board or a municipal corporation should specify the business to be transacted, following R. v. Pulsford, 8 B. & C. 350, and La Campagnie de Mayville v. Whitley, 1896, 1 Ch. 788, and distinguishing Marsh v. Huron College, 27 Gr. 605, and Cannon v. Toronto Corn Exchange, 5 A. R. 268, where there were by-laws expressly requiring specific notices to be given.

Under the Ontario Act meetings are either ordinary or special. At common law, a special meeting is only called for a special purpose which should be specified in the notice and no business not mentioned in the notice can be lawfully transacted at any special meeting. Brice on *Ultra Vires*, p. 35.

Rules 6 and 8 of Schedule 2 of the Municipal Corporations Act, 1882, 45-46 Vict. c. 50, are as follows:

"(6) Three clear days at least before any meeting of the council, a summons to attend the meeting, specifying the business proposed to be transacted thereat, and signed by the town clerk, shall be left or delivered by post in a registered letter at the usual place of abode of every member of the council, three clear days at least before the meeting.

"(8) No business shall be transacted at a meeting other than that specified in the summons relating thereto, except in case of a quarterly meeting, business prescribed by this Act to be transacted thereat."

The Municipal Act, R. S. M. 1913, c. 133, provides as follows:

SPECIAL MEETINGS—MANITOBA.

277. Special meetings of a council may be convened at any time by the head of the council or by one-fourth of its members giving before the day of meeting a reasonable notice of such meeting to all the members of the council: said notice may be verbal or in writing, and, if in writing, shall be delivered to the members or mailed to their addresses, and shall contain notice of the subjects to be taken into consideration. R. S. M. c. 116, s. 307.

278. Special meetings shall be held at the ordinary place of meeting of the council at the hour fixed for ordinary meetings, unless otherwise determined by notice of the meeting, by an adjournment or by a by-law of said council. R. S. M. c. 116, s. 308.

279. The council, before proceeding to business at such special meeting, must, if such be the fact, set forth in the minutes of that special meeting that the notice of meeting has been given in conformity with the requirements of this Act to all the members of the council who are not present at the opening of the meeting. R. S. M. c. 116, s. 309.

280. If on the opening of the special meeting it appears that the notice of meeting has not been given to all the absent members, no business shall be transacted at the meeting, but the presence of any member of the council shall have the effect of waiving the necessity of notice so far as he is concerned. R. S. M. c. 116, s. 310.

281. At a special meeting no other subjects or matters than those mentioned in the notice calling the meeting shall be taken into consideration. R. S. M. c. 116, s. 311.

ADJOURNMENTS.

282. Any ordinary or special meeting, when there is a quorum, may be adjourned by the council to any other hour of the same day or to a subsequent day, without the necessity of giving notice of such adjournment to the members who were not present, but, notice of an adjournment other than an adjournment from day to day shall be given, as in the case of a special meeting, to all members of the council. R. S. M. c. 116, s. 312.

Adjourned Meetings.—Notwithstanding the provisions of s. 208, the right of a chairman or presiding officer to adjourn a meeting of council was considered by Rose, J., in Re Jones and London, 1899, 30 O. R. 583, on a motion to quash a by-law as follows:

"I have examined all the cases to which I have been referred, or which I have been able to find, as to the right of a chairman to adjourn a meeting. The Municipal Act provides, s. 275: 'Every council may adjourn its meetings from time to time.' This differentiates this case from others to which I shall refer, where either nothing was said as to who had the power to adjourn, or where the power was vested in the chairman subject to the consent of the meeting. The first case that I have referred to is Stoughton v. Reynolds, 1736, 2 Str. 1045, where Hardwicke, C.J., said, referring to the power to adjourn: 'The power must arise from the custom, or common law. Here is no custom found, and I know of no book that shews how it stands at common law. As to the vicar, he seems to have no share in the election of the second churchwarden, nor to have any right to preside. Is the right of adjourning in the churchwardens? There is no case for that; though if there was, this is found to be the act of one only. We must therefore resort to the common right, which is in the whole assembly, where all are upon an equal foot. And though there may be a difficulty in polling for an adjournment, yet as there is no other way, that must be taken. It would be giving the vicar too much influence, to fix it in him and his churchwarden.'

"This case was referred to in The Queen v. D'Oyly, 1840, 12 A. & E. at p. 160, where Lord Denman, C.J., said: 'The case of Stoughton v. Reynolds is a good authority, but should not be pressed to the extent to which the argument in support of this rule would carry it. As it has been explained, it does not decide that the rector may not adjourn the meeting but only that, if he has done it so as to disturb the proceedings, the Court will interfere.' In The Queen v. D'Oyly the learned Chief Justice expressed the following opinion, at p. 159: 'Setting aside the inconvenience that might arise if a majority of the parishioners could determine the point of adjournment, we think that the person who presides at the meeting is the proper individual to decide this. It is on him that it devolves, but to preserve order in the meeting, and to regulate the proceedings so as to give all persons entitled a reasonable opportunity of voting. He is to do the

acts necessary for these purposes on his own responsibility, and subject to the being called upon to answer for his conduct if he has done anything improperly.'

"The Queen v. D'Oyly is cited in Buckley on the Companies Act, 7th ed., p. 519, as authority for the following propositions: 'There is at common law a right of adjournment of a public meeting, and semble it lies in the chairman.'

"The question came up in Salisbury Gold Mining Co. v. Hathorn, 1897, A. C. 268. There, however, there was an article of the association providing: 'The chairman may with the consent of the members present at any meeting adjourn the same from time to time and from place to place,' etc. And Lord Herschell said: 'According to the terms of Art. 66, it is the 'chairman' who may adjourn the meeting: it is to be his act, not that of the meeting or of those present at it. He cannot, it is true, adjourn it of his own mere motion, but the terms in which the members present are given a controlling voice strengthens the view that the adjournment is to be the act of the chairman.'

"In the argument in this case, The Queen v. D'Oyly, *supra*, MacDougall v. Gardiner, 1875, 1 Ch. D. 13, and National Dwellings Society v. Sykes, 1894, 3 Ch. 159, were referred to. In the last case Chitty, J., held that it was not within the scope of the chairman to stop the meeting at his own will and pleasure, and if he withdrew from the chair for the purpose of stopping the meeting improperly, the meeting by itself could resolve to go on with the business for which it had been convened, and appoint a chairman to conduct the business.

"Having regard to these authorities, I should say that the power here was in the meeting to adjourn, but I find nothing in the rules of order in terms saying that the adjournment must be upon formal motion, although possibly it is a fair inference to be taken from the rules, that the ordinary procedure for the adjournment of the meeting would be upon motion. But, having regard to the duties vested in the chairman to preserve order and to regulate the proceedings, I see no reason why he should not ask the council at any time whether, in the opinion of the members, it would not be better to adjourn, and upon an expression of opinion by the council in favour of an adjournment, why he should not declare an adjournment. And if his suggestion was opposed by some and carried only by a majority vote, I see no reason why an adjournment might not validly take place without the formality of a motion. And I think that that is what substantially was done here. There was a quorum present when he announced the adjournment; certainly a majority of those present were in favour of the adjournment for the ten minutes, because we find them in their places upon the expiry of the ten minutes. The two recalcitrant members who were probably in the act of retiring when the adjournment was announced, for the purpose of breaking up the quorum, certainly did not object; perhaps it might be fairly said that they had little opportunity to object; but the fact remains that they did not object; and, as, by the last clause of the by-law regulating the proceedings, it is stated that 'in all unprovided cases in the proceedings of council or in committee, resort shall be had to the law of Parliament as the rule for guidance on the question, and in such cases the decision of the mayor or other presiding officer shall be final and acquiesced in without debate,' and it is clear from one's knowledge of the procedure in Parliament that as long as a member is within the precincts of the House he may be counted in ascertaining whether a quorum is present, so here, there being a sufficient number of members within the council chamber, it is manifest there was a quorum present when the adjournment took place.

"Then, again, the members who composed the quorum upon the reassembling at the expiry of the ten minutes, were members who had been present during the prior proceedings. The fact that Alderman McPhillips was absent at the very moment of the adjournment makes, I think, but little difference. His absence has not been explained

upon the material, but it is probable that he was not far distant, for we find that he was present when the council resumed upon the expiry of the ten minutes.

"But, even if I am in error in my view that this was an adjournment by the consent of the majority of a quorum present, the validity of the objection is too doubtful to make it proper for me to act upon it to quash the by-law. Here, I think, the discretion which is vested in me should be exercised to sustain the by-law against such an objection, an objection not founded in merit nor, as it seems to me, sustained by law."

It is the duty of every member of council to be present at an adjourned meeting, and it is competent to the members present to transact any business which might have been transacted at the original meeting: Forbes v. Grimsby, 1903, 7 O. L. R. 137, Street.

In Re Municipality of Macdonald, 1894, 10 M. R. 294, the council at its first meeting adjourned to meet again on the call of the reeve and all subsequent meetings during the year were held on the call of the reeve without notice of the business to be transacted thereat. Taylor, C.J., quashed certain resolutions passed at one of the subsequent meetings on the ground that they were special meetings, and as no notice of the intended business was given it was not competent for the council at these meetings to pass the resolutions which were passed notwithstanding the fact that all the members of council were present. Certain other resolutions were quashed by the same Judge on the same grounds in Re Municipality of Macdonald, 1894, 10 M. R. 382, and the decision was upheld by the Full Court. Killam, J., said:—

"Lastly, it has been suggested, on behalf of the municipality, that, as the presence of a councillor has the effect, under s. 287 of the Municipal Act, of waiving notice of a special meeting, so far as such councillor is concerned, the applicant should have shown that some one or more of the councillors was not present at each of the meetings in question. The general rule is, however, that the onus of showing waiver of a condition precedent is upon the party relying or who might rely on such waiver, and I do not think that the applicant should be obliged to negative the waiver."

Bain, J., thus discussed the difference between general and special meetings:—

"The common law recognized two kinds of meetings of the members, or of the governing bodies, or corporations, ordinary, stated or regular meetings; and special or extraordinary meetings.

"The characteristic distinction between these two kinds seems to lie in the fact that the former are held at fixed and definite periods, and that the latter are called to meet emergencies that may arise from time to time. The times of holding regular meetings being fixed, all members of the corporation will be taken to know that the meetings will be held at the times appointed; and, therefore, at such meetings, as a general rule, all business that concerns the corporation may be transacted. But while it is necessary that some one should be entrusted with the power to call special meetings, it is also plainly necessary, in order that the power may not be abused, that everyone entitled to take part in the meeting should receive reasonable notice that it will be held, and of the business that will be brought before it.

"The Municipal Act, following the common law, provides for the holding of these two kinds or classes of meetings by the councils of municipalities; and that the Legislature intended that there should be a real distinction between the two kinds is emphasized by the fact that each kind is dealt with under a separate heading or title. Part IV., relating to 'Meetings of Councils,' is divided into two titles; the first relating to meetings generally, that is, regular or ordinary meetings, and the second to special meetings. It seems clear, too, that the distinction thus made between regular and special meetings is based on the fact that the former will be held periodically at times that have been fixed beforehand by the council under the authority of the Act, and that the latter may be convened as occasion may require.

By s. 268 the first regular meeting of every municipal council is fixed for the first Tuesday in January in each year; and what the Act evidently intends, although the intention is not explicitly stated, is that the time of holding the subsequent meetings shall be fixed and appointed by by-law or resolution of the council. If when a new council takes office there is a by-law of a former council in force fixing the time and place of the meetings of the council, that by-law will, of course, remain in force until it is altered or repealed; but if no such by-law has been passed by a previous council, then, I think, it is the duty of the council to decide for itself when its stated or regular meetings are to be held; and probably the best way of doing this would be by a by-law passed at its first meeting.

"However this may be, I am satisfied that the meetings in question, held as they were, not at times definitely fixed and appointed beforehand, but at times arbitrarily fixed on by the reeve, cannot be considered to have been regular meetings. There is an inherent difference between regular and special meetings; and the Legislature intended that this difference should be observed in the meetings of councils held under the authority of the Municipal Act. The Act provides that regular meetings will be held, and that special ones may be held; but if these two meetings are to be considered to have been regular meetings, then councils are able to disregard the distinction between the two kinds of meetings that the Legislature has marked, and to evade the law by holding special meetings without observing the directions of the Act for calling them.

"The meetings cannot, I am satisfied, be regarded as adjournments of the presumably regular meeting that was held next prior to the meeting of the 20th of March. They were not even nominally adjournments, that is, continuations of this meeting, and I can infer nothing else from the affidavits filed than that they were in fact and substantially new meetings."

It is submitted that under the Ontario Act, notwithstanding the omission of the statutory provision respecting the contents of notices of special meetings and of those limiting the business which can be done thereat, the rule of the common law applies, and that the notice of a special meeting must specify the business to be transacted and that no other business can be transacted at any such special meeting.

Members of Councils as Trustees.—See Baxter v. Kerr, 1876, 23 Gr. 367, where they acted in good faith, but mistakenly. Patchell v. Raikes, 1904, 7 O. L. R. 470, where they were held responsible for illegal payments, although they acted under the advice of counsel. King v. Matthews, 1903, 5 O. L. R. 228, where they sanctioned the expenditure of money in consequence of a misconstruction of a statute, but in good faith, and were excused, the court thinking that they were entitled to the protection of the Trustee Act. In Rochford v. Brown, 1911, 25 O. L. R. 206, Boyd, C., delivering the judgment of the Divisional Court, said that many grave questions arose as to the pertinence of the Trustee Act to a municipal corporation applying municipal funds to the payment of the costs of their constable in an action against him for acts done in the enforcement of the Liquor License Act. A municipal corporation occupies as regards corporate property the position as a trustee and is amenable to the jurisdiction of the courts exercised over trustees generally. Phillips v. Belleville, 1905, 9 O. L. R. 732; Parsons v. London, 1911, 25 O. L. R. 179; 442, C. A. A council however cannot be compelled to collect a debt. Norfolk v. Roberts, 1913, 28 O. L. R. 593; 50 S. C. R. 283. For a case where a member of the council was compelled to refund a secret profit made in connection with the corporation business, see Bowes v. Toronto, 1858, 11 Moo. P. C. 463.

PART VII.

Boards of Control.

209.—(1) There shall be a Board of Control for the City of Toronto consisting of the Mayor and four controllers to be elected by general vote. 9 Edw. VII. c. 73, s. 6 (3), *part.*

(2) The council may by by-law fix the salaries of the members of the board, not exceeding for each member $2,500 per annum. 3 Edw. VII. c. 19, s. 276 (4); 5 Edw. VII. c. 22, s. 11. 3 & 4 Geo. V. c. 43, s. 209 (1-2).

209*a*.—(1) In cities having a population of not less than 100,000 and not more than 200,000 inhabitants, there shall be a board of control, consisting of the mayor and four controllers to be elected by general vote.

(2) The council may, by by-law, fix the salaries of the members of the board, not exceeding for each member $2,500 per annum.

(3) This section shall be deemed to have been in force from and after the 1st day of July, 1913. 5 Geo. V. c. 34, s. 14; 9 Geo. V. c. 46, s. 6.

210.—(1) The council of any city having a population of less than 100,000, but more than 45,000, may by by-law provide for the election by general vote of four controllers, who with the Mayor shall constitute the Board of Control.

(2) The by-law shall not, nor shall a by-law repealing it, be passed until it has received the assent of the municipal electors. 9 Edw. VII. c. 73, s. 7.

(3) The council may by by-law fix the salaries of the members of the board, not exceeding for each member $1,500 per annum. 3 & 4 Geo. V. c. 43, s. 210 (1-3).

(4) A by-law passed under sub-section 1 shall not be repealed until at least five annual elections have been held under it, and no repealing by-law shall be passed later in any year than the first day of November. 5 Geo. V. c. 34, s. 15.

211. During the absence of the Mayor or if there is a vacancy in the office the person appointed as presiding officer of the council shall act as a member of the Board. *New.* 3 & 4 Geo. V. c. 43, s. 211.

212.—(1) Three members of a Board of Control shall form a quorum, and the Mayor shall preside at the meetings of the board, and in his absence the members shall appoint one of their number to preside. 3 Edw. VII. c. 19, s. 276 (3), *amended.*

(2) If a vacancy occurs in the office of controller the council, at a meeting called for that purpose, shall elect a person to fill the vacancy for the unexpired term of the member whose seat has become vacant. 3 Edw. VII. c. 19, s. 276 (5), *part.* 3 & 4 Geo. V. c. 43, s. 212 (1-2).

213.—(1) It shall be the duty of the Board of Control

(*a*) To prepare an estimate of the proposed expenditure of the year and certify it to the council for its consideration.

(*b*) To prepare specifications for and award all contracts and for that purpose to call for all tenders for works, material and supplies, implements, machinery, or other goods or property required and which may lawfully be purchased for the use of the corporation, and to report its action to the council at its next meeting.

(*c*) To inspect and report to the council monthly or oftener upon all municipal works being carried on or in progress.

(*d*) To nominate to the council all heads of departments and sub-departments in case of a vacancy

and, after a favourable report by the head of the department, any other officer of the corporation required to be appointed by by-law or resolution of the council, and any other permanent officers, clerks or assistants, and to recommend the salaries of all officers and clerks.

(*e*) To dismiss or suspend any head of a department and forthwith to report such dismissal or suspension to the council.

(2) The council shall not appropriate or expend, nor shall any officer thereof expend or direct the expenditure of any sum not provided for by the estimates or by a special or supplementary estimate certified by the board to the council, without a two-thirds vote of the council authorizing such appropriation or expenditure, but this prohibition shall not extend to the payment of any debenture or other debt or liability of the corporation.

(3) When opening tenders the board shall require the presence of the head of the department or sub-department with which the subject matter of them is connected, and when requisite the presence of the city solicitor.

(4) The head of such department or sub-department may take part in any discussion at the board relating to the tenders.

(5) The council shall not, without a two-thirds vote, reverse or vary the action of the board in respect of the tenders, when the effect of such vote would be to increase the cost of the work or to award the contract to a tenderer other than the one to whom the board has awarded it.

(6) No head of a department or sub-department or other permanent officer, clerk or assistant shall be appointed or selected by the council in the absence of the nomination of the board as provided by clause (*d*) of s.-s. 1, without a two-thirds vote.

(7) Where a head of a department has been dismissed by the board, he shall not be reappointed or reinstated by the council without a two-thirds vote.

(8) In the absence of a by-law of the council prescribing the mode of appointing, engaging or employing any officers, clerks, assistants, employees, servants and workmen not included in clauses (*d*) and (*e*) of s.-s. 1, the board may direct by whom and in what manner they shall be appointed, engaged or employed.

(9) The board may submit proposed by-laws to the council.

(10) The board, where in its opinion it is desirable, may amalgamate departments or sub-departments.

(11) The board may appoint a secretary or clerk who shall keep the minutes of its proceedings, prepare its reports and perform such other duties as may be assigned to him by the board or by the mayor or the council.

(12) The council may by by-law or resolution assign to the board such other duties as the council may deem proper.

(13) The board, when so required by resolution of the council, and upon one week's notice thereof, shall furnish to the council copies of the minutes of its proceedings and any other information in its possession which the council may require.

(14) The council may refer back to the board any report, nomination, question or matter for reconsideration.

(15) Where it is sought in council to reverse, set aside or vary the action of the board, or where a two-thirds vote is required, the vote by yeas and nays shall be recorded in the minutes of the council.

(16) The public, the high and separate school boards, the board of education, the board of commissioners of

police and the public library board and every other board whose estimates are to be provided for, shall furnish to the Board on or before the first day of March in each year their annual estimates.

(17) Clause (*d*) of s.-s. 1 shall not apply to a member of the fire department, except the head of it, or to an assessor, except the assessment commissioner, or to a representative of the council upon the board of a harbour trust, or of a corporation on the board of which the council is entitled to elect a representative, or to a member of the Court of Revision.

(18) Nothing in this section shall deprive a head of a department of the power which he possessed on the 7th day of April, 1896, under any by-law or otherwise, to dismiss any subordinate officer, clerk or employee.

(19) Notwithstanding anything in this Act, the duties assigned to the board shall be discharged exclusively by the board, except in the case mentioned in s.-s. 9. 3 Edw. VII. c. 19, s. 277, *redrafted*. 3 & 4 Geo. V. c. 43. s. 213 (1-19).

Tenders.—The procedure by-law of the city of Toronto in force 1913, contains the following provisions as to tenders:—

"118. All work and materials exceeding in value $200 shall be done and provided by contract, and after tenders have been advertised for at least ten days, or called for in any other manner which the extent and importance of the work may, by the Board of Control, on the recommendation to such Board by the head of the department having charge of the matter, be deemed necessary. In case of an emergency rendering it necessary to dispense with this rule, every such case is to be reported to the council at its next meeting, with the reasons which rendered it necessary to dispense with this rule.

"119. Every tender shall be received only by registered post, and shall be accompanied by a cheque marked good by the bank on which the same is drawn, or a cash deposit, equal to five per cent. of the contract price stated by such tender when the price so stated does not exceed $1,000, and for all tenders over $1,000 the amount of such cheque or cash deposit shall be two and one-half per cent. of the whole amount of such contract price. Immediately after the opening of tenders all such cheques or cash deposits, except those of the lowest and next lowest tendered, shall be returned to the tenderers by the secretary of the Board of Control (unless the Board refers all the tenders to an official for a report thereon), the cheques being first stamped or endorsed 'returned to drawer—tender not accepted.' The cheques or cash deposits of the lowest and next lowest tenderer shall be forwarded at once to the city treasurer and be placed by him to the credit of a special account entitled 'Contractors' Deposits,' and so remain until after the execution of the contract with the successful tenderer and of the bond (if required) has been certified by the city

solicitor. In case a report on the tenders is required, all cheques and cash deposits shall be forwarded to the city treasurer and placed to the credit of the said account, and all except the deposits of the lowest and next lowest tenderer shall be returned when the report of the Board of Control awarding the contract has passed the council. In all cases where a tender has been accepted and the party tendering fails to execute his contract and furnish the requisite bonds and sureties within seven days after notice to such party, the sum deposited shall be forfeited to the use of the corporation, and also in cases where a tenderer withdraws his tender before the Board of Control and council have considered the same and finally awarded the contract, the amount of such deposit shall be forfeited to the corporation. After the contract and bond have been properly executed, the cheque or cash deposit, or the amount thereof, shall be returned to the accepted tenderer."

Calling for tenders is merely an offer to negotiate or only an invitation for offers, has no binding effect and it is quite optional to accept any offer or none: See Spencer v. Harding, 1870, L. R. 5 C. P. 561, 39 L. J. C. P. 332. It is customary to insert a stipulation that the corporation does not bind itself to accept the lowest or any tender, but this is unnecessary. In any event, a municipal corporation to be bound would have to make an offer duly authorized by by-law and under seal in order for it to be binding.

Tender and the deposit if any, made with it, can be withdrawn at any time before acceptance, which in the case of a municipal corporation means at any time before a binding contract authorized by by-law and under seal has been executed: See Nelson Coke Co. v. Pellatt, 1902, 4 O. L. R. 481. citing Xenos v. Wickham, L. R. 2 H. L. 296.

If it is desired to receive tenders which cannot be withdrawn, they should be under seal and within the rule applied in the Nelson Coke case.

The acceptance of a tender, as above stated, must comply with the statutory formalities in order to be binding. The awarding which the Board does is a part of the in-door procedure necessary to consummate a formal contract, which shall be binding on the corporation. This power of contracting must be exercised by the council by by-law and under seal. See Contract, *supra*, p. 17.

In Ford v. Newth, [1901] 1 K. B. 683, 70 L. J. K. B. 459, a municipal corporation advertised for supplies for use during the ensuing year and invited tenders. A tenderer offered to supply various articles and the corporation accepted his tender. It was held that he could not withdraw without the consent of the corporation, and that the corporation would not be justified in buying the articles elsewhere.

On the other hand, in R. v. Demers, 1900, A. C. 103, P.C., 69 L. J. P. C. 5, where a printer covenanted with the Crown to do certain printing at certain prices, but there was no covenant or obligation on the part of the Crown to give him all or any of the printing work referred to in the contract, it was held that there was no breach of the contract in not ordering any printing: See also G. N. Ry. and Witham, 1874, L. R. 9 C. P. 16, 43 L. J. C. P. 1, and Leake on Contract, 5th ed., p. 21.

Being given the charter of a municipal corporation which confides the government of its affairs to a council, and to a board of commissioners, the duties of management, and, amongst others, the right of calling for and receiving tenders for supplies under certain conditions prescribed therefor, to open them at a meeting to be held at the time and place set forth in the notice, and to report thereon to the council whose approval is required, and two-thirds of whose members present may amend such report on a vote, is legal, the amendment, carried in that way, to report recommending the granting of a contract for supplies to the lowest tenderer, by replacing the name of the latter by another's, a competitor, provided that, within twenty-four hours, he accepts the contract at a lower price. Such an amendment, though made after the opening of the tenders, when all the tenderers are in possession of the figures of the tenders, is within the aforesaid power to amend and cannot be impugned for irregularities or favoritism, particularly when the notices calling for tenders reserved to the city the right to accept any of such tenders: West v. Montreal (1912), 21 Que. K. B. 289.

Officers to be Appointed by Council without Nomination by Board.—(1) Member of Court of Revision, the Assessment Act, R. S. O. 1914, c. 195, s. 61 (1); (2) Members of Fire Department, s. 400 (14). Assessors are appointed by the mayor and the assessment commissioner: Sections 230 and 231, *infra*.

While imperative in form, s.-s. 3 of s. 213, which requires the presence of the head or deputy head of a department when tenders are opened, is directory only. Failure to have the head or sub-head present will be a mere irregularity.

> "Where the prescriptions of a statute relate to the performance of a public duty and to affect with invalidity, acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, without promoting the essential aims of the Legislature, they seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed or, in other words, as directory only. The neglect of them may be penal indeed, but it does not affect the validity of the act done in disregard of them:" Maxwell, 5th ed., p. 608.

Statutory Duties of the Board of Control to be Discharged Exclusively by it.—Sub-section 19 of s. 213 contemplates that the Board alone shall possess the initiative with respect to duties assigned to it. The result is that the council as a whole cannot originate action in respect of matters within the jurisdiction of the Board, but only can exercise the power of reversing, setting aside or varying its action.

The situation between Board and Council, so far as duties assigned to the Board are concerned, is similar to that existing between a board of directors of a company, under the Joint Stock Companies Act, and the shareholders: See Kelly v. Electrical Construction Co., 1907, 16 O. L. R. 232; 10 O. W. R. 704, where Mulock, C.J., Ex.D., applied the rule laid down by Vaughan, B., in Rex v. Westwood, 1830, 7 Bing. 1 at p. 29, viz.:—

> "Whenever a charter confers an express power of making by-laws as to a particular subject on a certain part of the corporation (more especially where, as in this case, those terms are very general and comprehensive), there is no ground on which a presumption can be raised of an implied power existing in the body at large; but that such power is expressly taken from that body according to the rule: *Expressum facit cessare tacitum.*"

In like manner executive power cannot reside in two parts of a municipal corporation at the same time. So far as the duties assigned to the Board of Control by the Act are concerned, the council is deprived of power until the action of the Board of Control comes before it, when it may reverse, set aside or vary. While as between the Board acting under the powers conferred on it by the Act and the council as a whole, the executive power of the corporation in many respects rests in the hands of the Board exclusively; nevertheless the Board alone, so far as outsiders are concerned, cannot effectively bind the corporation as a general rule because of the imperative requirements of s. 249 (1), that the powers of every council must be exercised by by-law coupled with the imperative provisions of s. 10, that the powers of every corporation shall be exercised by its council. Section 213 must therefore be read subject to the overruling effect of ss. 10 and 246, so that all executive action by the Board of Control must, in order to be binding on the corporation, be validated by by-law of the council. In order to pass such a validating by-law, a bare majority of council is required. If the council seeks to reverse, vary or set aside the action of the Board, the by-law for that purpose must be passed by a two-thirds vote. Matters may be referred back to the Board by a bare majority. Persons dealing with the corporation are deemed to have notice of the provisions of the Municipal Act, and would therefore have notice of the limitations of the power of the Board to bind the council.

The Council may by By-law Fix Salaries.—If the council acts, it must act by by-law: Liverpool v. Liverpool, 1903, 33 S. C. R. 180, where Armour, J., said:—

"It is plain that the Towns Incorporation Act of 1895 conferred upon the council of the respondents the power to pass by-laws for making such regulations as are referred to in 63 Vict. c. 176, and such power so conferred impliedly excluded the power to make such regulations otherwise than by by-law, and this is the mode of making such regulations that should have been adopted by the council of the respondents.

"It was essential, therefore, to the validity of the regulations set forth in the resolution of the council of the respondents of the 31st May, 1901, that they should have been made by by-law and that such by-law should have been approved by the Governor-in-Council.

"The resolution, therefore, of the council of the respondents of the 31st of May, 1901, had no legal validity, and even if it could be treated as a by-law, as was suggested, had not the force of law, not having been approved by the Governor-in-Council and the appellants were not bound to conform to it.

"Taschereau, C.J., Sedgewick and Mills, JJ., concurred; Davies, J., dissenting."

Estimates.—Under s.-s. 2 of s. 213, the council may by two-thirds vote direct expenditure not provided for by estimates of the Board. This may involve increasing estimates for a particular matter or authorizing a new matter or both.

The council may, without a two-thirds vote, refuse to accept the estimates certified to it and may vary by reducing or reject the same and refer the matter back: See s.-s. 14.

The estimates of the Board are merely certified to the council for its consideration, and must be finally prepared by the council, as provided in s. 298 (1).

As to varying estimates after they have been once prepared and passed, see s. 298.

The combined effect of s.-s. 1 (*a*), s.-s. 2, s.-s. 14, s.-s. 15, s.-s. 19 and s. 298 (1), seems to leave with the council the ultimate power of preparing estimates.

The Board must prepare and certify. The council may authorize the expenditure so certified to it or may reverse, set aside or vary (by reduction) or refer back the same, by two-thirds vote, authorize expenditures not included in the Board's estimates or vary by increasing. But notwithstanding the marginal note to s.-s. 2, the council has full power over the estimates after they have once been prepared and certified to it by the Board. But by s.-s. 19, the duty to prepare them rests on the Board exclusively and not on the council as provided in s. 298 (1).

Powers of Councils with Respect to Estimates of School Boards and other Bodies.—In Toronto Public School Board v. Toronto, 1902, 4 O. L. R. 468, 1 O. W. R. 443, the Court of Appeal said:—

"The right of the school board in preparing their estimate is to include therein everything that, in their best judgment, may be needed to meet legitimate expenditure—that is to say, expenditure upon objects or for purposes within their lawful authority; and their duty to the council is to prepare it in such a manner as to shew generally what these purposes are and what is required in respect of each. The right and duty of the council is to examine the estimate so far as to ascertain that it is for purposes *intra vires* the school board. If an item or class of items is clearly for a purpose for which the board is not authorized by law to expend money, it is the right and duty of the council to reject it. But beyond this, in my opinion, the council cannot go.

"I refer to Canadian Pacific R. W. Co. v. City of Winnipeg, 1900, 30 S. C. R. 558, and to Public School Trustees of Nottawasaga v. Corporation of Township of Nottawasaga, 1888, 15 A. R. 310. The

following passage from the judgment of Burton, J.A., in that case is apposite: 'The trustees are the parties entrusted by law with the management of the school section, and the parties to determine on the amount required to be levied for the purpose; and when the Legislature enacted as a matter of convenience that the rates should be collected in the manner provided for the collection of the taxes, I should have supposed that no further change was intended than the substitution of one collector for another.'

"The provisions of the Municipal Act respecting the duties of the board of control in cities, particularly ss. 277 (*a*) (8), to which we have been referred since the argument, do not affect the question. There is nothing in any of them to suggest that the board of control are authorized to deal with the estimate of the school board in any other manner than I have already pointed out. Indeed, s.s. 8 rather aids that view, as it merely requires the various public bodies mentioned therein, including the school board, to 'furnish' to the board of control their several and respective annual estimates."

Summary of Powers of Boards of Control.

(1) As to estimates, s.-s. (1*a*)—to prepare and certify;

Council may not expend any sum not so certified without a two-thirds vote. Sub-sec. (2).

(2) As to contracts, s.-s. (1*b*)—to prepare specifications;
to call for tenders;
to award;
to report on.

Council may reverse or vary action on tenders, but two-thirds vote is required where effect is to increase cost of work or to award contract to another tenderer. Sub-section (5). Sub-sections (3) and (4) refer to consideration of tenders.

(3) As to works, s.-s. (1*c*)—to inspect and report;

(4) As to appointments, s.-s. (1*d*) to nominate;

(*a*) heads of departments;

(*b*) heads of sub-departments;

(*c*) and after favorable report by head of a department any other officer required to be appointed by residence or by-law;

(*d*) to recommend all salaries.

Council may not appoint any of foregoing in absence of nomination except by two-thirds vote.

(5) As to heads of departments, s.-s. (1*e*) to dismiss or suspend.

Council may not reverse without a two-thirds vote. Sub-sec. (7).

(6) As to other employees in absence of by-law of council—to direct by whom and in what manner all other employees shall be appointed, engaged or employed.

Council may direct by by-law as to by-laws. Sub-section (8).

(7) As to by-laws—to submit by-laws;

Council may also originate. See s.-s. (19).

(8) To amalgamate departments and sub-departments. Sub-sec. (10);

(9) To appoint secretary who shall keep minutes of its proceedings, prepare its reports and perform such other duties as may be assigned to him by the board or by the mayor or the council. Sub-sec. (11).

The Head.

214. The warden of a county, the mayor of a city or town, and the reeve of a village or township, shall be the head of the council and the chief executive officer of the

corporation. 3 Edw. VII. c. 19, s. 278, *amended*. 3 & 4 Geo. V. c. 43, s. 214.

215. It shall be the duty of the head of the council to,

(*a*) Be vigilant and active in causing the laws for the government of the municipality to be duly executed and obeyed;

(*b*) Oversee the conduct of all subordinate officers in the government of it and, as far as practicable, cause all negligence, carelessness and violation of duty to be prosecuted and punished; and

(*c*) Communicate from time to time to the council such information, and recommend to it such measures as may tend to the improvement of the finances, health, security, cleanliness, comfort and ornament of the municipality. 3 Edw. VII. c. 19, s. 279, *redrafted*. 3 & 4 Geo. V. c. 43, s. 215.

216. The head of the council of a county and of an urban municipality may be paid such annual or other remuneration as the council may determine. 3 Edw. VII. c. 19, s. 280. 3 & 4 Geo. V. c. 43, s. 216.

217. The mayor of a city or town may call out the *posse comitatus* to enforce the law within the municipality under the same circumstances in which the sheriff of a county may now by law do so. 3 Edw. VII. c. 19, s. 81, *amended*. 3 & 4 Geo. V. c. 43, s. 217.

The Head of the Council.—For the duty of the head as presiding officer of council, see Part VI., *supra*, p. 268.

Chief Executive Officer of the Corporation.—This term does not of itself confer any powers or duties upon the head. His powers and duties must be sought in the several sections of the Act.

Executive action is to be distinguished from legislative action. A council has both executive or administrative and legislative functions. The carrying out of the business of the corporation which has been duly authorized or imposed as a duty by statute, must be accomplished by executive officers and servants or agents.

Duties of Head.—Under s. 215 (a) the head is required to be active and vigilant in causing laws for the government of the municipality to be duly executed and obeyed. This casts a general duty on the head to see that all laws relating to the corporation are observed. The Muni-

cipal Act, the Assessment Act and all other Acts of the Provincial Legislature or of the Dominion Parliament which are concerned in any way with the government of the municipality as well as the by-laws of the municipality in so far as they relate to its government, are to be observed and the head is under a specific duty to see that this is done. The expression "laws, for the government," is wide enough to include all laws binding on the municipality as a municipality, but probably does not include laws of general application. As to these, however, the head as *ex officio* a Justice of the Peace, is under a duty also, see Part XVIII. The mayor should enforce the laws by refusing to be a party to their breach and by directing the proper officers to take the necessary steps to enforce them.

Under s. 215 (*b*) the head has the right to know what is being done by all other officers of the municipality and is under an imperative duty to see that negligence, carelessness and violation of duty is properly punished.

Under s. 215 (*c*) the head is required to make the special matters therein specified the subject of recommendations to council. These are matters pertaining to the general welfare of the municipality and as to most of them the council is given a general power to act under s. 250.

Mandamus to Mayor—In Holmes v. Brown, 1908, 18 M. R. 48, an action for a mandamus to compel a mayor to sign a cheque for a payment which the council had authorized, but the mayor had vetoed, was refused on the ground that if the plaintiffs had a legal right to the payment of the moneys in question, they had adequate remedy by action. See title Mandamus, *infra*.

Remuneration of Head of County or Urban Municipality.—Payment should be authorized by by-law and not by resolution or vote merely. R. v. Gore, 1848, 5 U. C. R. 357; East Nissouri v. Horsman, 1857, 16 U. C. R. 581.

In re McLean and Cornwall, 1871, 31 U. C. R. 314, a by-law to pay remuneration to a reeve was quashed. No remuneration can therefore be paid to the reeve of a township.

The remuneration of the mayor must be his absolutely and merely for the purposes of salary, so that he may deal with it as he thinks fit. The appropriation must be made *bona fide* and not to serve some ulterior purpose. See Atty.-Gen. v. Cardiff Corporation, 1894, 2 Ch. 337; 63 L. J. Ch. 557, where under a similar section of the Municipal Corporations Act, 1882, the corporation voted an additional £650 to the mayor, and carried it to a separate bank account and appointed a sub-committee, apparently intending under the guise of an addition to salary to hand over out of the rates a sum which was to be applied for unwarranted purposes. Romer, J., said:—

> "Was the resolution in the present instance increasing the salary by the sum of £650, passed *bona fide*? I am bound to say that I have had considerable doubt on this matter, by reason, amongst other things, of the appointment of the sub-committee, and the fact that the cheque for payment of the £650 was dealt with separately from the rest of the mayor's salary, drawn to a particular account, and carried, I notice, to a separate account. But on the whole, I will, in this particular case, give the corporation the benefit of the doubt, and therefore I shall not, by this judgment, decide anything adversely to them with regard to this particular sum of £650. But I have no doubt what I have said will be a guide to the corporation in any future payments of the kind which may have to be made. If payments are desired to be made, which are not intended to be really as a simple increase to a mayor's salary, they should not, in my opinion, be made by way of addition to the mayor's salary; they ought to be made directly, so that they may be directly challenged, if wrong, and impeached. No additional fee should be made to the mayor's salary, except it is intended to go absolutely and merely for the purposes of the salary, that the mayor may deal with it in any way he thinks fit, as part of his salary, and not otherwise."

Where it is anticipated that the mayor will be subject to increased expenditure because of the celebration of some national event, an addition may be made to his salary: Atty.-Gen. v. Cardiff Corporation, *supra.* Accordingly the payment of an additional sum to a mayor, coupled with the request that he take such steps as he might deem proper for the celebration of Her Majesty's Jubilee, was held good: Atty.-Gen. v. Blackburn Corporation, 1887, 57 L. T. 385. In Atty.-Gen. v. Batley Corporation, 26 L. T. 392, the purchase of a gold chain for the mayor out of the borough fund, was held illegal.

In Heffernan v. Walkerton, 1903, the council in order to recoup the mayor to some extent for his loss in law costs incurred in a suit, brought against him as mayor for what he did as mayor in the interest or the supposed interest of the town, passed a by-law to pay him $125. The by-law was not passed in accordance with the provisions of the Procedure By-law of the corporation in force at the time, but notwithstanding this, the majority of the Divisional Court refused to quash it, holding that on the merits there was no objection to the course taken and that the plaintiff was not a person in whose favor the Court's discretion to quash would be exercised.

As to payments made to mayor for the purposes of enabling him to attend a convention or to entertain guests, it should be noted that there must be express statutory authority, otherwise, the payment will be *ultra vires* of the corporation. Hart v. MacIlreith, 1907, 41 N. S. R. 351; 39 S. C. R. 657; Davis v. Winnipeg, 1914, 24 M. R. 483; 28 W. L. R. 634. In both of the last mentioned cases, special acts were passed validating the expenditure. See Illegal Payments, *infra.*

As to mayor of a city having a board of control. See s. 209.

"**Posse Comitatus.**—"Before the Norman Conquest all freemen between the ages of 15 and 60 who were capable of bearing arms, were bound to go forth to the host (fyrd) on general levy at the King's summons. Fyrd-fare was one of the three liabilities of all owners of land in England (afterwards called the trinodd necessities, the other two liabilities being to maintain fortifications and to repair bridges). . . The levy of each shire took the field, down to the Norman Conquest, under its alderman or military chief of the shire, and after the Conquest under the sheriff.

"This levy of all able-bodied men in each county had a double aspect. As a civil force it was known as the *posse comitatus* (the force of the county) which the sheriff was entitled to call on, to arrest criminals and suppress riots; and the obligation to serve in it was closely connected with the obligation attaching to every man of keeping watch and ward, and of following the hue and cry which was directed against criminals. In its other aspect, it was a military force and was called out under the sheriff or some other officer of the Crown to defend the realm in civil war or against foreign foes."
Manual of Military Law, 1914, p. 147.

"As conservator of the King's Peace, it is the duty of the sheriff to suppress unlawful assemblies and riots and apprehend offenders and to defend his country against invasion by the King's enemies for which purposes, he may take with him the *posse comitatus.* Any person who without physical impossibility, refuses to assist in the suppression of a riot, may if it was reasonably necessary to call on him for assistance, be indicted, and it is no ground of defence that owing to the number of rioters, his assistance would have been ineffective.

"In former times it was part of the duty of the sheriff to pursue and arrest felons within his county, and for that purpose to raise the hue and cry. Legally every person in a county is still bound to be ready at the command of the sheriff and at the cry of the county to arrest a felon, whether within a franchise or without, and in default is on conviction liable to a fine . . . , but this power of raising the *posse comitatus* for the arrest of felons is not now used in practice owing to the establishment of the county police."
25 Halsbury, p. 811.

Maitland says, in the Constitutional History of England, p. 234:—

"He (the sheriff) is no longer head of the county force, the *posse comitatus*. Under the Tudors the practice begins of appointing a permanent Lord-Lieutenant to command the military force, the militia it is coming to be called, of the shire."

Again p. 235:—

"The county force, the *posse comitatus*, is as much concerned with making hue and cry after malefactors as with defensive warfare; this work falls more and more into the constable's hands and as the militia becomes more military, the constable becomes less military, more purely, in our terms, a police officer."

These statutes (empowering the sheriff to command assistance) seem to be only in affirmance of the common law by which the sheriff might raise the *posse comitatus*, or in other words, such a number of men of the county as were necessary for his assistance in the execution of the "King's writs, quelling riots, apprehending traitors, robbers, etc." Hooper v. Smith, 19 Vt. 155, citing Bac. Abr. title "Sheriff" N. 2 from 22 A. & E., p. 1030, title "*Posse Comitatus.*"

The Sheriff's Act, R. S. O. 1914, c. 16, is silent as to the powers and duties of the sheriff with respect to calling out the *posse comitatus*. His right to do so must be at common law. There are no Canadian cases on the point. Query: Has the Sheriff's Act left the common law rights of the sheriff untouched? There is no clause preserving the common law duties and liabilities. Possibly the only way to call out the *posse comitatus* is under the provisions of the Militia Act, the militia now representing the *posse comitatus* as indicated by Maitland.

Duty of Head as to Riot Act.—The following provisions of the Criminal Code impose duties as to anticipated riots on all heads of councils:—

"91. It is the duty of every sheriff, deputy sheriff, mayor or other head officer, and justice, of any county, city or town, who has notice that there are within his jurisdiction persons to the number of twelve or more unlawfully, riotously and tumultuously assembled together to the disturbance of the public peace, to resort to the place where such unlawful, riotous and tumultuous assembly is, and among the rioters, or as near to them as he can safely come, with a loud voice to command or cause to be commanded silence, and after that openly and with loud voice to make or cause to be made a proclamation in these words or to the like effect:—

'Our Sovereign Lord the King charges and commands all persons being assembled immediately to disperse and peaceably to depart to their habitations or to their lawful business, upon the pain of being guilty of an offence, on conviction of which they may be sentenced to imprisonment for life.

'God Save the King.'

92. All persons are guilty of an indictable offence and liable to imprisonment for life who:

(a) With force and arms wilfully oppose, hinder or hurt any person who begins or is about to make the said proclamation, whereby such proclamation is not made; or,

(b) Continue together to the number of twelve for thirty minutes after such proclamation has been made, or if they know that its making was hindered as aforesaid, within thirty minutes after such hindrance.

93. If the persons so unlawfully, riotously and tumultuously assembled together, or twelve or more of them, continue together, and do not disperse themselves, for the space of thirty minutes after the proclamation is made or after such hindrance as aforesaid, it is the duty of every such sheriff, justice and other officers, and of all persons required by them to assist to cause such persons to be apprehended and carried before a justice.

2. If any of the persons so assembled are killed or hurt in the apprehension of such persons or in the endeavour to apprehend or disperse them, by reason of their resistance, every person ordering them to be apprehended or dispersed, and every person executing such orders, are indemnified against all proceedings of every kind in respect thereof.

3. Nothing in this section contained shall, in any way, limit or affect any duties or powers imposed or given by this Act as to the suppression of riots before or after the making of the said proclamation.

94. Every sheriff, deputy sheriff, mayor or other head officer, justice, or other magistrate, or other peace officer, of any county, city, town, or district, who has notice that there is a riot within his jurisdiction, who, without reasonable excuse, omits to do his duty in suppressing such riot, is guilty of an indictable offence and liable to two years' imprisonment."

A riot is defined by s. 88 of the code as an unlawful assembly which has begun to disturb the peace tumultuously.

The words of the proclamation must be read *verbatim*. See R. v. Child, 1830, 4 C. & P. 442, where a prosecution based on the Act failed because the words "God Save the King" were omitted from the proclamation.

The hour referred to in the code is to be computed from the time of the first reading: R. v. Woolcock, 1833, 5 C. & P. 516.

Duty of Head under Militia Act in Case of Riot.—The Militia Act, R. S. C. 1906, c. 41, ss. 80 to 90, makes provision for the calling out of the active militia in aid of the civil power where a riot or disturbance occurs or is anticipated. The procedure is for the mayor, warden or other head or acting head, together with two justices of the peace, to deliver a requisition to the district officer commanding, if he is present in the locality, or if he is not, to the senior officer of the active militia in the locality in the form given in the Act, and it thereupon becomes the duty of the officer receiving the requisition to call out the militia for the purpose of preventing or suppressing the disturbance. The officers and men called out have the powers of special constables and the municipality in which their services were required is to pay them at the rates specified in the Act. The pay is to be advanced in the first instance by the Crown and the advance may be recovered from the municipality by suit. In R. v. Sault Ste. Marie, 1910, 16 O. W. R. 871; 1 O. W. N. 1144, the corporation unsuccessfully disputed its liability on the ground that the requisition did not comply with the Act, and in Atty.-Gen. of Canada v. Sydney, 1914, 49 S. C. R. 148, reversing 46 N. S. R. 527, the claim by the Crown was disallowed by the Court below on the ground that the requisition had not been delivered to the senior officer of the active militia present in the locality as required by the Act; the Act being held to direct the sending of the requisition to the senior officer at or nearest the place where the riot has occurred or is anticipated, and in that case, the requisition had been sent to the officer at Halifax, there being officers nearer. Sir Charles Fitzpatrick giving judgment, allowing an appeal, said:—

"It appears to me obvious that, speaking generally, the statute contemplates real and effective proceedings to put down disturbances by aid of the militia power when the forces under the control of the local civil authorities are insufficient, and the section in question provides that the initial step must be taken by the civil authorities. It is for those authorities to judge of the magnitude of the disturbance, the necessity for aid, and, in the first instance, the strength of the force required to quell it. The section properly provides, therefore, that the requisitions must be made by those who are immediately associated with the locality where the trouble has arisen and in which the services of the militia are required. They are in a moment of urgency authorized to impose a heavy tax upon the ratepayers; hence the words used in that section authorize the senior officer to act 'when thereunto required in writing' by the chairman.

"These authorities, charged with the duty of maintaining order in the localities where the disturbances have arisen apply to the senior officer of the active militia at 'any locality.' Here there are no qualifying words as in the case of the civil authorities for the obvious reason that there may not be in the locality in which the riot occurs any active militia or there may be serious reasons why in a local disturbance the local militia should not be called upon to interfere. Hence, the necessity for leaving a wide discretion with the local civil authorities.

"There must have been in this case a serious and wide-spread disturbance, because the magistrates considered it necessary to summon assistance from three different quarters and the senior officer of the active militia who was in command, as I have already said, over the whole district, answered that summons and directed his subordinates to await his further orders.

"I do not wish to be understood as saying that the municipal authorities might not have limited their requisition to the officer commanding the militia force at Baddeck or in Sydney. My point is that the statute confers a power upon the local authorities responsible for the maintenance of the peace, which they exercise at their discretion in view of the necessities of the situation and they may requisition any officer in the province, and if the outbreak is sufficiently serious, they might go to headquarters and put the general officer commanding in a position to call out the whole militia force of the country.

"The word 'locality' as used in the section is perhaps somewhat indefinite, but it must be interpreted in such a way as not to unduly limit and possibly destroy the discretion which is undoubtedly conferred upon the civil authorities, and they having, in the exercise of their undoubted discretion, called upon the senior officer of the active militia for the district which included the scene of the disturbance, it was for him to determine how that requisition was to be met. This is made abundantly clear by reference to section 78 of the Act, which gives the officer commanding any military district authority, upon any sudden emergency, to call out the whole or any part of the militia within his command."

The Clerk.

218. Every council shall appoint a clerk, whose duty it shall be:

(*a*) To truly record in a book, without note or comment, all resolutions, decisions and other proceedings of the council;

(*b*) If required by any member present, to record the name and vote of every member voting on any matter or question;

(*c*) To keep the books, records and accounts of the council;

(*d*) To preserve and file all accounts acted upon by the council;

(*e*) To keep in his office or in the place appointed for that purpose, the originals of all by-laws, and of all minutes of the proceedings of the council; and

(*f*) To perform such other duties as may be assigned to him by the council. 3 Edw. VII. c. 19, s. 282, *redrafted*. 3 & 4 Geo. V. c. 43, s. 218.

219.—(1) Any person may, at all reasonable hours, inspect any of the records, books or documents mentioned in the next preceding section and the minutes and proceedings of any committee of the council, whether the acts of the committee have been adopted or not, and the assessment rolls, voters' lists, poll books, and other documents in the possession or under the control of the clerk, and the clerk shall, within a reasonable time, furnish copies of them, certified under his hand and the seal of the corporation, to any applicant on payment at the rate of ten cents for every hundred words, or at such lower rate as the council may fix.

(2) A copy of any record, book or document in the possession or under the control of the clerk purporting to be certified under his hand and the seal of the corporation, may be filed and used in any Court in lieu of the original, and shall be received in evidence without proof of the seal or of the signature or official character of the person appearing to have signed the same, and without further proof, unless the Court otherwise directs. 3 Edw. VII. c. 19, s. 284, *amended*. 3 & 4 Geo. V. c. 43, s. 219 (1-2).

220. Where the clerk is absent or incapable through illness of performing his duties, the council may by resolution provide that some other person, to be named in the resolution or to be appointed under the hand of the clerk, shall act in his stead, and the person so appointed shall have all the powers of the clerk. 3 Edw. VII., c. 19, s. 283, *amended*. 3 & 4 Geo. V. c. 43, s. 220.

221.—(1) The clerk of every local municipality shall in each year, within one week after the final revision of

the assessment roll, make a return to the Secretary of the Bureau of Industries, on forms approved by the Lieutenant-Governor in Council and furnished by the secretary, of such statistics or information as the assessment roll or other records of his office afford, and the forms call for; and every such return shall be transmitted by registered post.

(2) For every contravention of this section, the clerk shall incur a penalty not exceeding $40.

(3) The secretary shall cause to be prepared a tabulated statement of the returns which the Minister of Agriculture shall lay before the Assembly. 3 Edw. VII. c. 19, s. 285 (1-4), *redrafted;* 3 & 4 Geo. V. c. 43, s. 221 (1-3).

Right of Access to Municipal Records.—Sub-section (5) of s. 58 of the Local Government Act, 1894 (Imp.), provides:

> "Every parochial elector of a parish in a rural district may, at all reasonable times, without payment, inspect and take copies of and extracts from all books, accounts, and documents belonging to or under the control of the district council of the district."

An elector threatened to take legal proceedings against the council, who obtained a legal opinion. The elector claimed the right under s.-s. (5) to inspect the opinion, and upon being denied, applied for a rule *nisi* for a mandamus to allow him to inspect. In dismissing the application, Alverstone, C.J., said:

> "I am satisfied the section intended to give the right of inspection to ratepayers as such, and not to persons who desired to inspect documents from some other motive . . . he (the plaintiff) did not desire the document as a ratepayer, but as a litigant with the view of obtaining, if he could, evidence in support of his claim": R. v. Godstone Rural Council [1911] 2 K. B. 465; 80 L. J. K. B. 1184.

Section 219 (1) gives to any person the right to inspect the documents therein enumerated. Beyond this, the giving of information rests entirely in the discretion of the municipal authorities. There are no common law rights possessed by persons, whether inhabitants or ratepayers, to examine into the affairs of a municipal corporation, except such as are expressly or by implication given by the statute. Municipalities are in no way an evolution from the common law municipal corporations, but are the product of statutory enactments, and in this respect differ from them: Journal Printing Co. v. McVeity, 1915, 33 O. L. R. 166 App. Div. In this case, when Mayor McVeity of the City of Ottawa, took office, he found an entirely unsatisfactory state of affairs existing. The result was that he issued the following circular letters to Heads of Departments:

> "23rd April, 1914.
>
> "Heads of Departments:—
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> "The mayor desires it to be understood that, in his opinion, the giving of interviews or information or the writing of letters to the newspapers by officials is incompatible with the efficiency of the civic service, and expects that the same will be discontinued.
>
> "Newspaper reporters will not be permitted to have access to officials or admission to their offices during business hours.

"If any official has any information to impart or complaint to make, he must be content to confide it to the mayor or to the council.

"The mayor will regard the non-observance of this rule by any official as sufficient ground for suspension."

"24th June, 1914.

"Heads of Departments:—

"The mayor wishes it to be understood that he expects that no appointment will be made to any position of a higher grade than that of a day labourer without consultation with him.

"The mayor also wishes it to be understood that there is to be no relaxation of the rule prohibiting officials from being interviewed by or giving information to the representatives of the newspapers."

"21st October, 1914.

"Heads of Departments:—

"The mayor desires it to be understood that where an alderman is at the same time a newspaper reporter, he is to be regarded and treated as a reporter, and the mayor's order of the 23rd April last is to be understood as applying to him."

And finally a notice was affixed to the doors of the city hall, thus: "Newspaper reporters not admitted. By order of the mayor." The police officer placed in charge of the building during the day was instructed by the mayor to eject reporters disregarding this notice.

Action was brought by the defendant company to obtain a declaration that its reporters were entitled at reasonable times to access to the office of the city clerk, and of other heads of departments, for the purpose of obtaining information and of inspecting books and records kept by the city clerk and for an injunction to restrain the mayor from interfering with the reporters. In that connection, Middleton, J., said:—

"No public official is bound to submit to an interview at the hands of a newspaper against his will, and a persistent attempt on the part of reporters to interview the mayor and to catechise him with reference to his conduct of public affairs is not seriously attempted to be justified.

"A reporter, as a reporter, has no particular rights or privileges. He is not entitled to information save that which is open to any member of the public.

"The function of the press in gathering information for the public, so as to enable public affairs to be intelligently discussed, is obviously of the greatest importance. Those in charge of public business may well, as a matter of courtesy, afford special privileges to representatives of the press, and may well seek its aid in the education of the public mind by availing themselves of its readiness to disseminate information. All this must rest on good-will and mutual confidence, and this happily is generally found sufficient to insure adequate information reaching the public. When, unfortunately, this happy relation does not exist, and there is a tendency on the one side to heckle and annoy, and an inclination on the other side to be curt and perhaps almost churlish, it will probably be found that the Courts can afford no real redress. Many of the practical affairs of life must depend on good taste and good manners rather than on strict definitions of right emanating from the Courts. . . . In all this, I think, the mayor was amply justified in adopting the course he did. His conduct, however, was not unnaturally resented, and then he was made the victim of a good deal of persecution at the hands of the newspaper and its representatives. Attempts to compel the mayor to discuss civic affairs, and the items referring to his refusal, under the heading 'Our Daily Chat with the Mayor,' cannot be justified.

"In excluding the reporters from the city hall, the mayor, I think, went too far. As representatives of the newspaper company, as ratepayers of the city, and as residents of the city, the reporters had, I think, the right to enter the city hall for the purpose of obtaining such information as they were lawfully entitled to, and for the pur-

pose of seeking information which might be voluntarily given to them by those in charge of municipal affairs. . . .

"The case of Tenby Corporation v. Mason, [1908] 1 Ch. 457, supplies the principles which must guide me. . . .

"That case, while defining the principles applicable, differs from the case in hand, because here there has been no attempt whatever to exclude reporters from the meetings of the council; but the underlying principle is the same. In the administration of the public affairs of the municipality there must be many things that cannot be transacted in public, and there must be many other things which cannot be placed before the public prematurely, if the public interests are to be properly served. Those charged with the administration of public affairs are answerable to the electorate. If their constituents do not receive due information as to how the stewardship of their representative is being administered, the result will be ascertained at the polls. The Court cannot be called upon to compel the municipal officers to give to the newspapers any information beyond that which the Municipal Act prescribes. The mayor, as the head of the corporation, has the right to require the civic officials to give out no information beyond that pointed out by the statute, without his approval and sanction. If his views do not agree with those of the council, the council can overrule his action; but the matter is essentially a domestic one, with which the Courts have no concern.

"Because the mayor went too far in excluding reporters from the municipal buildings, some injunction must be granted; and I think it may well be framed in this way: There should be a declaration that the plaintiff's reporters are entitled at reasonable times to access of the offices of the city clerk for the purposes pointed out by s. 219 of the Municipal Act, and also entitled to access to the proper office for the purpose of inspecting the statement of the auditors, under s. 237 of the Municipal Act, also for the purpose of obtaining the inspection of any records or documents, the inspection of which is expressly authorized by the Municipal Act or by any other statute. It should also be declared that the reporters are entitled to inquire, at reasonable times, from the heads of the municipal departments, whether such officers have any information they are ready to give for publication; but this provision is not to authorize any reporter remaining in any municipal office when requested, by the officer in charge thereof, to retire."

Section 233 of the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50 (Imp.), is similar to s. 219. In Williams v. Manchester Corporation, 1897, 45 W. R. 421, 13 T. L. R. 299, which was practically a judgment by consent, epitomes of the minutes of committees prepared for council, but not incorporated in the minutes of council, were treated as minutes of council, and inspection of them was ordered, but this case is not an authority for the proposition that the public have rights not given by statute: Journal v. McVeity, *supra*.

In R. v. Southwold Corporation, 1907, 71 J. P. 351, it was held that a town council was not entitled to pass a resolution directing their clerk to refuse to shew a document, which had been read to the council, to a councillor merely because he desired to use it against the council, but apparently the council would have a right to refuse inspection even to councillors where desired out of mere curiosity: *ibid.* See also R. v. Wimbledon, 1898, 77 L. T. 599, and R. v. Bradford-on-Avon, 1908, 99 L. T. 89, in which case inspection of counsel's opinion given to the council was refused, notwithstanding s. 58 (5) of the Local Government Act, 1894, the general rule being that the books of a corporation are open to inspection of the corporators only for corporate purposes.

The clerk is disqualified, under s. 53, s.-s. (*f*), from being a member of any municipal concern whatever. See R. ex rel. Boyes v. Detlor, 1868, 4 P. R. 195.

The clerk can only bind the council by acts within the scope of his general authority or by such as they directed beforehand or sanctioned

afterwards by availing themselves of such acts to their advantage: Ramsay v. Western District Council, 1845, 4 U. C. R. 374.

An acting clerk can only be appointed when the clerk is absent or incapable of performing his duties.

Liability of Clerk for Errors and Omissions.—Peterborough v. Edwards, 1880, 31 C. P. 231.

Fraud of Clerk, Corporation getting the Benefit—Act within Scope of Authority.—Molsons Bank v. Brockville, 1880, 31 C. P. 174.

Minutes of Meetings.—The record of the proceedings of council kept by the clerk has no probative force. Evidence of what took place in council meetings must be given by witnesses who were present. The clerk might use the minutes prepared by him to refresh his memory of what took place, see Taylor on Evidence, 10th ed., par. 1782. There are two theories, however, the other being that the records of the proceedings by a corporation are the "constructive acts of the corporation; they are not the evidence of what is done, but they are what is done; since the proceedings must be in writing," Wigmore on Evidence, pars. 1661 and 2451. The passage of a resolution or any other proceeding might be shewn to have happened although no record appeared in the minutes. The Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50 (Imp.), s. 22 (5), provides that a minute of proceedings at a meeting of council or committee signed at the same or the next ensuing meeting by the mayor or by a member of council or of the committee describing himself as or appointed to be chairman of the meeting at which the minute is signed, shall be received in evidence without further proof, and s.-s. 6 provides that until the contrary is proven, every meeting of council or of a committee shall be deemed to have been duly convened and held and all the members of the meeting shall be deemed to have been duly qualified, and where the proceedings are the proceedings of a committee, the committee shall be deemed to have been duly constituted and to have had power to deal with the minutes referred to in the minutes. There are no similar provisions in the Ontario Act.

The Town Clerk May be the Town Printer.—In Re Schumacher and Chesley, 1910, 21 O. L. R. 534, the town clerk was also the town printer and printed the voters' list, and this was made one of the grounds of attack on a local option by-law. Riddell, J., thus dealt with the objection:—

> "The printing of voters' lists, etc., was done by the town clerk. There is no incompatibility in the dual position of the clerk and printer, such as in The King v. Tizzard, 9 B. & C. 418. There a clerk was elected an alderman—the board of aldermen having control over the clerk. It was pointed out that a man cannot be both master and man—the two were incompatible. Nothing of the kind is to be found here, and, while there is an objection to a man trying to serve two masters, there is none to this trying to serve the same masters in two capacities.
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> "The High Schools Act, R. S. O. 1897, c. 293, by s. 43, makes a trustee *ipso facto* vacate his seat if he enters into any contract, etc., with the board; and a similar provision is found in the Public Schools Act, R. S. O. c. 292, s. 100; but nothing of the kind is to be found in the Municipal Act in respect of clerks, etc. Section 80 refers to members of the council only. It is true that 'before entering on the duties of his office' he must make and subscribe a solemn declaration 'that he has not . . . any interest in any contract with . . . the . . . corporation:' Section 312. It is unnecessary to consider what would be the effect upon the contract if the clerk entered into one after his taking office—it is sufficient to say that the statute does not void the office.
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> "The same remark applies to the argument that he must be held to have vacated his office by reason of the alleged fact that he printed material for the temperance people."

Clerk's Duties Partly Statutory and Partly by Assignment of Council.—With respect to the duties imposed on him by statute, the clerk is not subject to the direction of council and cannot plead the Orders of Council as an excuse. The duties imposed by s. 218, s.-ss. (*a-e* inclusive), are statutory: See Att.-Gen. v. De Winton, 1906, 2 Ch. 106, 75 L. T. Ch. 612.

Dismissal of Clerk.—In London West v. Bartram, 1895, 26 O. R. 161, a clerk was removed from his office by resolution, and a by-law was subsequently passed confirming his removal, and appointing another person to be clerk. The defendant refused to deliver up the books, papers and seal, and an action of replevin was brought to obtain possession of these. The defendant contended that he could not be removed except by by-law, and that the by-law under which the corporation assumed to act was no by-law, because it was not signed by him as clerk and because the seal of the corporation was not fixed to it, being in the possession of the defendant, and the council could not, as it assumed to do, adopt a seal *pro hac vice*. It was held that the by-law was as against the defendant a valid by-law, and that he could not be heard to say that it was not properly sealed, and that in any event, following Vernon v. Smith's Falls, the resolution was sufficient for the purpose.

The Treasurer.

222.—(1) Every council shall appoint a treasurer, who may be paid either by salary or by a percentage, and may also appoint a deputy treasurer to act in the absence of the treasurer or in case of a vacancy in the office.

(2) The treasurer and the deputy treasurer, before entering on the duties of their offices, shall give such security as the council directs for the faithful performance of such duties, and for duly accounting for and paying over all money which comes into their hands.

(3) It shall be the duty of every council, in every year to inquire into the sufficiency of the security given by the treasurer, and to cause to be entered in its minutes the result of the inquiry. 3 Edw. VII. c. 19, s. 288, *amended.* 3 & 4 Geo. V. c. 43, s. 222 (1-3).

223.—(1) In case of the death of the treasurer of a county, the warden may, by warrant under his hand, appoint for such special purpose as he may deem necessary, a treasurer *pro tempore,* who shall hold office until the next meeting of the council; and all acts authorized by the warrant which are performed by him shall be as valid and binding as if performed by a treasurer.

(2) The warden shall, by the warrant, direct what security shall be given by the treasurer *pro tempore* for

the faithful performance of his duties, and for duly accounting for, and paying over, all money which comes into his hands, and before entering upon his duties he shall give such security, but he shall not interfere with the books, vouchers, or accounts of the deceased treasurer until a proper audit of them has been made. 3 Edw. VII. c. 19, s. 289, *amended.* 3 & 4 Geo. V. c. 43, s. 223 (1-2).

224.—(1) The treasurer shall receive, and safely keep all money of the corporation, and shall pay out the same to such persons and in such manner as the laws of Ontario and the by-laws or resolutions of the council direct.

(2) Except where otherwise expressly provided by this Act, a member of the council shall not receive any money from the treasurer for any work or service performed or to be performed.

(3) The treasurer shall not be liable for money paid by him in accordance with a by-law or resolution of the council, unless another disposition of it is expressly provided for by statute. 3 Edw. VII. c. 19, s. 290, *amended.* 3 & 4 Geo. V. c. 43, s. 224 (1-3).

225. The treasurer shall open an account in the name of the corporation in such of the chartered banks of Canada or at such other place of deposit as may be approved of by the council, and shall deposit to the credit of such account all money received by him on account of the corporation, and he shall keep the money of the corporation entirely separate from his own money. 3 Edw. VII. c. 19, s. 291 (5). 3 & 4 Geo. V. c. 43, s. 223.

Treasurer Paying Interest on Unauthorized Overdraft. — Att.-Gen. v. De Winton, [1906] 2 Ch. 106, 75 L. J. Ch. 612, was an action to impeach the accounts of a treasurer who had credited himself and debited the borough funds with amounts for interest in respect of overdrafts which were unauthorized, and this was held to amount to *ultra vires* borrowing by the council. Farwell, J., said:—

> "The defendant's . . . contention is that he is not personally liable; that the overdrafts and interest thereon were made and debited by the order of the borough; and that he merely acted as their servant. I am of opinion that this contention is not well founded. The question before me relates to the funds collected by and on behalf of the borough for public purposes under the Municipal Corporations Act, 1882, and the Public Health Act, 1875, and the Private Harbour

Acts; and it has been settled, at any rate since Lord Cottenham's decision in Att.-Gen. v. Liverpool Corporation; Att.-Gen. v. Aspinall, [1837] 7 L. J. Ch. 51, 58; 2 Myl. & Cr. 613, 618, that property held for public purposes is held upon charitable trusts: 'If the property in question be subject to any public trust, and if the appropriation complained of be not consistent with such trust, but for purposes foreign to it, and if there be not, in the Municipal Corporations Act'—now the Act of 1882—'any provision taking from the Court its ordinary jurisdiction in such cases, then it will follow that the Attorney-General has, under the circumstances stated, a right to file the information, and to pray that the fund may be recalled, secured, and applied for the public, or in other words, charitable purposes, to which it is by the Act devoted.' I have recently had to consider this case in Stevens v. Chown; Stevens v. Clark, [1901] 70 L. J. Ch. 571, 1 Ch. 894, and I will merely say that I remain of the opinion then expressed, and all the more so because it has been approved by Lord Lindley in Yorkshire Miners' Association v. Howden, [1905] 74 L. J. K. B. 511, 523; A. C. 256, 280. It is plain, therefore, that this Court would have jurisdiction to restrain the borough from misapplying these funds on the ground of breach of trust.—Att.-Gen. v. Newcastle-on-Tyne Corporation and North-Eastern Railway, [1889] 58 L. J. Q. B. 558; 23 Q. B. D. 492. But the defendant is their treasurer, and knows that the moneys which he has credited to himself are trust moneys, and he is clearly amenable to the jurisdiction of the Court and cannot escape by pleading the wrongful orders of his employers. There is no question of repaying here; but, even if there were, the defendant knew that this was a trust fund, and 'those who know that a fund is a trust fund cannot take possession of that fund for their own private benefit, except at the risk of being liable to refund it in the event of the trust being broken by the payment:' per Mr. Justice Fry, in Foxton v. Manchester and Liverpool District Banking Co., [1881] 44 L. T. 406. But the treasurer is not a mere servant of the council; he owes a duty, and stands in a fiduciary relation to the burgesses as a body; he is the treasurer of the borough (s. 18); all payments to, and out of, the borough fund, must be made to, and by, him (s. 142); he has to account to three auditors, two appointed by the burgesses and one by the mayor (s. 25); and, although he holds office during the pleasure of the council only (s. 18), this does not enable him to plead the orders of the council as an excuse for an unlawful act. In my opinion the observations of Mr. Justice Erle in Reg. v. Saunders, (1854), 24 L. J. M. C. 45, with relation to a county treasurer, apply with equal force to a treasurer under the Municipal Corporations Act, 1882: 'if an order be made on the county treasurer to pay expenses wholly disconnected with county matters, such an order is without jurisdiction, and one which the treasurer would be bound to disobey; and if the treasurer did pay it, it would be the duty of the Quarter Sessions not to allow the items of such expenses in the treasurer's account.'"

A treasurer who carried forward a balance shewn on the books of a deceased treasurer believing that his estate, which was in fact insolvent, would pay over the corporation moneys and in the meantime used his own moneys for several years, tacitly allowing the corporation to think that the old balance was in his hands, succeeded in recovering from the corporation the moneys he had advanced, subject to a reference to ascertain whether and to what extent any damage had resulted to the corporation by reason of the treasurer's conduct: Leslie v. Malahide, 1906, 13 O. L. R. 97.

Knowledge of a treasurer as to the constitution of a firm of private bankers with whom corporation moneys were deposited by him will be attributed to the corporation and may prevent recovery from a person holding out as a partner when in fact he is not: Oakville v. Andrew, 1905, 10 O. L. R. 709 C. A.

Shall Give Security.—The provisions of the Public Officers Act, R. S. O. 1914, c. 15, by which the Lieutenant-Governor in Council may prescribe the form of the security required to be furnished under any statute by a public officer, do not apply to treasurers or other officers of municipal corporations having the custody of moneys.

The general law of suretyship cannot be discussed here, but it should be noted that a material mis-statement in the application for a surety bond, even though made innocently, will relieve the surety. In Arnprior v. United States Fidelity Co., 1914, 30 O. L. R. 618, 51 S. C. R. 94, the defendants, in submitting to the town corporation questions regarding the position and duties of the collector of taxes, expressly stated that the answers would be taken as the basis of the bond, and at the foot of the answers the mayor, in his official capacity, declared that it was agreed that the answers were to be taken as conditions precedent and as the basis of the bond. Sections 12 (2) and (*b*), with the answers given, were as follows:—

> "Q. 12 (*a*) What means will you use to ascertain whether his accounts are correct? A. Auditors examine rolls and his vouchers from treasurer, yearly.
>
> "Q. (*b*) How frequently will they be examined? A. Yearly."

The auditors did not at any time examine the collectors' rolls, and their annual certificate shewed that they did not even claim to have examined any other books than those of the treasurer. The Appellate Division held that the surety company was not liable, and the Supreme Court dismissed an appeal.

As to the question of materiality of answers, see Venner v. Sun Life, 1889, 17 S. C. R. 394; Jordan v. Provincial Provident, 27 S. C. R. 554, and Hay v. Employers' Liability Assurance Co., 1905, 6 O. W. R. 459, overruling London West v. London Guarantee, 1890, 26 O. R. 520. Also ss. 156 and 194 to 201 of the Insurance Act, R. S. O. 1914, c. 183.

All of which were considered in the Arnprior case.

"Treasurer Persona Designata."—Neither a county nor a city is liable to pay for the cost of advertising the list of lands to be sold for arrears of taxes when ordered by the treasurer, as he does not act as an officer of the corporation in respect to tax sales, but merely as a *persona designata:* Warwick v. Simcoe, 1900, 36 C. L. J. 461; Bank of Commerce v. Toronto Junction, 1902, 3 O. L. R. 311, but *contra*, McSorley v. St. John, 1882, 6 S. C. R. 531, followed in Crawford v. St. John, 1898, 34 N. B. R. 560, and Mellon v. King's County, 1900, 35 N. B. R. 159, where the corporation was held liable for damages resulting from the issue of a warrant by the treasurer to collect arrears of taxes from a non-resident wrongly described as a resident, there being no jurisdiction to proceed by warrant in the case of non-resident defaulters. See title Respondeat Superior, *infra*.

226. Every treasurer shall prepare and submit to the council, half-yearly, a statement of the money at the credit of the corporation; and in local municipalities which have passed by-laws requiring it to be done, shall, on or before the 20th day of December in each year, prepare and transmit to the clerk a list of all persons who have not paid their municipal taxes on or before the 14th day of that month. 3 Edw. VII. c. 19, s. 292, *amended.* 3 & 4 Geo. V. c. 43, s. 226.

[*As to delivery by registrars to treasurers of cities, duplicate plans or maps of surveys or subdivisions of*

land in cities or towns, see Registry Act, 10 Edw. VII. c. 60, s. 88.]

227.—(1) The treasurer of every local municipality shall, on or before the first day of May in each year, transmit by registered post to the Secretary of the Bureau of Industries, on forms approved by the Lieutenant-Governor in Council and furnished by the secretary, such information or statistics regarding the finances or accounts of the corporation as the forms call for.

(2) For every contravention of this section the treasurer shall incur a penalty of $20.

(3) The Secretary shall cause to be prepared a tabulated statement of the returns, which the Minister of Agriculture shall lay before the Assembly. 3 Edw. VII. c. 19, s. 293 (1-2), *amended.* 3 & 4 Geo. V. c. 43, s. 227 (1-3).

228.—(1) Every treasurer, on or before the 7th day of January in each year, shall transmit by registered post to the head of every municipality to whose treasurer he has made any payment during the year ended on the 31st day of the next preceding December, a statement signed by him setting forth every such payment and the date of it. 3 Edw. VII. c. 19, s. 294*a* (1), *redrafted.*

(2) The head of the municipality shall cause every such statement received by him to be read at the next meeting of the council after the receipt of it, and to be delivered to the auditors before the audit of the accounts for the year to which the statement relates. 3 Edw. VII. c. 19, s. 294a, (2), *redrafted.* 3 & 4 Geo. V. c. 43, s. 228 (1-2).

229. Where a treasurer is removed from office, or absconds, the council shall forthwith give notice to his sureties, and his successor may draw any money of the corporation which may have been deposited by the trea-

surer to his credit. 3 Edw. VII. c. 19, s. 294, *amended.* 3 & 4 Geo. V. c. 43, s. 229.

(*Note.—Old s. 294b, requiring registrars of deeds to send statements of amounts paid to treasurer, struck out as covered by s. 105 of the Registry Act.*)

Assessors and Collectors.

230.—(1) The council of every local municipality shall appoint as many assessors and shall annually appoint as many collectors for the municipality as may be deemed necessary.

(2) The appointment shall be made as soon as practicable after the organization of the council.

(3) The council may assign to an assessor or collector the district within which he is to act, and may make regulations for governing him in the performance of his duties.

(4) In a city, town or township the same person may be appointed assessor or collector for more than one ward or polling subdivision.

(5) A member of the council or the clerk or treasurer of the municipality shall not be appointed assessor or collector.

(6) The collector of a municipality, the council of which has passed a by-law requiring the taxes to be paid on or before the 14th day of December, shall, on the 15th day of December in each year, return, upon oath, to the treasurer the names of all persons who have not paid their taxes. 3 Edw. VII. c. 19, s. 295, *redrafted.* 3 & 4 Geo. V. c. 43, s. 230 (1-6); 9 Geo. V. c. 46, s. 7.

231.—(1) The council of a city or town, instead of appointing assessors, may appoint an assessment commissioner, who, in conjunction with the mayor, shall appoint such assessors as may be necessary, and the assessment commissioner and the assessors shall constitute a board

of assessors, and shall have all the powers and perform all the duties of assessors appointed under the next preceding section.

(2) The council of a city or town, having a population of less than 20,000, may provide that all the duties of an assessor shall be performed by the assessment commissioner, and in that case it shall not be necessary to appoint assessors. 3 Edw. VII. c. 19, s. 296 (1); 6 Edw. VII. c. 34, s. 15, *redrafted.*

(3) It shall not be necessary to appoint the assessment commissioner, assessors or collectors of a city annually.

(4) In a city or town which has an assessment commissioner, all notices in matters relating to assessment which in other municipalities are required by this or any other Act to be given to the clerk shall be given to the assessment commissioner. 3 Edw. VII. c. 19, s. 296 (3-4) *amended.* 3 & 4 Geo. V. c. 43, s. 231 (1-4).

[*As to delivery by registrars to assessment commissioners in cities on request, of duplicate plans or maps of every survey or subdivision of lands therein, and the furnishing of lists of absolute conveyances, see* 10 Edw. VII. 60, ss. 88 and 100.]

[*Note.—Ss. 297 and 298, relating to collectors in provisional counties struck out, as all the old provisions as to separation of a junior county from a union have been repealed.*]

Auditors and Audit.

232.—(1) Subject to ss. 233 and 240, every council shall, at its first meeting in every year, appoint two auditors.

(2) No person who is or during the next preceding year was a member of the council, or the clerk or treasurer of the municipality, or who has, or during the next preceding year had, directly or indirectly, alone or in

conjunction with any other person, a share or interest in any contract or employment with or on behalf of the corporation, except as auditor, shall be appointed an auditor.

(3) If a person appointed auditor for a county refuses, or is unable to act, the head of the council shall appoint another person not in the employment of such head to be auditor in his stead. 3 Edw. VII. c. 19, s. 299, *amended.* 3 & 4 Geo. V. c. 43, s. 232 (1-3).

[*S. 300, re Auditors in City of Toronto, repealed by 9 Edw. VII. c. 73, s. 8. See now 9 Edw. VII. c. 125, s. 2.*]

[*Note.—S. 301 (2) making s. 299 apply to audit of accounts of current year, struck out as unnecessary.*]

For declaration of office of auditor, see 242 (6).

233. The council of any municipality may provide that the auditors shall be appointed in November or December in each year for the next succeeding year, and thereafter while the by-law remains in force the council shall appoint the auditors in accordance with its terms, instead of at its first meeting. 3 Edw. VII. c. 19, s. 301 (1), *amended.* 3 & 4 Geo. V. c. 43, s. 233.

234.—(1) The auditors appointed under s. 233 shall, at the end of every month, beginning with the first month in the year following that of their appointment, examine and report upon all accounts affecting the corporation, or relating to any matter under its control, or within its jurisdiction, and after the examination of every account, voucher, receipt and paid debenture submitted for audit, shall stamp on it, in indelible letters, the word "audited," and initial it. 3 Edw. VII. c. 19, s. 302, *amended.*

(2) The auditors appointed under s. 233 shall also perform the duties of auditors appointed under s. 232 with respect to the accounts and transactions of the year in which they are appointed. *New.* 3 & 4 Geo. V. c. 43, s. 234 (1-2).

235. An auditor may administer an oath to any person concerning any account or other matter to be audited. 7 Edw. VII. c. 40, s. 6. 3 & 4 Geo. V. c. 43, s. 235.

236. Where an auditor of a city dies, or resigns, or his office becomes vacant from any cause, the council may fill the vacancy, and the person appointed shall hold office for the remainder of the year for which the original appointment was made. 3 Edw. VII. c. 19, s. 303, *amended.* 3 & 4 Geo. V. c. 43, s. 235.

237.—(1) The auditors appointed under s. 232 shall examine and report upon all accounts affecting the corporation, or relating to any matter under its control or within its jurisdiction for the year ended on the 31st day of December preceding their appointment.

(2) They shall annually prepare in duplicate an abstract of the receipts, expenditure, assets, and liabilities of the corporation, and a detailed statement in duplicate of the same for the next preceding year in such form as the council may direct, and shall report on all accounts audited by them, and make a special report of any expenditure made contrary to law, and shall transmit by registered post one copy of the abstract and one copy of the detailed statement to the Secretary of the Bureau of Industries, and shall file the other abstract, the other detailed statement, and their reports, in the office of the clerk, within one month after their appointment.

(3) Where the auditors are appointed under s. 233, or where they have been required to make their audit under the provisions of s. 240, the abstract, statements, and reports mentioned in s.-s. 2, shall be, with respect to the year for which they are appointed, and shall be made and filed within one month after the expiry of that year and the auditors shall be deemed to continue in office during that period for the purpose only of preparing and filing such statements and reports.

(4) For every contravention of s.-s. 2 or 3, an auditor shall incur a penalty not exceeding $40.

(5) A resident of the municipality may inspect the abstract, statements and reports at all reasonable hours, and may, by himself or his agent, at his own expense, make a copy of or extracts from them. 3 Edw. VII. c. 19, s. 304 (1-2), *redrafted.*

(6) The auditors of every municipality shall also make a report upon the condition and sufficiency of the securities of the treasurer; and such report shall show what cash balance, if any, was due from the treasurer to the corporation at the date of the audit, and where it is deposited, and what security there is that the same will be available when required; but this shall not relieve the council from the performance of the duty imposed by s. 222. 3 Edw. VII. c. 19, s. 304 (3); 7 Edw. VII. c. 40, s. 7, *amended.*

(7) The clerk shall publish the abstract, statements and reports in such form as the council may direct; and in the case of a local municipality shall transmit a copy of the abstract and statements to the clerk of the council of the county, and the same shall be kept in his office. 3 Edw. VII. c. 19, s. 306.

(8) The auditors may make a written requisition upon the treasurer for a request to any bank or company with which the money is or has been deposited, or with which the treasurer has kept an account, to exhibit the account and details thereof to them; and it shall be the duty of the treasurer, within twenty-four hours after the delivery to him of such requisition, to comply with it.

(9) The council of every town, village and township shall hold a meeting on the 15th day of December in each year, and shall immediately thereafter publish a detailed statement of the receipts and expenditures of the corporation for the portion of the year ended on that day, together with a statement of assets, liabilities and uncollected taxes, and a similar statement respecting the last 15 days of the next preceding year.

(10) The statements shall be signed by the head of the council and by the treasurer, and shall be published.

(11) Instead of publishing the statements the council may cause them to be posted up, not later than the 24th day of December, in the office of the clerk and of the treasurer, at all post offices, and at not less than 12 other conspicuous places in the municipality.

(12) The clerk shall procure to be printed not less than one hundred copies of the statements, and shall deliver or transmit by post one of them to every elector who requests him to do so, not later than the 24th day of December in each year, and shall also see that copies of the statements are produced at the nomination meeting.

(13) The next preceding four sub-sections shall not apply to a township municipality in a provisional judicial district, or in the electoral district of North Renfrew, or in the Provisional County of Haliburton.

(14) A member of a council or an officer of a corporation, or any other person, who knowingly makes or causes or procures to be made, any untrue entry in the statements, or who knowingly omits or causes to be omitted from them anything which should be included, shall incur a penalty of not less than $5 or more than $40. 3 Edw. VII. c. 19, s. 304 (4) and (6-10), *redrafted.* 3 & 4 Geo. V. c. 43, s. 237 (1-14).

238. The council of a city or town may provide that all accounts shall be audited before payment. 3 Edw. VII. c. 19, s. 305. 3 & 4 Geo. V. c. 43, s. 238.

(*Note.—S. 306 now 237* (*7*).)

239. The council shall, upon the report of the auditors, finally audit and allow the accounts of the treasurer and collectors, and all accounts chargeable against the corporation; and where charges are not regulated by law, the council shall allow what is reasonable. 3 Edw. VII. c. 19, s. 307. 3 & 4 Geo. V. c. 43, s. 239.

(*Note.—Old s. 308, giving power to county council to audit all money paid out by county treasurer, struck out as covered by provision as to appointing auditors.*)

240. Instead of appointing two auditors annually as provided by s. 232, the council may by by-law provide for the appointment of one or more auditors to hold office during pleasure, who shall daily or otherwise examine, audit and report on the accounts of the corporation. 3 Edw. VII. c. 19, s. 309, *amended*. 3 & 4 Geo. V. c. 43, s. 240.

241. The Treasurer of Ontario may in his discretion retain in his hands money payable to a corporation, if it is certified to him by the Secretary of the Bureau of Industries that any officer of the corporation whose duty it is to make returns to the Bureau has not done so. 3 Edw. VII. c. 19, s. 304 (5). 3 & 4 Geo. V. c. 43, s. 241, *amended*. 7 Geo. V. c. 42, s. 2.

Duty of Auditors.—Under a similar provision of the Public Health Act, 1875 (Imp.), s. 246, Russell, C.J., said, in Thomas v. Devonport, [1900] 1 Q. B. 16, 69 L. J. Q. B. 51:—

> "I do not agree that his (the auditor's) sole duty is to see that there are vouchers formal and regular corresponding to the items for which the urban sanitary authority seeks to have credit. That is, in my opinion, an incomplete and imperfect view of his duties. An auditor is justified in making and bound to make a reasonable examination to see whether or not the payments made by the sanitary authority are made contrary to the powers and duties of that authority; and if he finds that there are such payments, it is his duty to report to the burgesses."

In Re London v. General Bank (No. 2), 1895, 2 Ch. 673, Lindley, L.J., thus discussed the duties of auditors: an auditor, however, is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly shew the true position of the company's affairs; he does not even guarantee that his balance-sheet is accurate according to the books of the company. If he did, he would be responsible for error on his part, even if he were himself deceived without any want of reasonable care on his part, say, by the fraudulent concealment of a book from him. His obligation is not so onerous as this. Such I take to be the duty of the auditor: he must be honest—*i.e.*, he must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes that what he certifies is true. What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion very little inquiry will be reasonably sufficient, and in practice I believe business men select a few cases at haphazard, see that they are right, and assume that others like them are correct also. Where suspicion is aroused more care is obviously necessary; but, still, an auditor is not bound to exercise more than reasonable care and skill, even in a case of suspicion, and he is perfectly justified in acting on the opinion of an expert where special knowledge is required.

Mandamus to Auditors—If it is essential either by by-law or by statute that an account be audited before payment, a mandamus can be granted when the Court is satisfied that the account is correct, to the auditors to audit and certify it: Re Mack and Board of Audit of Stormont, etc., 1911, 25 O. L. R. 121. See also In re Sheriff of Lincoln v.

County of Lincoln, 1873, 34 U. C. R. 1; In re Fenton v. County of York, 1880, 31 C. P. 31; In re Davidson and Waterloo, 1864, 24 U. C. R. 66; In re Stanton v. Elgin, 1883, 3 O. R. 86; In re Hamilton v. Harris, 1845, 1 U. C. R. 513.

Auditors are Liable for Misfeasance.—See In re London and General Bank (No. 2), *supra.*

Audit by Provincial Auditor.—See Williamson v. Elizabethtown, 1904, 8 O. L. R. 181; 2 O. W. R. 977.

Duties of Officers Respecting Oaths and Declarations.

242.—(1) Every person elected as a member of the council of a township or as trustee of a police village, before he takes the declaration of office or enters upon his duties, shall make and subscribe a declaration of qualification, Form 2. 3 Edw. VII. c. 19, s. 311 (1), *first part.*

For form 2 see s. 69.

(2) Every member of a council, trustee of a police village, every water commissioner, commissioner of industries and sewerage commissioner, and every clerk, treasurer, assessment commissioner, assessor, collector, engineer, clerk of works and street overseer or commissioner, before entering on the duties of his office, shall also make and subscribe a declaration of office, Form 16.

FORM 16.

Declaration of Office.

I, *A. B.*, do solemnly promise and declare that I will truly, faithfully and impartially, to the best of my knowledge and ability, execute the office of (*insert name of office, or in the case of a person who has been appointed to two or more offices which he may lawfully hold at the same time*), that I will truly, faithfully and impartially, to the best of my knowledge and ability, execute the offices to which I have been elected (*or* appointed) in this municipality, and that I have not received, and I will not receive, any payment or reward, or promise thereof, for the exercise of any partiality or malversation or other undue execution of the said office (*or* offices), and that I have not by myself or partner, either directly or indirectly, any interest in any contract with or on behalf of the said corporation (*where declaration is made by the clerk, treasurer, collector, engineer, clerk of works or street overseer, add the words following*) save and except that arising out of my office as clerk (*or* my office as assessor or collector, *or as the case may be*).

3 Edw. VII. c. 19, s. 312, *part.*
3 & 4 Geo. V. c. 43, form 16.

(3) Every person elected or appointed to two or more municipal offices may make one declaration of office

as to all of them. 3 Edw. VII. c. 19, s. 312; 6 Edw. VII. c. 35, s. 29, *redrafted.*

(4) Every returning officer, deputy-returning officer, poll clerk, constable and other election officer, before entering upon the duties of his office, shall make and subscribe a declaration, Form 17.

FORM 17.

DECLARATION OF ELECTION OFFICERS.

I, *A. B.*, do solemnly promise and declare that I will truly, faithfully and impartially, to the best of my knowledge and ability, execute the office of (*inserting the name of the office*) in this municipality, and that I have not received, and will not receive, any payment or reward, or promise thereof, for the exercise of any partiality or malversation or other undue execution of the said office.

3 Edw. VII. c. 19, s. 313, *part.*
3 & 4 Geo. V. c. 43, form 17.

(5) Where by this Act any oath or declaration is required to be made by a deputy-returning officer, or by a poll clerk, and no special provision is made therefor, the same, in the case of a deputy-returning officer, may be made before the returning officer for the municipality or ward, or before the poll clerk, or before any person authorized to administer an oath; and, in the case of a poll clerk, before any such person, or before the deputy-returning officer. 3 Edw. VII. c. 19, s. 313, *redrafted.*

(6) Every auditor, before entering upon his duties, shall make and subscribe a declaration, Form 18. 3 Edw. VII. c. 19, s. 314, *amended.*

FORM 18.

DECLARATION OF AUDITOR.

I, *A. B.*, having been appointed auditor for the municipal corporation of , promise and declare that I will faithfully perform the duties of that office according to the best of my judgment and ability; and I do solemnly declare that I had not, directly or indirectly, any share or interest in any contract or employment (except that of auditor, *if reappointed*) with, by or on behalf of such municipal corporation during the year preceding my appointment, and that I have not any such contract or employment except that of auditor, for the present year.

A. B.

3 Edw. VII. c. 19, s. 314, *part.*
3 & 4 Geo. V. c. 43, form 18.

(7) Except where otherwise provided the person by whom the oath or declaration is made shall file the same in the office of the clerk within 8 days after it is made. 3 Edw. VII. c. 19, s. 317, *redrafted.* 3 & 4 Geo. V. c. 43, s. 242 (1-7).

243. Except where otherwise expressly provided, in addition to the persons authorized by law to administer an oath, the head of a council, a controller, an alderman, a reeve, or the clerk of a municipality may, within the municipality, administer an oath, or take any declaration under this Act, or relating to the business of the corporation. 3 Edw. VII. c. 19, s. 316, *redrafted.* 3 & 4 Geo. V. c. 43, s. 243.

(*Note.—See also s. 145 re administration of oaths.*)

244. Every qualified person duly elected to be a member of a council, a trustee of a police village, or a water commissioner, or a sewerage commissioner, and every person appointed as assessment commissioner, commissioner of industries, assessor or collector, who refuses the office to which he has been elected or appointed, or does not, within twenty days, after knowing of his election or appointment, make and file the declaration of office, and in the case of a member of a council of a township or of a trustee of a police village, the declaration of qualification, and every person authorized to take any such declaration, who, upon reasonable demand, refuses to take it, shall incur a penalty of not less than $8, or more than $80, which, when recovered, shall be paid over to the corporation. 3 Edw. VII. c. 19, s. 319; 6 Edw. VII. c. 35, s. 30, *redrafted.* 3 & 4 Geo. V. c. 43, s. 244.

Declaration of Qualification, Form 2.—Section 311 (1), now repeated by s. 242 (1), read as follows:—

"Every person elected or appointed under this Act to any office requiring a qualification of property in the incumbent shall, before he takes the declaration of office, or enters upon his duties, make and subscribe a solemn declaration to the effect following: etc."

The taking of the declaration is now only necessary in the cases of members of township councils and trustees of police villages. Members of councils of urban municipalities are. required to take the declaration of

qualification on nomination day or before 9 p.m. on the following day: s. 69 (4). The language of s. 242 (1) is imperative. Members have no right to exercise or discharge the functions pertaining to the office until the declaration is taken. It is an essential prerequisite to the discharge of the duties: R. ex rel. Clancy v. St. Jean, 1881, 46 U. C. R. 77; R. ex rel. Martin v. Watson, 1906, 11 O. L. R. 336. In R. ex rel. Clancy v. Conway, 1881, 46 U. C. R. 85, leave to file an information in the nature of a *quo warranto* was granted on the ground that the respondent was exercising the functions of office without making the declaration of qualification. See also R. ex rel. Morton v. Roberts, 1912, 26 O. L. R. 263, where the respondents had taken declarations to the effect that they had been qualified instead of to the effect that they were qualified at the time of taking the declarations. As they were in fact qualified, Riddell, J., on appeal, gave them leave to make proper declarations within 10 days, in which case their appeals were allowed but without costs, and the same course was followed in R. ex rel. Clancy v. Conway, *supra*.

The legislature has apparently adopted the view of Riddell, J., in R. ex rel. Morton v. Roberts, *supra*, that the property qualification is merely a qualification to be elected and need not be a continuing qualification during the term of office. This result seems to follow from note (*d*) to Form 2. See *supra*, p. 99.

Failure to specify the estate as required by clause 4 of Form 2 has been held not to be a ground for taking proceedings under Part IV.: R. ex rel. Grayson v. Bell, 1 C. L. J. N. S. 130; R. ex rel. Halsted v. Ferris, 6 C. L. J. N. S. 266, and generally a defective declaration is not a good ground on which to base proceedings, unless so defective as not to be a declaration at all.

For penalty for failure to make this declaration, see s. 244.

Declaration of Office, Form 16.—Form 2 is a declaration designed to test the qualification of a person to be elected a member of council.

Form 16, on the other hand, is designed (1) to pledge the person appointed or elected to office to the performance of his duty, and (2) to test his disinterestedness. Failure to make the declaration exposes an offender to the penalty mentioned in s. 244.

The person making a declaration of office becomes upon making it, *de facto* a member of council or officer unless his election was merely colourable: R. v. Chester Corporation, 1856, 35 L. T., 25 L. J. Q. B. 61; R. v. Welshpool Corporation, 1876, 35 L. T. 594, and the office is then full, and a new election cannot be proceeded with until the person in possession has been ousted by the appropriate proceedings by council under s. 152, or by proceedings by a relator under Part IV.: R. v. Beer, [1903] 2 K. B. 693; 72 L. J. K. B. 608.

Duty of Members of Councils to Look After Corporation Business.—By Form 16 a member of council solemnly binds himself to execute the duties of his office. In addition to specific duties mentioned in the Act, such as the duty to vote unless excused, s. 206, there is also an implied duty on every councillor to be present at all meetings of council or the committees thereof to which he has been assigned.

Acceptance or Refusal of Office.—From very early times the refusal to make the declaration of office has been held equivalent to a refusal of office even if the party is incapable of making it: Attorney-General v. Read, 1678, 2 Mod. 299; Starr v. Mayor of Exeter, 1683, 3 Lev. 116, affirming S. C., 2 Show. 158; Rex v. Larwood, 1693, Carthew 306. See review by Riddell, J., in R. ex rel. Morton v. Roberts, 1912, 26 O. L. R. 263. Acceptance of office may expose a disqualified person who afterwards disclaims to costs: s. 184, where will be found a discussion of what amounts to acceptance of office.

Disinterestedness Required from Members of Council.—Interest of certain kinds amounts to a disqualification both to sit and to vote: s. 53, and may be a ground for taking proceedings to unseat a councillor under Part IV. But a member of council may, without coming

within the prohibition of s. 53 and without fault on his part, become interested in such a manner as to come within common law principle that a member of a municipal council is disqualified from voting in proceedings involving his personal or pecuniary interests; and an ordinance or resolution, passed by the concurrence of one or more members so disqualified, is void. See notes to s. 207, where the effect of such an interest on the part of a councillor is discussed. Where an interest not within s. 53 is present, apparently a councillor is not exposed to the loss of his seat, but merely must refrain from voting. The Courts have, from a very early date, looked upon members of councils as trustees and held them to the same high standard of disinterestedness that is required of a trustee in dealing with his *cestuis que trust* or with the trust property. The leading case is Bowes v. Toronto, 1858, 11 Moore's P. C. C. 463. Bowes was a member of a firm of Bowes & Hall, stockbrokers, and at the same time mayor of Toronto. A large amount of city debentures were sold through the instrumentality of Bowes & Hall, and Bowes received £4,100 as his share of the profit. Bowes' relation to and participation in the transaction were discovered and an action was brought to recover the sum received by him.

Judgment was given against Bowes, who appealed.

Lord Justice Knight Bruce, in delivering their Lordships' judgment, said, in part:—

> "This appeal originates in a suit which, in the year 1853, was instituted in the Court of Chancery of Upper Canada, by certain inhabitants of the City of Toronto, on behalf of themselves and all other inhabitants of that city, against Bowes, the appellant here, and Corporation of the City of Toronto, the respondents here. In the course of it, after Bowes had answered, the corporation was, by an order, substituted as plaintiffs for the original plaintiffs, and ceased accordingly to be defendants. Witnesses having been examined on each side, the Court, at the hearing, pronounced a decree in favour of the respondents, which affirmed on appeal in the Court of Error and Appeal of Upper Canada by the opinions of the majority of the Judges, has been brought for final review hither. The appeal has been fully and ably argued before us, on the part of the appellant.
>
> "The object of the suit was to charge the appellant in favour of the corporation of the City of Toronto, the respondents, with the amount of profit made by the appellant, of the firm of Bowes & Hall (of which the appellant was the principal member), by means of the acquisition and subsequent disposal of certain debentures issued by the corporation. The claim was grounded on the connection of the appellant with the corporation, he having been, in the year 1850, one of the aldermen, and throughout the years 1851, 1852 and 1853, the mayor of Toronto, and so a leading member of the corporate body.
>
> . . . .
>
> "The decree deals with the appellant as an agent or a trustee who, while acting in the agency or trusteeship acquired for himself by contract, without the knowledge of the persons for whom he was agent or trustee, an interest in the subject of the agency or trusteeship, and is accordingly incapable of retaining from them the benefit, if any, of the acquisition. And it has scarcely been denied in argument that if the appellant stood in the relation of agent or trustee towards the corporation or inhabitants of Toronto, the decree (subject to the point of Hall's absence) has charged the appellant rightly. The relation, however, was disputed; but as their Lordships think, unsuccessfully. He may not have been agent or trustee within the common meaning or popular acceptance of either term, but he was so substantially, he was so within the reach of every principle of civil jurisprudence, adopted for the purpose of securing, so far as possible, the fidelity of those who are entrusted with the power of acting in the affairs of others. . . .
>
> "The defence has been also, to a great extent, rested on the alleged ground that the appellant did not give wrong advice to the governing body of the corporation, or exercise influence over it in the matter of the debentures; that the governing body would have

acted exactly as it did if the appellant had not been a member of it; that the corporation took altogether a prudent and correct course, and has lost nothing; and that any person not connected with it might honestly, safely and effectually have made the bargain with Hincks and the contractors which the appellant did make. Assuming the alleged facts thus stated to be stated accurately, we conceive that they make no difference. . . .

"The secrecy and disingenuousness with which the appellant conducted himself do not improve his case, especially as, if he had, on the 28th June, disclosed the true state of things to the council, its other members might have taken a different course from that in fact taken by them (a point as to which it can be scarcely necessary to refer, particularly to the evidence of . . .). But we do not say, that had the appellant, on the 28th of June, made a full communication to the council, and nevertheless its members had acted as they did act, that would have prevented the success against him of a suit on behalf of the inhabitants, which in effect and substance this suit still is.

"It has been also argued that the governing body of the corporation was a deliberative body, and on that ground out of the operation of any civil rules or principles applicable to agents and trustees; and the reported cases of Lord Petre v. The Eastern Counties Railway, 1 Railway Cases 462, and Simpson v. Lord Howden, 3 Myl. & Cr. 97, were mentioned; and it was said, that members of the British Legislature often vote in Parliament respecting matters in which they are personally interested, and do so without censure or risk. We are of opinion, however, that neither the governing character nor the deliberative character of the corporation council makes any difference, and that the council was in effect and substance a body of trustees for the inhabitants of Toronto; trustees having a considerable extent of discretion and power, but having also duties to perform, and forbidden to act corruptly. With regard to members of a legislature, properly so called, who vote in support of their private interests; if that ever happens, there may possibly be insurmountable difficulties in the way of the practical application of some acknowledged principles by Courts of civil justice, which Courts, however, are nevertheless bound to apply those principles where they can be applied. The common council of Toronto cannot in any proper sense of the term be deemed a legislative body; nor can it be so treated. The members are merely delegates in and of a provincial town for its local administration. For every purpose at present material, they must be held to be merely private persons having to perform duties, for the proper execution of which they are responsible to powers above them. We agree that the cases of Lord Petre v. The Eastern Counties Railway, and Simpson v. Lord Howden, must at present be viewed as correct expositions of English law, but so viewed, they do not, we conceive, affect the controversy before us.

"The recommendation of the Committee to Her Majesty must be the dismissal of the appeal, with costs."

In Patchell v. Raikes, 1904, 7 O. L. R. 470; 3 O. W. R. 487, which was an action by a ratepayer on behalf of himself and all other ratepayers against the members of the council of the town of Midland and the Canada Furnace Company to compel a refund to the town corporation of a sum which it was alleged had been illegally paid over by the town council to the company, Garrow, J.A., said:—

"That members of municipal councils are to be regarded in many respects as trustees, with a trustee's duties and responsibilities, needs but little citation of authority: Attorney-General v. Compton (1842), 1 Y. & C. C. C. 417; Attorney-General v. Belfast Corporation (1855), 4 Ir. Ch. 119; Attorney-General v. Wilson (1837), 9 Sim. 30; Bowes v. Toronto (1856), 6 Gr. 1, (1858), 11 Moo. P. C. 463. And this must of course be assumed to be known to all parties dealing with such a council.

"As trustees the council could only pay away the trust fund under their control to persons having legal claims to receive it. To pay it to a person having no legal claim was to commit a breach of trust for which both the members of council and the person receiving the money would be responsible to the *cestuis que trust*, the ratepayers. The first question, therefore, in my opinion to be determined is, was the claim to interest made by the company a legal claim, capable of enforcement? To that there can be only one answer and that in the negative.

"The only remaining defence of any importance is that relating to the consequences which ought to follow from the parties having taken the opinion of counsel, and apparently acted upon it. The mere opinion of counsel, however eminent, is in itself no defence to a claim for breach of trust: Boulton v. Beard (1853), 3 DeG. M. & G. 608; In re Knight's Trusts (1859), 27 Beav. 45, at p. 49; although of course a very important circumstance in considering, not whether a stranger to the trust may be allowed to retain the trust money improperly obtained from the trustees, but whether the trustees should themselves be held personally responsible to make good the loss."

On the other hand while the same disinterestedness is required of a member of council as is required on a trustee in connection with the trust estate, the Courts will not exercise a supervision over the operations of council as if they were in fact trustees. Thus in Parsons v. London, 1911, 25 O. L. R. 172, where the plaintiff in a ratepayer's action, sought to restrain the council from selling a portion of a market square to the Royal Bank, Middleton, J., thus discussed the position of councillors as trustees, as follows:

"This particular sale is attacked as having been made by the council, who are said to occupy a fiduciary position, without the observance of the precautions that ought to be taken by trustees.

"Phillips v. City of Belleville (1905), 9 O. L. R. 732, is relied upon as authority for the proposition that 'a municipal corporation occupies, as regards corporate property, the position of a trustee, and is amenable to the like jurisdiction of the Courts as is exercised over trustees generally.' This statement, taken from the head note, is well warranted by the decision of the majority of the Court, and I propose to accept it as an accurate statement of the law. At the same time, I think it proper to say that, if the question had been open, I should have great difficulty in assenting to it. No doubt, the councillors occupy a fiduciary position towards the ratepayers, which will render them liable to account for any secret profit they may make out of municipal business—it was so held in Bowes v. City of Toronto, (1858) 11 Moo. P. C. 463; but, with deference, it seems to me that this falls far short of determining that all the rules of equity with reference to the conduct of trustees can be applied to a municipal council in the exercise of its statutory powers.

"In Bowes v. City of Toronto (at p. 524), it is said: 'The common council of Toronto cannot in any proper sense of the term be deemed a legislative body; nor can it be so treated. The members are merely delegates in and of a provincial town for its local administration. For every purpose at present material, they must be held to be merely private persons having to perform duties, for the proper execution of which they are responsible to powers above them.'

"This was said in 1858. Municipal councils are now recognised as occupying a far more important position. They now have important legislative as well as administrative functions, and the trend of decision is to recognise the supremacy of the council, both in the legislative and administrative field, so long as the act done is within the ambit of its jurisdiction, and not *ultra vires*. If the 'powers above,' to which the municipal council is to answer, are the civil Courts, then the Courts have been steadily abdicating their jurisdiction and declining to sit as an upper chamber of the municipal council,

and to interfere with the action of the people through their elective representatives, unless fraud is shewn. If the council seeks to go beyond the limited authority given by the supreme legislature of the province, it is then the duty of the Courts to confine its action to the limits of the delegated authority; but I can find no warrant in law or in principle for that which is here contended by the plaintiff, that, when the legislature has said that these lands may be sold by the city 'at such price and upon such terms as the council of the corporation may deem expedient,' the Court can add to this, 'provided such sale is by public auction or by tender after due advertisement, and not in a private way, but only after adequate steps have been taken to ensure competition."

And this statement of the law was approved by the D. C.

And again in Norfolk v. Roberts, 1913, 28 O. L. R. 593; 50 S. C. R. 283, which was a ratepayer's action to compel a council to collect a debt, Meredith, C.J.O., in the Appellate Division, said:

> "It is, in my judgment, erroneous to treat either the corporation or its council as trustees for the ratepayers. They are, no doubt, in the sense in which the Sovereign is spoken of as a trustee for the people, trustees for the inhabitants of the municipality; but they are, in my opinion, in no other sense trustees, but a branch of the civil government of the province; and, within the limits of the powers committed to them by the legislature, at all events in the absence of fraud, should be free from interference by the Courts.
>
> "I entirely agree with what was said by Middleton, J., in Parsons v. City of London, 1911, 25 O. L. R. 172, and by the learned Chief Justice of the King's Bench in delivering the judgment of the Divisional Court (1912), ib. 442, as to the powers of municipal councils."

Penalty for Refusing Office or not Making and Filing Declaration.—Knowledge of election or appointment to office is a condition precedent to liability. Under s. 34 of the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50 (Imp.) the liability arises only "after notice of election," and it has become a custom for the town clerk to serve on each person elected a notice of his election. In R. v. Preece, 1843, 5 Q. B. 94; 12 L. J. Q. B. 335, it was held that the notice must be either by being present at the election or by official notification. The declarations made by the returning officer or the clerk under s. 68 (3), 69 (7), s. 126 or s. 129 (8), would not of themselves be sufficient to warrant a finding that a person elected knew of his election.

As to method of recovery, see Part XXII.

Who may Administer Declarations. Nature of the Declarations.—Sub-section 3*a* of s. 129 of the Consolidated Municipal Act, 1903, as amended by 4 Ed. VII. c. 22, s. 4 (now s. 69 (4), required a statutory declaration to be taken. Sections 311, 312, 313, 314 of the Municipal Act, R. S. O. 1897, c. 223 (now s. 242), as amended required solemn declarations to be taken. The Act now simply calls for a declaration. The question was raised in R. ex rel. Cavers v. Kelly, 1906, 7 O. W. R. 600, as to whether or not a statutory declaration meant a declaration under s. 36, c. 145 R. S. C., but the case merely decided that under 315, which provided that certain declarations should be made before some Court, Judge, Police Magistrate or Justice of the Peace, a declaration might be taken before a commissioner for taking affidavits. In R. ex rel. Milligan v. Harrison, 1908, 16 O. L. R. 475, Meredith, C.J., expressed the view that the words "statutory declaration" might be treated as an inartistic mode of describing the declaration for which the sub-section provides, and he held that the declaration authorized by s.-s. (3*a*) *supra* might be taken before a commissioner for taking affidavits, though apparently he thought the declarations directed by s. 315, *supra*, could only be taken before the officers therein mentioned. These difficulties are now removed by the recasting of ss. 242 and 243. The latter section now expressly recognizes that the declarations can be taken before any person authorized by law to

administer an oath and the Commissioners for taking Affidavits Act, R. S. O. 1914, c. 77, s. 10 provides:

> "Every Commissioner shall have power to take declarations in all cases in which declarations may be taken, or may be required under any Act in force in Ontario."

In R. ex rel. O'Shea v. Letherby, 1908, 16 O. L. R. 581, the Master held a declaration taken before the town clerk insufficient, but now he is named in s. 243.

Declaration of Election Officials, Form 17, see s. 102.

Declaration of Auditor, Form 18, see s. 232.

Election or Appointment of One Person to Two Incompatible Offices.—Under the Winnipeg charter where only one-half of the aldermen are elected annually, the term of office being two years, it is possible for an alderman before his term is up and without resigning his seat as alderman, to be elected mayor. A similar situation may arise under the Imperial Act, when a councillor is elected an alderman or an alderman a councillor, or a councillor is elected in more than one ward. The latter case is expressly provided for by s. 68, but the former is provided for by s. 14 (4), which enacts that if a councillor is elected to and accepts the office of alderman, he vacates his office of councillor. But the case where an alderman is elected councillor is unprovided for. This situation was considered by the Court of Appeal in R. v. Bangor, 1886, 18 Q. B. D. 349; 56 L. J. Q. B. 326, where it was held that he vacated his seat as alderman on accepting his new office. Lord Esher thus dealt with the situation:—

> "It is clear that there is no express provision, either in the Municipal Corporations Act or any other statute, that an alderman cannot be elected a town councillor; but it is suggested that there is a necessary implication to that effect. I shall deal with that presently. It is, however, said that the two offices cannot be held at the same time by the same person. That seems to me to be true. The two offices are incompatible—that is to say, it is impossible to suppose that the legislature would allow the same person to hold both at the same time. Now a long series of decisions upheld and enunciated the position that where two offices are incompatible a man is not prevented from being a candidate for one of the offices merely because he holds the other, whether it be superior in rank or power or not. But the way in which these cases say the principle acts is, that the man on being elected and on accepting the second office thereupon vacates the first, and can properly be said to have been legally elected to the second."

The question arises as to the liability of such a person to pay a fine in case he declines to accept the second office. Lord Esher in R. v. Bangor, *supra*, assumed that he would be liable under the provisions of the Imperial Act.

Salaries, Tenure of Office and Gratuities.

245.—(1) When the remuneration of any officer of a corporation is not fixed by law, the council shall fix it.

(2) The council shall give to the clerk, for services and duties performed by him, under the Ditches and Watercourses Act, a fair and reasonable remuneration, to be fixed by the council.

(3) The council shall fix the sum to be paid to the clerk by any person for copies of awards or other documents, or for any other services rendered by him, other than such as it is his duty to perform under that Act.

(4) Where an appointment to an office or an arrangement for the discharge of the duties of an office is to be made, the council shall not invite or require applicants to name a sum for which they will discharge the duties of the office, or give the appointment to, or make the arrangement with, the person who offers to perform the duties at the lowest salary or remuneration.

(5) Notwithstanding that a corporation employs a solicitor or a counsel whose remuneration is wholly or partly paid by salary, annual or otherwise, the corporation shall have the right to recover and collect lawful costs in all actions and proceedings, in the same manner as if the solicitor or counsel was not so remunerated, if the costs are, by the terms of his employment, payable to the solicitor or counsel as part of his remuneration in addition to his salary. 3 Edw. VII. c. 19, s. 320, *redrafted.* 3 & 4 Geo. V. c. 43, s. 245 (1-5).

246. All officers appointed by a council shall hold office during the pleasure of the council, and shall, in addition to the duties assigned to them by this Act, perform all other duties required of them by any other Act, or by by-law of the council. 3 Edw. VII. c. 19, s. 321, *amended.* 3 & 4 Geo. V. c. 43, s. 246.

247. A council may grant to any officer who has been in the service of the corporation for at least twenty years and who, while in such service, has become incapable, through illness or old age, of efficiently discharging the duties of his office, a sum not exceeding the aggregate of his salary or other remuneration for the next preceding three years of his service, as a gratuity upon his ceasing to hold the office. 3 Edw. VII. c. 19, s. 322, *amended.* 3 & 4 Geo. V. c. 43, s. 247.

[*Note.—This section has been amended to cover illness as well as old age. It has also been suggested that*

the council should have such a power where an officer retires from any cause after twenty years of service.]

[*Note.—S. 323, allowing municipalities to accept the bonds of guarantee companies to ensure the integrity of officials, struck out, as covered by 9 Edw. VII. c. 67.*]

Salaries fixed by Statute.—Where a salary is fixed by statute, it is unlawful for a corporation to enter into an agreement with the holder of the office that he is to take less than the statutory salary. Carlyle v. Oxford, 1914, 30 O. L. R. 413 App. Div., following Liverpool v. Wright, 1859, 28 L. J. Ch. 868, where an agreement of the kind was held void on two grounds: (1) because a person accepting an office of trust can make no bargain in respect of that office; and (2) because the law presumes that all the fees are required for the purpose of enabling him to uphold the dignity and perform properly the duties of his office.

Costs of Municipality where Salaried Solicitor is Employed.—The costs awarded to a party to a law-suit are paid to him by way of indemnity only, and under the common law, a plaintiff who has a verbal agreement with his solicitor to pay no costs, cannot recover any from the defendant. Harold v. Smith, 1860, L. J. Exc. 141, 5 H. & N. 381, approved. Gundry v. Sainsbury, 1910, 1 K. B. 645; 79 L. J. K. B. 713 C. A.

Written agreements are within the Solicitor's Act, 1870, 33 & 34 Vict., c. 28, ss. 4 & 5 (Imp.). Under the above Act, it has been held in England that a solicitor can be remunerated by salary, and the client nevertheless recover costs from his opponent. Galloway v. London, 1887, L. R. 4 Eq. 90; 36 L. J. Ch. 978, unless it can be shewn that the costs would exceed the amount of salary. Henderson v. Merthyr Tydfel, 1900, 1 Q. B. 434; 69 L. J. Q. B. 335.

In Ontario, s. 245 (5) *supra*, applies. See also s. 71 of the Solicitor's Act, R. S. O. 1914, c. 159. The provisions of s.-s. (5) that the costs can be recovered if by the terms of the agreement they are payable to the solicitor as part of his remuneration in addition to his salary were added by 44 Vict. c. 24, s. 5, after the decision in Stevenson v. Kingston, 1880, 31 C. P. 333, affirming Jarvis v. Great Western, 1859, 8 C. P. 280. The latter cases state the law where the solicitor is employed on salary only. Both of these cases were considered and approved by the Court of Appeal in Meriden v. Braden, 1896, 17 P. R. 77, and a motion for leave to appeal for the purpose of opening a discussion with a view to the adoption of the rule of the English cases, was refused by Moss, J.A., in Ottawa Gas v. Ottawa, 1902, 5 O. L. R. 246.

In the same case, 4 O. L. R. 656, following Jarvis v. Great Western, *supra*, the Divisional Court disallowed all costs to the corporation where their solicitor by arrangement was to receive a salary of $1,800 per year, for all services including the costs of litigation in which he was engaged, notwithstanding the fact that after the action was dismissed with costs and before the bill was rendered, the corporation by by-law provided that all costs payable to the corporation in any suit should be paid to the city solicitor as part of his remuneration, in addition to his salary, setting aside the ruling of Street, J., that the corporation was entitled to the benefit of the rule in s. 245 (5).

The Winnipeg Charter, s. 484, provides that the city may recover costs, notwithstanding the employment of solicitors or counsel by salary, whether or not the costs are payable as remuneration in addition to salary.

Where solicitor of municipal corporation defends action brought against Local Board of Health with the result that action is dismissed with costs, the Local Board of Health is entitled to costs, although it is under no liability to the solicitor or the municipal corporation. Simpson v. Local Board

of Health of Belleville, 1917, 41 O. L. R. 320, applying R. v. Canterbury, 1903, 1 K. B. 289, distinguishing Jarvis v. Great Western R. W. Co., 1859, U. C. C. P. 280.

No costs can be recovered where a solicitor is paid by an annual salary: Jarvis v. Great Western, *supra;* Stevenson v. Kingston, 1880, 31 U. C. C. P. 333; Ottawa Gas Co. v. City of Ottawa, 1902, 4 O. L. R. 656, 5 O. L. R. 246; Ponton v. City of Winnipeg, 1909, 41 S. C. R. 366. The Municipal Act, s. 245 (5) gets over the difficulty as to payment by salary.

In Stephens v. Calgary, 1909, 12 W. L. R. 379, the by-law of the city provided that the city solicitor should receive a salary in lieu of all costs and that all costs taxed in favour of the city should form part of the general revenue thereof. The Taxing Officer disallowed every item of costs except actual out-of-pocket disbursements. Notwithstanding the absence of a provision in the Legal Profession Act, corresponding to s. 5 of the English Solicitor's Act, 1870, the Court followed Henderson v. Merthyr Tydfel, *supra*, and confirmed the ruling.

Employment of Solicitor should be by By-law.—In Manning v. Winnipeg, 1911, 21 M. R. 203, the Court of Appeal for Manitoba held that the employment of a solicitor must be by by-law in view of the imperative provisions of s. 472 of the city charter, that the powers of the council should be exercised by by-law, following Hunt v. Wimbledon, 1878, 4 C. P. D. 48; Young v. Leamington, 1883, 8 A. C. 517 H. L.; 52 L. J. Q. B. 713, and distinguishing Lawford v. Billericay, 1903, 1 K. B. 772 C. A., holding also that acceptance of the work would not avail unless by by-law, and commenting unfavourably on Macartney v. Haldimand, 1905, 10 O. L. R. 666, and East Gwillimbury v. King, 1910, 20 O. L. R. 510 C. A. See title Contracts.

Mandamus to Municipal Officers.—Where the act to be done is a corporate function, the mandamus must be directed to the corporation—when the duty appertains to the officer of the corporation in his official capacity, then the mandamus must be to the officer himself. This distinction kept in mind reconciles the cases. Middleton, J., in Re Bolton v. Wentworth, 1911, 23 O. L. R. 394; 18 O. W. R. 795; 2 O. W. N. 827. See also Rodd v. Essex, 1910, 44 S. C. R. 137; 19 O. L. R. 659.

Distinction Between Officers and Mere Employees.—Section 154 of Ordinance No. 33 of 1893 N. W. T. provided:

> "The duties of all officers of the city shall be as provided in this Ordinance, and, in addition thereto, as provided in by-law appointing same, but nothing contained in any by-law, rule, order, or resolution shall be held to detract from or lessen the obligation to perform the duties herein provided."

And a by-law of the City of Calgary provided that:

> "All officers appointed by the council shall be deemed to hold their respective offices during pleasure, unless otherwise provided by Ordinance or by-law, and office hours, except for the mayor, city solicitor, and auditors, shall be," etc.

A city engineer who claimed he had been employed for a term was dismissed before the end of the term, and brought action against the city. It was contended by the city that the by-law applied to him. The full Court, per Beck, J., in confirming judgment in favour of the engineer, said:

> "I think, however, that it is sufficient to say that a city engineer is not an 'officer' of the city. The distinction between an officer and a mere employee is fully recognized, though it is not always easy to draw the line between the two: Dillon on Municipal Corporations, s. 232; Smith on Municipal Corporations, s. 155; Bouvier's Law Dictionary, tit. 'Officer,' Re Great Wheat Palgooth Co., 53 L. J. Ch. 42; Re Great Western Coal Co., 55 L. J. Ch. 494. The word 'official' seems to be used in the Ordinance in the popular sense, justified by the standard dictionaries, to include all persons in the

service of the municipality, whether officers or mere employees. The Ordinance contemplates the existence of a city clerk and a treasurer, and in various sections their duties and powers are defined. There is express provision, as I have pointed out, for the appointment of an assessor, and his duties and powers are also defined. There are officers who exercise from time to time powers which, as the necessary incidents of their office, are the acts of the corporation, and these acts are primarily, and for the most part, of an executive and coercive or quasi-coercive character, and are binding upon and affect the rights of the inhabitants and ratepayers of the municipality.

"The city engineer is not an officer in any such sense, and, in my opinion, no more an officer than any subordinate clerk employed to do merely clerical work. He is, like them, a mere employee—a servant engaged by contract; whether to do one particular work or to do all the work which may arise during an extended period of time requiring the services of a civil engineer, does not change his position in that regard.

"My conclusion, therefore, is that, though the plaintiff may have been an 'official,' as that word is used in the Ordinance, he was not an 'officer,' and it is the latter, not the former word, which is used in the by-law. Having regard to the nature of the duties presumably falling to a city engineer, requiring, as they would, his absence from his office during a large part of his time, it seems to me to afford a further reason why it could not have been the intention that the terms of the by-law should apply to that official."

Speakman v. Calgary (1908), 1 A. L. R. 454; 9 W. L. R. 264.

All Appointed Officers Hold Office During the Pleasure of the Council.—Section 321 formerly read "Shall hold office until removed by the council." The amendment makes applicable the English decisions under many Acts which provide that officers shall hold office during the pleasure of the council or other appointing authority. For example, Hayman v. The Governing Body of Rugby School, 1874, L. R. 18 (Eq.) 28; 43 L. J. Ch. 834, where the governing body which had power under s. 13 of the Public Schools Act, 1868, to dismiss the headmaster of the school at their pleasure, and did dismiss the headmaster without assigning reasons, held that they were able to dismiss without notice and without reasons being assigned. It was contended by the plaintiff that notwithstanding the foregoing construction of the Act that the Court will control the proceedings of such bodies whenever it is satisfied that their powers have been exercised corruptly, unjustly or for the purpose of effecting some collateral object. It was held that governing bodies will always be presumed to have fairly and honestly exercised their powers until the contrary is shewn, and that the burden of shewing the contrary lies on those who object to the manner in which the power has been exercised, and that no reasons need be given, but, if reasons are given, the Court will look at their sufficiency. Among the earlier cases considered in Hayman v. Rugby, *supra*, were the following: Doe v. Haddon, 3 Douglas 310, where a corrupt motive in one of the governing body was held to vitiate the whole proceedings; The King v. Campion, 1890, 55 J. P. 21, and 1 Sid. 14; Dummer v. Chippenham, 14 Ves. 245; in Re Fremington School, 10 Jurist 512, 11 Jurist 421, where because three members of the governing body had expressed in writing, their belief in the guilt of the officer before they went into the inquiry, an injunction was granted restraining the resolution from being carried into effect by giving liberty to reconsider the matter, and upon the same conclusion being reached again the Court refused to interfere.

As the council is acting judicially in dealing with proposed dismissals, the least pecuniary interest on the part of any member will be fatal to any action in which he participates. Hayman v. Rugby, *supra*, following R. v. The Justice of Hertfordshire, 6 Q. B. 753.

In *ex parte* Richards, 1878, 3 Q. B. D. 368, 47 L. J. Q. B. 498, a local Board of Health, which had power under s. 37 of the Public Health Act, 1848, to appoint officers and remove them at pleasure, dismissed a clerk who applied for a rule for a *quo warranto*, which was refused on

the ground that a person holding office at pleasure is not in the discretion of the Court by assisting in promoting what is obviously a vexatious proceeding. In the same case it was held that a resolution to dismiss is not to be considered as a rescission of the old resolution under which an officer was appointed, but as a new resolution in itself, so that rules of procedure having reference to re-consideration have no application in such a case. See also Wood v. Eastham, 1907, 71 J. P. 128 C. A.

Vernon v. Smith's Falls, 1892, 21 O. R. 331, was a case under s. 445 of the Municipal Act, R. S. O. 1887, c. 184, which provided that offices should be held during the pleasure of the council. The council dismissed an officer who had been employed for a year by by-law, without giving any reasons; the resolution merely stating that his services were not wanted, and it was contended on behalf of the officer that the council had exercised their pleasure under the section when making the appointment for one year. Meredith, J., considered this contention too palpably erroneous to call for any observation, and following the rule laid down in Hayman v. Rugby, *supra*, he adopted with approval the observations of Armour, J., in Willson v. York, 1881, 46 U. C. R. 299, as follows:—

> "The effect of this is, that all such officers hold their offices during the pleasure of the council, and may be removed by the council at any time without any notice of such intended removal, and without any cause being shewn for such removal, and without the council thereby incurring any liability to such officers for such removal.
>
> "There is no hardship in this, for such officers accept their offices upon these terms; and were it otherwise, councils might be greatly embarrassed in the transaction of their public duties by the forwardness of an officer whom they would have no means of immediately removing without subjecting themselves to the liability of an action."

The dismissal was by resolution and not by by-law and this was held to be sufficient.

See also Hellems v. St. Catharines, 1894, 25 O. R. 583.

Gratuities under S. 247.—A gratuity to employees in the case of joint stock companies can be given without express powers. Hampson v. Price's Candle Co., 1876, 45 L. J. Ch. 437; Hatton v. West Cork, 1883, 23 C. D. 654; 52 L. J. Ch. 689, and the rule would probably apply to municipal corporations, but a gratuity on removal or resignation would require express authority. As to pensions, see *infra*.

The council has a discretion to act or not which cannot be reviewed when properly exercised. See R. v. Stepney Borough Council, 1902, 1 K. B. 317; 71 L. J. K. B. 238.

Councillors' Salaries.—Municipal councillors cannot vote salaries to themselves unless expressly authorized by statute. Amherst v. Read, 40 N. S. R. 154. See s. 424.

Attachment of Salaries of Municipal Servants and Constables Paid by the Corporation, etc.:—

> "The case of Wilson v. Fleming (1901), 1 O. L. R. 599, seems to shew that salaries of the city officials can never be successfully attached unless they are held over for at least one day, and no cheques are delivered until then. If any one, to save himself annoyance, deliberately pays in advance, the creditor is helpless. If this could not be done the master would be obliged to dismiss the servant, who would starve unless he left the country."

In Fallis v. Wilson an order attaching all debts due by a police constable was served on the Treasurer of Toronto. The Master held that his wages were attached, saying:—

> "It was contended that a policeman is not a servant or officer of the city, and so the attaching order was not properly served on the Treasurer.
>
> "The first branch of this proposition is distinctly affirmed by 3 Edw. VII., c. 19, ss. 488-491 (O.), and the judgment of the Chancellor in Kelly v. Barton (1895), 26 O. R. 608, at p. 623 (affirmed

in Court of Appeal on 28th November, 1895, not reported). But s. 492 provides that the city council shall appropriate and pay such remuneration for and to the respective members of the force, as may be required by the Police Commissioners. It seems, therefore, that the treasurer was the proper person to serve; for, as said by Lord Coleridge, C.J., in Booth v. Trail (1883), 12 Q. B. D. 8, at p. 10, in a similar case: 'When there is a statutory obligation to pay money, and no other remedy is expressly given, there would be a remedy by action. It is clear that, there being a statutory obligation, and the corporation having the funds to meet it, the corporation could in some way or other be compelled to pay.' I, therefore, think this objection fails."
See notes to s. 357.

INVESTIGATION OF CHARGES OF MALFEASANCE, ETC., OR JUDICIAL INQUIRY IN RELATION TO MUNICIPAL MATTERS.

248.—(1) Where the council of a municipality passes a resolution requesting a Judge of the County or District Court of the county or district in which the municipality is situate to investigate any matter relating to a supposed malfeasance, or breach of trust, or other misconduct on the part of a member of the council, or an officer, or a servant of the corporation, or of any person having a contract with it, in regard to the duties or obligations of the member, officer, servant, or other person, to the corporation, or to inquire into or concerning any matter connected with the good government of the municipality, or the conduct of any part of its public business, the Judge shall make the inquiry, and shall for that purpose have all the powers which may be conferred upon Commissioners under the Public Inquiries Act, and he shall, with all convenient speed, report to the council the result of the inquiry and the evidence taken.

(2) The Judge shall be paid by the corporation the same fees as he would be entitled to if the inquiry had been made by him as a referee under the Judicature Act.

(3) The council may engage and pay counsel to represent the corporation, and may pay all proper witness fees to persons summoned to give evidence at the instance of the corporation, and any person charged with malfeasance, breach of trust, or other misconduct, or whose conduct is called in question on such investigation or inquiry, may be represented by counsel. 3 Edw. VII. c. 19, s. 324, *amended;* 2 Geo. V. c. 40, s. 2. 3 & 4 Geo. V. c. 43, s. 248 (1-3).

Jurisdiction of Commissioner under s. 248.—In Re Godson and Toronto, 1888, 16 O. R. 275, 16 A. R. 452, 18 S. C. R. 36, the council of the city of Toronto passed a resolution reciting that an inspector, Lackie, had been alleged to be guilty of certain misfeasance and breach of trust in making false measurements and giving false certificates as to quality, and permitting Godson, a contractor, to furnish inferior material to the corporation, and directing a County Judge to investigate generally the relations which may have existed between Lackie and any contractors, and then after reciting generally the unsatisfactory condition of the inspection department of the city, the resolution directed a general investigation into every matter and thing connected with the present or past relations which may have existed between the city contractors, officials and other persons who were or had been connected with the corporation and generally to investigate and report upon the whole system of tendering, awarding, carrying out, fulfilling and inspecting contracts. Counsel for Godson asked the County Judge for an order directing particulars of specific charges to be furnished. This was refused, and counsel withdrew. Godson moved for a writ of prohibition, which was granted by Robertson, J. The Court of Appeal set aside this writ of prohibition. Osler, J.A., said:—

> "He is merely *persona designata* to conduct an inquiry, and apart from the fact that he has been selected by the assembly as a person who, from his training and position, is likely to conduct it in a judicial spirit, it is a mere accident that it is not being conducted by an alderman or committee of the council, or any one else who is not a Judge. His proceedings can legally affect no one either in purse or person. He is not acting or assuming to act in a judicial capacity in taking the evidence or in making his report, and he can impose no obligation on anybody beyond that of appearing to give evidence.
>
> "If he goes beyond his authority, that is his own concern. It must be inquired into and answered in another way; the Court cannot interfere by prohibition, which is the mode of proceeding to which my observations are confined.
>
> "The limits of that jurisdiction have been much discussed of late years, and the principles on which the Court acts are, I think, well settled. I had occasion to consider them recently in the case of The Bell Telephone Co., 1884, 7 O. R. 605.
>
> "Of the numerous authorities which might be cited it is, I think, sufficient to refer to two: Regina v. Hastings, 6 B. & S. 401; Regina v. Local Government Board, 10 Q. B. D. 309.
>
> "Other points were argued in the case, into the discussion of which I do not enter, as the only one which can be said to invite decision is whether prohibition lies. I must add, however, that the appeal appears to me to be entirely gratuitous, the scope of the inquiry having been enlarged by the city council since the judgment in such a way as to preclude all possible objection on the part of the applicant for the writ; with those rights alone we are concerned."

In Lane v. Toronto, 1904, 7 O. L. R. 423, the council passed a resolution that in the interests of good government the Judge of the County Court be requested to investigate the election of members of council and Board of Education, and the conduct of officials and other persons in connection with the election. A motion was made by the plaintiff, a ratepayer, for an interim injunction in an action brought against the city and the Judge to restrain them from proceeding with the inquiry on the ground that s. 324 (now s. 248 redrafted) was not broad enough to cover an inquiry into an election. Britton, J., said:—

> "The resolution was not well drawn, but such as it is, it, in my opinion, gives to the County Judge, as *persona designata*, authority and jurisdiction to inquire into 'the election for members of the Toronto city council and board of education held on January 1st, 1904,' and to report to the council the result of the inquiry and the evidence taken thereon. As the County Judge has jurisdiction, it is not for this Court, at the instance even of a ratepayer, who sues only *qua* ratepayer, to say how, in every respect and as to details, the jurisdiction shall be exercised. It will be for the Judge to say, within

limitations, which I cannot on a motion for injunction, in advance, define, what he will admit as evidence. If witnesses do not complain, or if they do not take steps to protect themselves if illegally or improperly treated, it is not open to some one else merely on his own behalf to step in and stop a legitimate inquiry, because some alleged wrong either in the admission or rejection of evidence, or in going beyond the scope of the commission on the part of the Judge or counsel in conducting the inquiry.

"If I am right in holding that the city council could legally authorize such an inquiry as was intended by their resolution, and as is now proceeding, then the case of In re Godson and City of Toronto, 16 A. R. 452; and 18 S. C. R. 36, is entirely in point, and there is just as much reason for refusing an injunction now, as there was for refusing prohibition then.

"Possibly, in view of that case, which seems to cover the whole ground, it would have saved trouble and expense if the resolution of the council had more precisely defined the particular matter to be investigated.

"It was urged with great force by counsel for the plaintiff that the defendants should be restrained from making an examination of the ballot papers relating to the last municipal election.

"I do not know what power the County Judge has under his commission from the city council to order any inspection of these ballots.

"Inspection of the ballots is provided for by s. 189 of the Municipal Act. It may be had under the order of a Court or Judge of competent jurisdiction, upon satisfactory evidence on oath that the inspection or production of the ballot papers is required for the purpose of maintaining a prosecution for an offence in relation thereto, or for the purpose of taking proceedings under the Municipal Act in contesting an election or return.

"This investigation and inquiry is not for the purpose of maintaining a prosecution for an offence in relation to the ballot papers, although such a prosecution may result from or follow the inquiry. If an examination of the ballot papers is properly had, what is found may be told upon this inquiry.

"It was also just as strongly urged that the defendant, the County Judge, should be restrained from compelling witnesses to answer questions that could tend to criminate such witnesses. It was stated in argument that the learned County Judge holds that s. 255 (now s. 191) of the Municipal Act applies to the investigation under consideration, and that no witness can be excused from answering, although the evidence of such witness might tend to criminate him. Assuming this to be so and that the Judge and the counsel for the city are wrong in supposing that s. 255 (now s. 191) applies to this investigation, I do not think that a reason for granting an injunction at the instance of the plaintiff herein. As to that part of the proceedings upon the inquiry, the plaintiff is not affected—and is in no way interested except to the extent only of the additional cost of the inquiry occasioned by its being extended into what is unauthorized.

"When there is jurisdiction to make an investigation, I cannot find any authority for the contention that this Court should watch every step, and either prescribe rules in advance as to the line upon which the inquiry should proceed, or stop it when something is done contrary to law, although the persons most interested are not before the Court complaining or objecting. It is not for this Court, at this stage and on this motion, to say what evidence shall be admitted or how witnesses shall be examined or otherwise dealt with. Witnesses have their rights as well as counsel, and means can be taken for their protection if their rights are invaded. I simply decide that the objections raised are not, in my opinion, sufficient to justify restraining the defendants from proceeding. As I look upon the matter, it is my duty to give effect in the largest way possible to the provision of s. 324, which enactment was intended to enable the council to ascertain what, if anything, affects the good government of the city, and what, if

anything, is wrong in the conduct of the public business of the city, with a view to removing what is evil and preventing a recurrence of it, and promoting what is good."

The next case is Chambers v. Winchester, 1907, 15 O. L. R. 316, where an action was brought against the Judge of the County Court, asking for an injunction to restrain him from acting as a *persona designata*, and for his removal and the appointment of an unbiassed commissioner. Boyd, C., in dismissing an application for an interim injunction, said:—

"An injunction is now asked based upon a writ issued in the High Court to restrain the County Judge, as such commissioner, from proceeding with the inquiry in a private manner with closed doors, as in camera, and from proceeding first to examine the said parks commissioner, who is the plaintiff in this action, and is a party to the inquiry. An opinion being expressed by Meredith, C.J., at an earlier stage of this action, that the proceedings should be conducted in public, I understand that the County Judge has expressed his willingness to conform himself to that method of procedure, so that nothing more needs be said on that branch of the motion, except that I quite agree that in matters of public interest, such as this, where misconduct is alleged, it is expedient to have the inquiry conducted as in open Court. The procedure of the Court is impliedly recognized as the normal method of examining the witnesses and parties, though I do not say but that in exceptional cases the commissioner will exercise a wise discretion in excluding witnesses (while one is being examined), or in excluding the general public where the disclosures are of a nature unfit for publication; but evidence should not be taken behind the back of the person chiefly interested. The general rule as to the ordering of business is that the commissioner has the absolute power of regulating the proceedings of his own tribunal, so long as he keeps within his jurisdiction: Todd's Parliamentary Government, 2nd ed., vol. 2, p. 445. . . .

"Lastly, the Court is asked to remove the County Judge, and appoint an 'unbiassed, impartial commissioner,' as the Judge (now made defendant) cannot now make the investigation 'in a judicial spirit.' The status of the County Judge in the discharge of these functions is defined in the Godson case. His duties are to take evidence and to return the evidence with a report of the result of his inquiries, to the council, by whose action he was appointed. His report may supply information and material upon which the council may decide to take action, but any such action is wholly within their discretion. He has no power to pronounce judgment imposing liability on anybody; he merely makes preliminary inquiries, gathering together and presenting in compact form such information as will enable the council to deal with the whole matter as they shall be advised. All he has to do, as the outcome of his commission, is to report to the council the result of the inquiry and the evidence taken thereon. It is the evidence taken which governs, and that speaks for itself. The commissioner tries nothing and decides nothing. He is not a judicial officer.

"The affidavit of the plaintiff complains of the commissioner having asked for complaints to be sent, and having received letters relating to the parks department, and makes suggestions of improper motives and prejudiced action on the part of the commissioner. Mere suspicion of bias and inference, or conjecture that wrong will be done in the result of the investigation, is the utmost that can be drawn from the affidavit.

"Now, regard what the commissioner may do in entering upon this and like investigations without being blameworthy in any culpable sense. It is not beyond the competence of the commissioner himself to initiate proceedings to procure papers, books and documents which are likely to further his investigations; nor is it beyond his competence to invite communications to be sent in by persons who are willing to assist in the inquiry; it is also within his powers, though it may not be a discreet course, to confer with possible witnesses, with a *bona fide* view of ascertaining what they know, and

whether it will be worth while to have them duly subpoenaed. So long as *ex parte* affidavits are not procured from such persons, the commissioner may take (or preferably direct to be taken) such steps in the way of collecting evidence as are permissible in the case of solicitors preparing for trial. But, of course, such communications do not become evidence till the deponent speaks openly under the sanction of an oath and under liability to be forthwith cross-examined. Whatever *ex parte* information has been or may be obtained, I cannot suppose that the commissioner will act upon it or return it as evidence in his report. Much less can I assume that he is being actuated by any partisan spirit, however zealously he may seek to gain light from every available quarter to guide him in giving permanent shape to all the relevant facts. I deprecate the making of affidavits impugning the integrity of an officer designated by the Legislature, and accepted by the municipality as statutory commissioner, upon such slender grounds as are here alleged. Aspersions of this serious kind are easy to frame upon 'information and belief,' but they should not be listened to for a moment when the function of the commissioner is merely to collect and report materials for the subsequent consideration or action of the city council. The commissioner is not *pro hac vice* a judicial person—he decides nothing affecting the legal rights of the plaintiff, and he is not, therefore, within the ambit of judicial, quasi-judicial, or administrative officers, who become disqualified by interest or bias: Regina v. London County Council, Re The Empire Theatre (1865), 71 L. T. 638.

"Even were a plain case clearly established of unfair dealing, that would not, in my opinion, suffice to attract the jurisdiction of this Court. By analogy to proceedings in the case of a Royal Commission (as distinguished from a statutory), the application for redress where, for any sufficient reason, the commissioner becomes unworthy of confidence, should be directed to the appointing power, which, in this instance, is the municipal council. That body may, if it pleases, in a proper case, suspend or dissolve the resolution under which the present commissioner acts: See Todd, Parliamentary Government, 2nd ed., vol. 2, p. 441.

"I refuse the application for an injunction with costs. I have a very strong opinion that the plaintiff has no *locus standi*, because the Court is without jurisdiction, but upon an interlocutory examination I do not dismiss the action."

"In Re Berlin and the Judge of the County Court of Waterloo, 1914, 33 O. L. R. 73, the council of the city of Berlin passed a resolution requesting the Judge of the County Court to investigate certain charges of misconduct and lack of harmony in the city police force. The Judge refused to proceed with the inquiry on the ground that there was no jurisdiction to do so. Middleton, J., refused a mandamus directing him to proceed, saying:—

"I think the learned Judge is right in the position which he takes. The words which I have quoted from s. 248 are undoubtedly very wide. Practically everything in one way or another concerns the good government of the municipality, and some limitation must necessarily be found to the wide terms used. Similar wide expressions are found in s. 250: 'Every council may pass such by-laws and make such regulations for the health, safety, morality, and welfare of the inhabitants of the municipality . . . as may be deemed expedient.' No one supposes that this general provision confers unlimited jurisdiction upon the municipal council; yet it might well be argued that all laws dealing with every possible topic are presumed to be passed in the interest of the health, safety, morality, and welfare of the inhabitants.

"A somewhat similar problem has recently been faced in Australia, in the case of Colonial Sugar Refining Co. Limited v. Attorney-General for the Commonwealth of Australia, 1912, 15 Commonwealth L. R. 182; Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co. Limited, 1913, 17 Commonwealth L. R. 644, and [1914] A. C. 237. There, an Act had been passed authorizing inquiry

of the widest possible nature, and a commission had been issued directing an inquiry into the sugar industry. One of the industries to be investigated attacked the Act, and brought action claiming a declaration of the validity of the Act and an injunction to restrain the investigation contemplated. It was admitted that the investigation was concerning a matter over which the legislative body had no jurisdiction under the constitution as it stood; but it was said that the inquiry concerned the good government and welfare of the community, and that what was sought was material upon which to base proceedings looking towards an amendment of the constitution. The Privy Council held that the Act was *ultra vires*, and that the Legislature had no authority to direct an inquiry with reference to a matter outside of some actually existing power possessed by the Legislature, either under the constituting statute or at common law; and that, therefore, there was no power to direct a general inquiry — more particularly an inquiry into matters which had been excepted from the jurisdiction of that particular legislative body.

"This principle appears to me to be entirely applicable here. In our scheme of municipal government some matters concerning the welfare of the inhabitants are taken from the jurisdiction of the municipal council and vested in other legislative and administrative bodies. School affairs are entrusted to school boards and boards of education; certain public utilities are placed in charge of boards specially constituted; and the affairs relating to the police force are placed in the hands of Police Commissioners. I do not think it is competent for the municipal council to direct an inquiry before the County Judge into the matters entrusted to these independent bodies. Within the limits of the jurisdiction conferred upon these bodies they are supreme and in no sense subordinate to the municipal council. This has been demonstrated in a series of cases in which the municipal council has undertaken to review the action of school boards.

"The unseemly results, if this is not so, are quite apparent upon most superficial consideration of the situation. The Board of Police Commissioners, consisting of the mayor, the police magistrate, and one of the County Judges, has considered and dealt with the very matters now to be inquired into. The council now suggest that the whole matter be reviewed by the other County Judge. The Police Commissioners have the authority to act, and no doubt have acted, in accordance with their views. The County Judge who is asked to investigate has no power to take any action upon the evidence brought before him. His only function is to report to the municipal council. The municipal council, then, has no power to act, for the matters in question are not within its jurisdiction, but under the charge of the Police Commission. If there is the right to have the inquiry, the inquiry might just as well be directed to take place before the County Judge who is himself a member of the Police Commission. In many counties this must be so, because there is only one Judge in the county; and, speaking generally, the Senior Judge is the member of the Board; and the council, if it has the power, may direct that the conduct of the Senior Judge and his colleagues be investigated by the Junior Judge sitting alone.

"For these reasons, I think I am bound to hold that the inquiry authorized by s. 248 can only be directed concerning matters within the jurisdiction of the municipal council and with a view to obtaining a report for the guidance of the municipal council in dealing with matters over which it has authority.

"The scope of the inquiry and its purpose is, I think, well indicated in Re Godson and City of Toronto (1888-9), 16 O. R. 275, 16 A. R. 452; Godson v. City of Toronto (1890), 18 S. C. R. 36. Paramount authority of the Board of Police Commissioners with respect to matters over which it has jurisdiction is established in Kelly v. Barton, 1895, 26 O. R. 608, 22 A. R. 522; and Winterbottom v. London Police Commissioners, 1901, 1 O. L. R. 549, 2 O. L. R. 105, C. A.

"The decision of my learned brother Britton, in Lane v. City of Toronto, 1904, 7 O. L. R. 423, is in no way in conflict with this view.

There it was alleged that in a municipal election for members of the council and Board of Education there had been corruption and misconduct. It was held that this was a matter connected with the good government of the municipality, and that an inquiry was justified under the statute. Manifestly so; what was to be investigated was the conduct of an election under the control of the council itself. Its officers were charged with misfeasance. No inquiry was sought into the conduct of the election."

Powers as to Witnesses.—The Public Inquiries Act, R. S. O. 1914, c. 18, s. 2, provides that the Lieutenant-Governor in Council may confer on commissioners the power of summoning any person and requiring him to give evidence on oath, and to produce such documents and things as the commissioner or commissioners deem requisite for the full investigation of the matters into which they are appointed to examine. Section 3 provides that the commissioner or commissioners shall have the same power to enforce the attendance of witnesses, and to compel them to give evidence and produce documents and things, as is vested in any Court in civil cases.

R. S. M. 1913, c. 34, contains provisions to the same effect.

In Kelly v. Mathers, 1915, 25 M. R. 581, Kelly brought an action to restrain Mathers, C.J.K.B., Macdonald, J. and Sir H. J. Macdonald, commissioners under a commission issued under the Manitoba Act, from proceeding upon the ground amongst others that the commission had no power to compel the plaintiffs to attend and give evidence, more particularly in view of the commissioners' intimation of their intention to commit them in case of their refusing to attend, and of the Attorney-General's expressed intention to prosecute them in the civil and criminal courts. On this point, Howell, C.J.M., and Cameron, J.A., both agreed that the commission had power to commit for contempt, and Perdue J.A., agreed with this view in Re Edward Beck, 1916, 11 W. W. R. 657, which was a case where a witness was actually committed and fined for refusing to be sworn by Galt, J., acting as Commissioner under the same Act.

Howell, C.J.M., in Kelly v. Mathers, *supra*, referring to Attorney-General v. Colonial, 1914, A.C. 237, discussed by Middleton, J., in Re Berlin and County Judge of Waterloo, *supra*, said:—

"After giving the judgment of the Lord Chancellor anxious consideration, I construe it to be simply a declaration that the statute, read in its ordinary and clear language, while in some respects within legislative power, yet in chief and mainly giving rights far beyond the legislative power, was *ultra vires*. It was strongly urged that the case decided that, to make such legislation good, the Act must in specific language set forth the subject upon which the commissioners may enforce the attendance of witnesses.

"If this is the true construction of the case, then the Canadian as well as the Manitoba statute is *ultra vires*. I think the case is not an authority to support that proposition. . . . To me it is clear that the four matters referred to in the Manitoba statute are all within the legislative competence of this Legislature, and to investigate the transactions of the Government and its officials and the contractors connected with the erection of the legislative buildings clearly comes within the first two matters mentioned in the statute."

From this view, it would appear that councils can only direct inquiries into matters which are within the ambit of their own authority, and that they cannot direct inquiries as to matters relating to some future powers which it may be thought advisable to get from the Legislature.

The commission referred to in Kelly v. Mathers, *supra*, allowed the greatest latitude in tendering hearsay evidence which tended to shew that serious crimes had been committed. A commission consisting of Perdue, J.A., Galt, J., and Robson, Public Utilities Commissioner, appointed under the same Act, refused to permit hearsay evidence as to wrong doing to be given until counsel stated that they were prepared to put in evidence tending to establish such wrong doing, and the commissioners withheld from public mention names of persons incidentally incriminated by hearsay evidence.

PART IX.

GENERAL PROVISIONS APPLICABLE TO ALL MUNICIPALITIES.

Jurisdiction—Nature and Extent.

249.—(1) Except where otherwise provided, the jurisdiction of every council shall be confined to the municipality which it represents and its powers shall be exercised by by-law. 3 Edw. VII. c. 19, s. 325, *amended*.

As to meetings held outside of the municipality, see ss. 196 *et seq.*

All persons within a municipality whether residents or strangers are bound to take notice of the by-laws of the municipality. Pierce v. Bartrum, Cowp. 269; R. v. Osler, 1872, 32 U. C. R. 324.

By-laws do not Bind the Crown.—The Crown erected certain additions to a prison contrary to the provisions of a by-law passed by the corporation of Manchester under The Public Health Act, and a summons was taken out against the prison commissioners for a contravention of the by-laws. The magistrate stated a case and a Divisional Court consisting of Day and Wills, JJ., held that the proceedings could not in any shape succeed against the Crown or against the prison commissioners or against anybody concerned in the matter on the ground that the Crown is not bound by a statute unless it is named either expressly or by necessary implication, and that the purposes of public health and public good intended to be served by The Public Health Act, 1875, could not be held to apply where there was a great, high and responsible officer of state vested with discretion to deal with the subject matter in question, as was the Secretary of State with respect to prisons. Sec. 327 of the Act, which contains a saving clause with regard to some portion of the rights of the Crown, did not afford a ground for presuming that all other exceptions of the Crown were intended to be done away with, but was merely inserted *ex majore cautela*. Gorton L. B. v. Prison Commissioners, 1904, 2 K. B 165 n; 73 L. J. K. B. 114 n. This case was decided in 1887.

Where Council May Act by Resolution.—When a council is acting under the Municipal Act, its powers must be exercised by by-law unless otherwise expressly authorized or provided for, but if a council is exercising powers conferred upon it by some other Act, a resolution may be sufficient. Port Arthur v. Fort William, 1898, 25 A. R. 522; Lewis v. Alexander, 1895, 24 S. C. R. 551, 558; Toronto v. Toronto R. W. Co., 1906, 12 O. L. R. 534, 584. But an Act may be so drawn as to make a by-law necessary, as was the case in Liverpool v Liverpool, 1903, 33 S. C. R. 180, where it was held that the power to pass by-laws for making regulations impliedly excluded the power to make such regulations otherwise than by by-law. See also Leslie v. Malahide, 1907, 15 O. L. R. 4, where a settlement of an action by resolution was held to be not binding on the corporation. Note however that notwithstanding the imperative requirements of sec. 174 of the Public Health Act, 1875, Imp., that certain contracts must be in writing and under seal, compromises of suits and claims have been held not to be contracts to which the section applies, and such agreements may be enforced though not sealed: Williams v. Barmouth, 1897, 77 L. T. 383. The cases under section 174 have been held to apply to the provisions of sec. 249 of The Municipal Act, which requires a council to exercise its power by by-law. The difference between the rule in Williams v. Barmouth and that in Leslie v. Malahide, seems to be this;—in the former case it was held that the settlement was not a contract to which sec. 174 applied, and in the absence of an imperative statutory requirement, a compromise is one of the contracts which need not be under seal; the latter case apparently proceeded on the assumption that a

compromise is not one of the contracts where a seal may be dispensed with, although the decision may be justified on the ground that such a compromise is within sec. 249 of the Act.

(2) A by-law passed by a council in the exercise of any of the powers conferred by and in accordance with this Act, and in good faith, shall not be open to question, or be quashed, set aside, or declared invalid, either wholly or partly, on account of the unreasonableness or supposed unreasonableness of its provisions or any of them. *New.* 3 & 4 Geo. V. c. 43, s. 249 (1-2).

By-laws which Cannot be Repealed.—A. & E. Encyclopædia of Law, Volume 5, p. 96, Great Western v. North Cayuga, 1872, 23 C. P. 31; Alexander v. Huntsville, 1894, 24 O. R. 665; Hamilton Power v. Gloucester, 1909, 13 O. W. R. 661.

The rule in volume 5, A. & E., is, a corporation has not the power by laws of its own enactment to disturb or divest rights which it has created, or to impair the obligation of its contract.

Invalid By-law May be Repealed, and a council may go through a form of repealing an invalid by-law in order to prevent trouble and expense. Peoples' Milling Co. v. Meaford, 1886, 10 O. R. 405.

Applicant to Quash a By-law not Estopped by Voting against it.—Re Armstrong and Toronto, 1889, 17 O. R. 766.

In re Caldwell and Galt, 1898, 30 O. R. 378, there was an application to quash a by-law on the ground that the copies published were not true copies because they did not state the dates when the principal and interest of the debentures should be paid, although the by-law stated them. It was further objected that the enacting clause did not settle the specific sums to be paid for principal and interest, though the recital when read with the enacting clause made quite clear what was to be done. The by-law was upheld.

250. Every council may pass such by-laws and make such regulations for the health, safety, morality, and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act, as may be deemed expedient and are not contrary to law, and for governing the proceedings of the council, the conduct of its members, and the calling of meetings. 3 Edw. VII. c. 19, s. 326, *redrafted.* 3 & 4 Geo. V. c. 43, s. 250.

251. Proceedings begun by one council may be continued and completed by a succeeding council. *New.* 3 & 4 Geo. V. c. 43, s. 251.

252. The council of a local municipality shall not, after the 31st day of December in the year for which its

members were elected, pass any by-law or resolution for, or which involves, directly or indirectly, the payment of money, or enter into any contract or obligation on the part of the corporation, or appoint to or dismiss from office any officer under the control of the council, or do any other corporate act, except in case of extreme urgency, or unless the act is one which the council is required by law to do. 3 Edw. VII. c. 19, s. 328, *amended.* 3 & 4 Geo. V. c. 43, s. 252.

253.—(1) The power to license any trade, calling, business or occupation or the person carrying on or engaged in it shall include the power to prohibit the carrying on of or the engaging in it without a license. *New.*

(2) Except where the power of fixing the sum to be paid for the license is expressly conferred on a Board of Commissioners of Police, the Council of the Municipality, where by this or any other Act the Council or the Board is authorized to pass by-laws for licensing any trade, calling, business or occupation or the person carrying on or engaged in it may, subject to the limitations contained in the Act, fix the sum to be paid for the license and the time for which it shall be in force and may provide for enforcing payment of the license fee.

(3) The license fee may be in the nature of a tax for the privilege conferred by it. 3 Edw. VII. c. 19, s. 329, *redrafted.*

Subject to the provisions of *The Theatre and Cinematographs Act.*

(4) The granting or refusing of a license to any person to carry on a particular trade, calling, business or occupation, or of revoking a license under any of the powers conferred upon a council or a Board of Commissioners of Police by this Act, or any other Act, shall be in its discretion, and it shall not be bound to give any reason for refusing or revoking a license and its action shall not be open to question or review by any Court. 3 Edw. VII. c. 19, ss. 486*a* and 583, par. 28, *part redrafted.*

(5) Where a license is revoked the licensee shall be entitled to a refund of a part of the license fee proportionate to the unexpired part of the term for which it was granted. 3 Edw. VII. c. 19, s. 583, par. 28, *part amended.* 3 & 4 Geo. V. c. 43, s. 253 (1-5).

Police or Municipal Regulations.—The constitutional cases contain many references to the police power, and police regulations, and the question arises frequently whether the jurisdiction in connection with the matters covered by these terms rests with the provinces or with the Dominion. Sedgewick, J., thus discussed the matter in Re Prohibitory Laws, 1895, 24 S. C. R. 248:—

> "But it is argued that what is called 'the police power' is possessed by the provinces under 'municipal institutions,' and that the right in question is a mere incident of 'the police power.' Now, if by 'police power' is meant the right or duty of maintaining peace and order and of seeing that law—all law whether of imperial, federal or local origin—is enforced and obeyed, then I agree that that power is wholly with the provinces. But it is with them, however, not because it specially belongs to 'municipal institutions,' but because they are charged with the 'administration of justice.' The legislatures may delegate this duty to municipal functionaries, but the mode of administration is a matter of provincial concern.
>
> "If, however, that wide meaning is given to 'the police power,' which the jurisprudence of the United States has given to it, the power of limiting or curtailing without compensation the natural or acquired rights of the individual for the purpose of promoting the public benefit, the power, for instance, which enables a state legislature to regulate the operation and tolls of a grain elevator in Chicago, or to compel a company to use interlocking switches upon its line of railway, then, I say, the provinces do not exclusively possess it. It is common possession of both, to be exercised by both in their respective domains for the common weal."

Taschereau, J., in Huson v. S. Norwich, 1895, 24 S. C. R. 160, said:—

> "There are a large number of subjects which are generally accepted as falling under the denomination of police regulations over which the provincial legislatures have control within their territorial limits, which yet may be legislated upon by the Federal Parliament for the Dominion at large. Take, for instance, the closing of stores and cessation of trade on Sundays. Parliament, I take it for granted, has the power to legislate on the subject for the Dominion, but, until it does so, the provinces have, each for itself, the same power."

In R. v. McGregor, 1902, 4 O. L. R. 198, the Divisional Court had to consider the bearing of certain regulations of the Dominion Government under the Petroleum Inspection Act (Dom.), in so far as they bore upon the provisions of a municipal by-law in the same behalf. Meredith, C.J., giving judgment of the Court, said:—

> "These regulations (*i.e.*, the Dominion)) are in force notwithstanding the repeal of c. 102 (R. S. C. c. 1, s. 7 (50)), and as far as they are material to the present inquiry are as follows:—
>
> "'Section 1. In cities and towns where there are municipal regulations or laws respecting the storage of petroleum and the products thereof, petroleum and naphtha, which have been inspected as required by Act 44 Vict. c. 23, or by the Petroleum Inspection Act aforesaid, and the inspection fees paid, may be stored in any building or place which is in conformity with the municipal regulations in that behalf.'
>
> "Assuming the provisions of these Acts and regulations to be *intra vires* the Dominion Parliament, it is clear, I think, that they do not supersede the provincial legislation referred to or any by-laws passed under the authority of that legislation.

"The provincial legislation was intended to confer power to make regulations in the nature of police or municipal regulations of a merely local character for the prevention of fires and the destruction of property by fire, and applying the language of Sir Barnes Peacock in delivering the judgment of the Judicial Committee of the Privy Council in Hodge v. The Queen, 1883, 9 App. Cas. 117, at p. 131, as such cannot be said to interfere with the general regulation of trade and commerce, which belongs to the Dominion, and do not conflict with the provisions of the Petroleum Inspection Act, 1899, or the regulations as to the storage of petroleum and naphtha, which are in force under the authority of that Act.

"On the contrary, the Dominion regulations are carefully framed so as not merely not to conflict with the municipal regulations on the subject with which they deal, but to require these regulations to be conformed to as the condition upon which it is to be lawful to keep or offer for sale or have in possession petroleum or naphtha. See also Attorney-General for Ontario v. Attorney-General for the Dominion, [1896] A. C. 348; Attorney-General of Manitoba v. Manitoba License Holders' Association, [1902] A. C. 73."

By-law Passed in Bad Faith.—In Re Hamilton and Gloucester, 1909, 13 O. W. R. 661, where a township passed a by-law authorizing a licensee to store gunpowder for five years, the licensee spent large sums in buildings and began storing powder, and the council, upon petition, subsequently passed a repealing by-law at the instance of adjoining property owners; the by-law was quashed, as having been passed in bad faith.

Power to Require Dominion Companies to Obtain Municipal Licenses.—In Re Major Hill Taxicab Co. and Ottawa, 1915, 33 O. L. R. 243, the company which had a Dominion charter and a provincial license, refused to take out a municipal license under a by-law passed by the Board of Commissioners of Police on the ground that it could not be compelled to take out an additional license, but Lennox, J., held that the Legislature could give and had given the Board the power to pass the by-law in question, and that nothing contained in John Deere v. Wharton, 1915, A. C. 330, 84 L. J. P. C. 64, warranted any other view.

Power to License.—The Legislature of Ontario has now, by s. 253 (1), expressly conferred the power to prohibit in all cases in which it has been given the power to license, thus repealing for Ontario the rule that a power to license does not involve a power to prohibit.

It has also, by s. 253 (2) and (3) expressly rejected the view that the power to regulate coupled with a power to license is a mere conferring of police power, and that the license fee in such a case is merely an indemnity for the expense and trouble of issuing the license, declaring that the fee may be imposed as a tax, thus conferring on municipalities in all cases the power of direct taxation by license to the same extent as the Legislature possesses it.

And by s. 253 (4) the Legislature has absolutely deprived the Courts of all power to review or question the granting or the refusing of a license, thus putting to an end the jurisdiction exercised in such cases as Davis v. Bromley Corporation, *supra*.

The cases thus excluded in Ontario express principles still applicable in jurisdictions where there are no statutory provisions corresponding to those contained in s. 253.

The granting of a permit or the approval of plans for the erection of buildings, while similar to the granting of a license, is a mere exercise of police power, and in Ontario as in other jurisdictions, is still subject to review by the Courts, and it is submitted that even with respect to licenses, the Courts may intervene to declare that a license has not been validly granted or refused, in which the body assuming to act had in fact no jurisdiction, so that the act amounts to a nullity, as where the council acted at a meeting held outside of the municipality or where the presence of disqualified or interested members rendered the act a nullity by reason of the fact that the granting of licenses is a judicial act.

In re Fisher and Carman, 1905, 1 W. L. R. 455, 16 Man. R. 560, by-law regulating billiard rooms and providing for closing on Sunday held *intra vires*, as restriction was not intended to enforce Sunday observance, but merely to regulate pool rooms. The Court of Appeal refused to investigate the reasons which induced the council to require the room to be closed on a certain day of the week.

In re Talbot and Peterborough, 1906, 12 O. L. R. 358, a by-law imposing a license fee of $200 on sale of cigarettes in stores and shops, where the fee was shown to exceed in amount the annual profits which any shop could make on such sales, held *ultra vires*, as in effect prohibitive and not merely regulative.

In Rowland v. Collingwood, 1908, 16 O. L. R. 272, 11 O. W. R. 804, Britton, J., in quashing a by-law fixing the license fee for a tavern at $2,500 in a town with a population of 7,000, thus discussed the question of good faith: "The test of the validity of the by-law in question must depend upon the good faith of the council in passing it. If it was passed in the *bona fide* exercise of the power given to the council, the by-law should stand, notwithstanding the apparent unfairness of being allowed to have a tavern license in a city of 300,000 for $1,200, and compelling a man who wishes to keep a tavern in an outlying town to pay the sum of $2,500, or even a larger sum, for the privilege.

"There is no technicality about this; it is the broad question on its merits.

To determine this question of *bona fides*, I must look: (1) at the object the Legislature had in view in this legislation; (2) the powers and duty of the council under it; and (3) the circumstances under which, and how and why the council passed the by-law." He held that the amount of the duty was the strongest evidence of want of *bona fides* and was evidence of some ulterior motive, and he also reviewed the earlier cases: In re Barclay and Township of Darlington, 1854, 12 U. C. R. 86; Greystock v. Otonabee, 1855, 12 U. C. R. 458; In re Talbot and City of Peterborough, 1906, 12 O. L. R. 358, and In re Brodie and Town of Bowmanville, 1876, 38 U. C. R. 580.

In Hall v. Moose Jaw, 1910, 12 W. L. R. 693, 3 Sask. L. R. 22, the by-law delegated to the chairman of the license and police committee and the license inspector certain authority and power, and it subsequently was amended by adding a proviso that no license should be granted unless the applicant had been recommended by the chief of police. The by-law was held *ultra vires* in the absence of a special power of delegation. (Note:—This power is given in the Ontario Municipal Act and in the Winnipeg City Charter). The by-law was also held bad because prohibitive, when the authority of the council did not include prohibition. Virgo v. Toronto, 1896, 65 L. J. P. C. 4, was followed. The applicant sued for damages but failed in this respect because the by-law had not been quashed.

In Mitcham Common v. Cox, 1911, 80 L. J. K. B. 1188, 104 L. T. 824, it was said that licenses or permits are unobjectionable so far as they are part of the machinery of legitimate regulation; as soon as they become mere means of discrimination or hindrances in the way of one class from which other classes are free, they cease to be justifiable and cannot be required. Lawful preferential treatment is the exception and is a question of degree.

If the fees were unreasonable so as to be in fact prohibitive, or if discrimination had been shown as between different members of the same class, *e.g.* resident or non-resident dentists, the by-law could be successfully attacked on these grounds, as the granting, refusing or cancelling of a license is a judicial act.

In Re Crabbe v. Swan River, 1913, 23 Man. L. R. 14, 22 W. L. R. 860, 23 W. L. R. 373, a by-law to regulate pool rooms contained the provision that where, in the opinion of the council, the licensee had allowed profanity, gambling or boisterous conduct in the licensed premises, or failed in any other respects mentioned in the by-law, the licensee should be liable to have his license revoked on a motion of the council carried with a three-fourths majority. Such a motion was carried, and it was contended that, as the motion had been made without investigation, the cancellation could not be sustained. The by-law and the cancellation were upheld by the Court of

Appeal: Kruse v. Johnson, 1898, 2 Q. B. 91, 67 L. J. Q. B. 782, was much discussed. It was contended that the conduct mentioned in the by-law could not be an offence unless it was expressed to be to the annoyance of others, on the principle of Strickland v. Hayes, [1896] 1 Q. B. 296, 65 L. J. M. C. 55, but this ground was overruled.

Nature of Licensing Power.—In re Foster and Raleigh, 1910, 22 O. L. R. 26, Middleton, J., thus discussed the nature of the licensing power delegated to municipalities by the legislature: "By the British North America Act, s. 92 (9), power is given to the province to make laws in relation to 'shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes.'"

"When the province delegated to the municipality the power to make laws regarding 'licensing,' and also the express power to fix a license fee, without any restriction or limitation, it must be taken to have handed over to the municipality the full power conferred by the section quoted—the right to exact a license fee for raising a revenue for municipal purposes. The whole scheme of the Municipal Act is the delegation to the local municipalities—within the prescribed limits—of the full and plenary jurisdiction possessed by the legislature itself."

"When it has been deemed wise to limit the amount to be charged as a license fee, this limitation has been expressly made. When no limit, the discretion of the council is the only guide, subject to the qualification above indicated, that the fee must be honestly imposed as a license fee, and not with the view of prohibiting."

"There is a dictum of Strong, J., in Pigeon v. Recorder's Court and City of Montreal, 1889, 17 S. C. R. 495, at p. 503, which goes further: 'When the power of taxing is conferred it never can be objected to an instance of its exercise that the tax imposed is prohibitory in its operation; in all such cases the amount of the tax must rest exclusively in the discretion of the body possessing the power to impose it.' This is *obiter* only, because in the case then under discussion there was power to prohibit. This case, however, is clear authority in favour of the municipality upon this application, and I quote what is said at pp. 501-2 as conclusive authority: 'The argument . . . is that . . . the statute is to be interpreted as conferring powers of police regulation only and not taxing powers; that the sum to be fixed by the by-law as that to be paid for the license is not intended as a tax or impost for revenue purposes, but merely as an indemnity for the expense and trouble of issuing the license; . . . There is no force whatever in this argument. Had the city council only possessed the police power (and it would have been restricted to that if the mere power to regulate, and for that end to license, had been conferred without any express provision authorising the exaction of a sum to be paid for the license) there might have been some colour for this contention; but when we find the legislature authorising the city council to impose such charge for the license as it should think reasonable, without any reference to the payment being by way of indemnity, as a fee for the trouble and expense involved in issuing a license, an interpretation which would restrict the words in which the statute is expressed in the way contended for would be nothing short of legislation, and is therefore entirely inadmissible . . . It would be impossible for any Court, without arrogating to itself the power of revising and controlling the acts of the council, a jurisdiction for which no authority can be derived from statute or common law, to say that the fee to be paid must be limited in amount to a sum which should appear to the Court to be reasonable as a mere remuneration for the labour and expense of issuing the license."

Reasonableness.—In re McCracken and Sherborne, 1911, 23 O. L. R. 92, at p. 100, Riddell, J., in a dissenting judgment however, made the following observations as to reasonableness, which are interesting in view of the provisions contained in s. 294 (2):

> "Speaking for myself, I regret that our Courts have ever imported into the consideration of municipal by-laws the English practice in the King's Bench, when considering by-laws of corporations, whether common law and customary corporations or those deriving their being from Royal charter.

"I venture to think that those on the spot elected by the people are better judges of what is, or is not, reasonable, than His Majesty's Justices, and I find myself in the same difficulty as was Lord Coleridge in Dublin, Wicklow and Wexford R. W. Co. v. Slattery, 1878, 3 App. Cas. 1155. He, at p. 1197, speaks of 'the inherent vagueness of the word 'reasonable,' the absolute impossibility of finding a definite standard, to be expressed in language, for the fairness and the reason of mankind, even of Judges.' But it is too late now to change the practice, and we must consider the matter of unreasonableness. The Divisional Court in In re Hassard and City of Toronto, 1908, 16 O. L. R. 500, although divided upon the interpretation of the by-law itself, did not disagree on the principle laid down by Lord Russell of Killowen in Kruse v. Johnson, [1898] 2 Q. B. 91, 14 Times L. R. 416: 'The Court ought as far as possible to support by-laws issued by local authorities, unless it could be clearly seen that the by-law was made without jurisdiction or was manifestly unreasonable' (16 O. L. R. at p. 512). 'Such by-laws . . . ought to be, as has been said, 'benevolently' interpreted' (*ib.*)."

Discretion Cannot be Delegated.—Discretion confided to council or to the Board of Commissioners of Police cannot be delegated to others, as for example, requiring an applicant for a license to get the consent of certain persons. Re Kiely, 1887, 13 O. R. 451; R. v. Webster, 1888, 16 O. R. 187.

Dispensing Power. By-law Containing Power to Council to Exempt Official Cases from its Operation.—In Salt v. Scott, 1903, 2 K. B. 245; 72 L. J. K. B. 627, a Divisional Court thought that by-laws of general application relating to the construction of buildings, ought to contain a dispensing power enabling the local authority or their authorized officer to say that a particular building is of an exceptional character and that the hard and fast rule laid down by the by-law ought not to apply to it, but refused to quash on the ground of unreasonableness a by-law which did not contain such a provision.

Corporation Cannot Waive By-law.—A corporation cannot waive the requirements of its by-laws: Re McIntosh and Pontypridd, 1891, 61 L. J. Q. B. 164, where the cases will be found.

Bad Faith.—Courts will review the action of municipal councils in all cases where such action is based upon fraud, oppression, gross abuse or bad faith. The general rule is that all the powers of the corporation must be exercised *bona fide*. The corporation cannot while exercising an undoubted power, do so for the purpose of accomplishing an ulterior object which is unlawful. While the doctrine has been applied from the earliest times, it was recently considered by the House of Lords in Westminster Corporation v. London and N. W. Railway, 1905, A. C. 426; 74 L. J. Ch. 629, in which case the corporation having power under the Public Health Act, 1891, to construct comfort stations, proceeded in the exercise of such power to provide in connection with such a convenience, a subway capable of being used as a passage-way under a crowded street. The plaintiff railway company which owned lands adjoining the passage-way, brought an action to restrain the use of the passageway on the ground that the corporation had constructed it as a means of crossing the street under the pretense of constructing conveniences, the corporation having no power to construct sub-ways. Lord Macnaghten thus discussed the facts: "Then I come to the question of want of good faith. That is a very serious charge. It is not enough to shew that the corporation contemplated that the public might use the subway as a means of crossing the street. That was an obvious possibility. It cannot be otherwise if you have an entrance on each side and the communication is not interrupted by a wall or a barrier of some sort. In order to make out a case of bad faith it must be shewn that the corporation constructed this subway as a means of crossing the street under colour, and pretence of providing public conveniences which were not really wanted at that particular place.

. . . I agree with Mr. Justice Joyce that the primary object of the council was the construction of the conveniences with the requisite and proper means of approach thereto and exit therefrom.

"I have felt more difficulty with regard to the question whether the corporation have acted altogether reasonably—'with judgment and discretion'—as Lord Justice Turner puts it in a well-known case. It seems to me that when a public body is exercising statutory powers conferred upon it for the benefit of the public, it is bound to have some regard to the interest of those who may suffer for the good of the community. I do not think it is right—I am sure it is not wise—for such a body to keep its plans secret and carry them into execution without fair and frank communication with those whose interests may possibly be prejudiced or affected. I cannot help thinking that if the engineer of the corporation and the engineer of the railway company had been put into communication, some modification of plan might have been suggested which would have obviated all this litigation and expense, and all the litigation and expense yet to come if the Court of Appeal is to take upon itself, as it proposes to do, the functions of a sanitary authority and determine the precise dimensions of approaches to such a place as this. The surveyor thought it politic, and not unworthy of his position as an officer of a great public body, to try and throw dust in the eyes of his correspondent. I do not suppose that the officials of the railway company were put off their guard by the answer which he sent. I have no doubt they knew perfectly well what the corporation proposed to do. But still, the mode in which they were met prevented anything like a free interchange of ideas between these two bodies for their mutual advantage.

"The result of these considerations to my mind is that if, at the trial, the respondents had suggested any practical mode of altering or amending the plans that would have obviated the inconvenience which the works as executed must cause to them, I should, speaking for myself, have been disposed to think that an injunction ought to have been granted to secure that object. Unfortunately, the respondents chose to stand aloof, and have given no assistance to the Court. Under these circumstances I think there is no alternative but to allow the appeal, and to restore the judgment of Mr. Justice Joyce. But I think there ought to be no costs either here or in the Court of Appeal."

Bad Faith in Refusing Permit.—In Davis v. Bromley Corporation, 1908, 1 K. B. 170; 77 L. J. K. B. 51, an action was brought against the corporation for maliciously refusing to approve building plans. The action was dismissed by the trial Judge, and this was confirmed by the Court of Appeal where Vaughan Williams, L.J., gave the following judgment: "The only question we have to deal with in this case is whether an action will lie against the defendant corporation for their refusal to approve of certain building and drainage plans which have been submitted to them by the plaintiff. It is not contested that the legislature has given the power to this particular body to decide the question whether the plans are in accordance with the by-laws. It is admitted that the corporation in this matter were not exercising judicial functions, but were exercising a discretion which is vested in them by statute, and the whole object of bringing the action is to see whether the plaintiff cannot have the decision of the corporation to disapprove the plans overruled. His case is that the decision of the corporation is so unreasonable that it affords ground for saying that they were actuated by motives by which they ought not to have been actuated, namely, by a feeling of bitterness against the plaintiff arising by reason of previous litigation. But even if the facts are such as to suggest that the corporation were actuated by any improper motive, it remains that the legislature has vested in this body the right and duty of deciding whether such plans should be sanctioned. And where a statute has vested in a local authority such a duty and power, in my opinion no action will lie against the local authority for refusing to give their sanction, even though there is evidence to shew that the members of the corporation were actuated in their decision by a feeling of bitterness or some other indirect motive against the plaintiff. It is not the intention of the legislature that a person who desires an

opportunity of getting rid of such a decision should bring an action against the council. As has been pointed out by Mr. Justice Bigham in the course of the argument, it is obvious that a jury would not be a convenient tribunal for trying such a question. If it is said that the result of our so holding is that a person in the position of the plaintiff will be left without a remedy, the answer is that—though no action for damages will lie—he still has a remedy in a case in which the facts are such that the Court would arrive at the conclusion that, though there was a pretence of exercising the power vested in the corporation, yet in truth and in fact the corporation never did address their minds to the question before them. In such a case the King's Bench Division would grant a mandamus directing the corporation to perform their statutory duty. The appeal must therefore be dismissed."

Uncertainty.—A by-law may be held void for uncertainty. See remarks of Mathew, J., in Kruse v. Johnson, *supra;* Scott v. Pilliner, 1904, 2 K. B. 855; Leyton v. Chew, 1907, 2 K. B. 283; 76 L. J. K. B. 781.

Rules of Construction Applicable to By-laws.—It has been repeatedly held that *prima facie* the same interpretation should be applied to terms used in a by-law which is applied to the same terms in the Act under which the by-law is passed. Blashill v. Chambers, 1884, 53 L. T. 38; 14 Q. B. D. 479; Kennard v. Cory, 1892, 2 Q. B. 578; 67 L. J. Q. B. 809, where Wills, J., laid down the rule that where a power to make by-laws is derived from a statute, it is necessary in every instance to look into the statute under the authority of which the by-law affects to be made and to see whether or not it is within the statutory power. Where by-laws are directed against the common law right and the liberty and freedom of every subject to employ himself in any lawful trade or calling, they should be confined strictly within the limits authorised by statute and any attempt to exceed those limits should be firmly repelled. See Merritt v. Toronto, 1895, 22 A. R. 207. This case was followed by the Court of Appeal for Manitoba in Watt v. Drysdale, 1907, 17 M. R. 15, where Howell, C.J.M., emphasized the proposition that the power of municipalities to pass by-laws restricting common law rights, can only be found in language clear and distinct.

Discrimination.—There are numerous cases in which by-laws have been held invalid because they have discriminated against particular individuals or classes. In particular where the common law rights exist to exercise a trade or calling to which the council may attach the condition of taking out a license, and may govern and regulate the holder of such license, there must be no discrimination. Accordingly, a by-law of the city of St. John fixing a license fee of $20 for non-resident traders, and $10 for resident traders, was held bad. Jonas v. Gilbert, 1880, 5 S. C. R. 356, and this decision was followed by the full Court of Alberta, which held a by-law of the City of Calgary imposing a license fee of $1,000 on non-resident auctioneers, and $20 on resident auctioneers, was invalid: R. v. Pope, 1906, 4 W. L. R. 278. A by-law of the City of Toronto depriving the Dominion Government of the benefit of discounts allowed to all other consumers of water for prompt payment, was held void by the Supreme Court of Canada for discrimination. Atty-Gen. v. Toronto, 1892, 23 S. C. R. 514.

Definition of By-law.—By-law of the legislative type has been defined by Russell, C.J., in Kruse v. Johnson, *supra*, as follows: "A by-law of the class we are considering, I take to be an ordinance affecting the public imposed by some authority clothed with such statutory powers, ordering something to be done or not done, and accompanied by some sanction or penalty for non-observance. It necessarily involves restriction of liberty of action by persons who come under its operation as to acts which but for the by-law they would be free to do or not to do, as they pleased. Further, it involves this consequence—that if validly made it has the force of law within the sphere of its legitimate operation."

Definition of Franchise.—When the legislature has delegated to municipal authorities the power which it possesses of granting or withholding the right to use streets, etc., and of determining the terms and conditions upon and subject to which the right shall be exercised, the giving of the consent of the municipal authorities to the exercise of rights, is usually spoken of as the conferring of a franchise or the granting of a privilege or right, and it is in that sense and not according to their technical meaning that the words are used by legislatures. Toronto Electric v. Toronto, 1915, 33 O. L. R. 267.

Bad Faith in Serving Private Interests.—London v. Westminster, *supra*, was applied in Bell Telephone v. Owen Sound, 1904, 8 O. L. R. 74; 4 O. W. R. 69, where a town council refused to a telephone company the permission required by its Dominion Act to carry its wires across a certain street underground instead of overhead, for the purpose of exacting a tax or payment from the company as a condition of granting the permission. Meredith, J., perpetually restrained the corporation from interfering with the work of the plaintiffs.

By-laws passed to serve the interests of particular individuals will not be upheld. The following series of early cases illustrate the attitude the Courts will take in this connection.

In re Morton and St. Thomas, 1880, 6 O. A. R. 323, the council attempted to pass a by-law opening up a lane, in the interests of a particular individual. Upon an application to quash, Mr. Justice Osler used the following language: "I think the by-law should be quashed, because the council in passing it were not using their powers, if they had any in the particular case, in good faith in the interest of the public, but simply to subserve the interests of private persons. No one was interested in having this land opened but Dr. McLarty, the owner of lot No. 4, who, in order to benefit his own property at the expense of his neighbour, procured the council to open a lane which had apparently been intended for the use only of the owners of the sub-divisions of lot 5, but which had never been in fact opened or used, and that lot not being in fact sold in the sub-division lots, could be of no possible use to any one but the owner of lot 4, for whom it had never been intended. Corporations are trustees of their powers for the general public, and when they prostitute them for the benefit of one individual at the cost of another, the general public not being interested, their action will be restrained by the Courts." Re Morton & St. Thomas, 1880, 6 O. A. R. at 325, and this ground was approved of in the Court of Appeal by Burton, Hagarty and Morrison.

In Pells v. Boswell and Toronto, 1885, 8 O. R. 680, a by-law was passed for extending a certain street, not in the public interest, but in that of T. & M., and was quashed. Boyd, C., said as follows: "All the direct evidence, and all the circumstances of the case make against the efficiency of this by-law as a *bona fide* piece of municipal legislation. When the facts are examined, there is not even a colour of public interest attaching to its enactment or its provisions. The whole thing is palpably passed in the interests of two individuals, who object to pay what the plaintiff seeks to get for this coveted strip of land."

In Scott v. Tilsonburg, 1886, 13 O. A. R. 233, a by-law was passed exempting a manufacturing establishment from taxation, and in return the manufacturer agreed to make a payment for the benefit of the town, thus rendering it unnecessary for the councillors to submit a by-law to the ratepayers. Hagarty, C.J.O., observed: "The fair way to view this argument of defendants is to read the by-law with a preamble setting out the actual facts—the desire to procure the branch line; their willingness, for such purpose, to pay a named sum therefor; their unwillingness to submit a by-law therefor to the ratepayers, and Mr. Tilson's agreement 'to stand in the place of the town,' and pay the required amount, the town on its part, agreeing to exempt certain property of his from taxation for ten years.

If such a by-law could stand, I am free to admit that I have hopelessly misunderstood the whole scope and bearing of our municipal system, and the extent of the revising power of the Superior Courts created by the legislature.

I think we must always, in examining a by-law, see that it is passed for the purpose allowed by the statute, and that such purpose is not resorted to as a pretext to cover an evasion of a clear, statutable duty—that it is, in short, a by-law for exemption, and not a mere pretext to cover the wrong committed by the council in applying the assets or monies of the corporation in a manner forbidden without the consent of the ratepayers."

Ultra Vires.—The jurisdiction of Courts of law to review the acts of corporations with a view to determining whether or not the acts are within the scope of the powers granted to the corporation has finally resulted in the development of the doctrine of *ultra vires*. It is only within recent years that the doctrine has taken definite form and has been dignified by a special name. The doctrine was first laid down in Ashbury v. Riche, 1875, L. R. 7 H. L. 653; 44 L. J. Ex. 185, in a case where a construction company incorporated by registration under the Companies' Act, 1862, entered into a contract to construct a railway from Antwerp to Tournay; the company's memorandum stated that the objects for which the company was established, were "to make and sell, or lend on hire, railway carriages and waggons, and all kinds of railway plant, fittings, machinery and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work and sell mines, minerals, land and buildings; to purchase and sell, as merchants, timber, coal, metals, or other materials, and to buy and sell any such materials on commission or as agents."

The company having been advised by counsel that the transaction was not binding, refused to carry it out and repudiated all liability under the contract, and thereupon the plaintiff brought an action against the company, and judgment was given in his favor, from which an appeal was taken to the House of Lords. Benjamin and Gifford, for the plaintiff, contended that the shareholders of a company could adopt transactions not literally within the scope of the company's memorandum, contending that in that respect shareholders resemble other parties who contract through agents, and that if they adopt the acts of the agents, and do not promptly repudiate them after knowledge, they are bound. The House of Lords overruled this view, and laid down the principle that a contract not authorized by the memorandum is not susceptible of confirmation even by the universal consent of all the shareholders.

In Atty.-Gen. v. Great Eastern, 1879, 5 App. Cas. 473; 48 L. J. Ch. 445 C. A., Bramwell, L.J., thus referred to Ashbury v. Riche, *supra*: "I was counsel for the plaintiff in the latter case. I know none at common law before it in which a trace of this doctrine is to be found, and certainly I was never more surprised than at that decision—a decision which proceeded on grounds which, with all respect be it said, were erroneous, and led, as I believe they have in other cases, to an erroneous result. The mistake being in not distinguishing that many of the provisions of Acts of Parliament constituting companies are not provisions as between the companies and the public, but agreements among the shareholders *inter se;* that they constitute their agreement of partnership—their instrument or settlement." The Court however, dismissed an action brought by the Atty.-Gen. on behalf of the public, to stop an *ultra vires* act, pointing out that as between the company and any person outside the company, it is for such persons to take proper advice, and guard themselves from risks, which they are perfectly free to avoid. But see next case.

In Atty.-Gen. v. London County Council, 1902, A. C. 165; 71 L. J. Ch. 268 (H.L.), the doctrine was applied to a municipal corporation acting under powers wholly derived by statute. The London County Council had under statutory powers, acquired certain tramways from certain private companies. The companies had operated omnibuses as feeders to the tramways, and the County Council assumed to continue the operation of the omnibuses. Haldane, K.C., for the County Council, contended that it had power to work and run the omnibuses under the general statutory power to purchase the whole undertaking, that in any event, cars and carriages mentioned in the Act would include omnibuses, and further that whatever is fairly incidental to the things which the legislature has authorised ought not to be regarded as *ultra vires*, unless expressly prohibited. He

further contended that the County Council had the general powers of a common law corporation, and could therefore do all such acts as regards its property as an ordinary person could, except so far as particular acts were expressly forbidden. The House of Lords overruled all these contentions without calling upon Asquith, K.C., for the Atty.-Gen. Halsbury, L.C., saying: "It appears to me that, as far as any question of general law is involved in this case, the whole ambit of the considerations that arise has been completely traversed by the two cases of Ashbury Railway Carriage and Iron Co. v. Riche, [1875] 44 L. J. Ex. 185; L. R. 7 H. L. 653, and Atty.-Gen. v. Great Eastern Railway [1880] 48 L. J. Ch. 428, 435; 49 L. J. Ch. 545; 11 Ch. D. 449, 483; 5 App. Cas. 473, and I do not think that much would be gained by going through each individual topic of it, because I think now it cannot be doubted that those two cases, if we look at them, do constitute the law upon this subject. It is impossible to go behind these two cases; they are now part of the law of this country, and we must acquiesce in them, whether we like them or not." The Court expressed dissent from the view that the Atty-Gen. could not maintain an action to restrain an *ultra vires* act enunciated by the Court of Appeal in Atty.-Gen. v. Great Eastern, *supra*. See title Actions by the Atty.-Gen., *infra*, p.

A recent illustration of the strictness with which the doctrine of *ultra vires* is applied, will be found in Ottawa Electric Light Co. v. Ottawa, 1906, 12 O. L. R. 290; 8 O. W. R. 204, where the Court of Appeal for Ontario in an action brought by ratepayers on behalf of all ratepayers, adjudged certain by-laws invalid, and restrained all action under the invalid by-laws in so far as the by-laws assumed to authorize the corporation to buy electric power for the purpose of reselling it to others on the ground that nothing in any of the Acts authorized the corporation to traffic in electric power; the corporation could merely produce electricity and sell that which is produced. This decision shews that municipal trading so called, must be expressly authorized by the legislature.

Statutory Corporations.—The principle which applies to common law corporations is to be distinguished, see Sheppard v. Bonanza Creek.

Effect on Ultra Vires By-law of subsequent Conferring of Power.—In R. v. Reed, 1886, 11 O. R. 242.—In anticipation of the coming into fofce of an Act conferring the necessary power, a by-law was passed which provided that it should go into force on the day after the enabling Act came into force. The by-law was quashed, O'Connor saying:—

> "The by-law was passed, as appears, in the interval between the day on which the Act of the Legislature passed and the day on which it was limited to go into operation.
>
> "During that time the Act was inoperative, not in force, as if it had not passed at all, and no act could be done or justified under and by virtue of it. It could during that interval confer no power or authority whatever. It therefore follows that when the council passed the by-law No. 494 they had no power or authority to do so; it was therefore a void Act, a nullity, void, not merely voidable, by-law. The council might have passed the same by-law after the Act went into operation, or they might have passed another adopting and legalizing it, but it does not appear that they did. They have, it is true, passed a by-law to amend it, by adding something thereto; but a nullity cannot be amended; that which is not cannot be added to, subtracted from or multiplied, simply because it is not, does not exist."

In Watt v. Drysdale, 1907, 17 M. R. 12, it was held that an amendment of the statute could not have the effect of ratifying and legalizing a by-law which was passed prior to the conferring of the power given by the amendment.

An *ultra vires* by-law does not become a good by-law by the subsequent of power to enact it. It must be re-enacted, and an amendment of some provisions after the conferring of the power does not amount to a re-enactment: R. v. Nunn, 1905, 15 M. R. 288, at 297 and 303.

Reasonableness.—In Slattery v. Naylor, 1888, 13 App. Cases 446; 57 L. J. P. C. 73, Lord Hobhouse said:

> "The jurisdiction of testing by-laws by their reasonableness was originally applied in such cases as those of manorial bodies, towns, or corporations having inherent powers or general powers conferred by charter of making such laws. As new corporations or local administrative bodies have arisen, the same jurisdiction has been exercised over them. But in determining whether or no a by-law is reasonable, it is material to consider the relation of its framers to the locality affected by it, and the authority by which it is sanctioned."

This, as was pointed out by Draper, C.J., is a common law jurisdiction which is exercised when the powers given to the corporation by statute, have been used in an unreasonable, unfair or oppressive manner calculated to produce injury to the community: Kelly v. Toronto, 1864, 23 U. C. R. 426.

In Slattery v. Naylor, *supra*, it was contended that it is a necessary condition of every by-law, and that a power to make by-laws means a power to make reasonable by-laws. Lord Hobhouse in delivering judgment, pointed out that according to this argument, the question whether a by-law is reasonable, is only one branch of the question whether it is *ultra vires*, and if a mere fantastic and capricious by-law such as reasonable men could not make in good faith, had been passed, it would raise in a very crucial shape the question whether a Court of law could set it aside as unreasonable. He declined to question the reasonable character of the by-law under consideration in that case.

In Virgo v. Toronto, 1896, A. C. 88; 65 L. J. P. C. 4, Lord Davey in giving judgment, pointed out that the two questions of *ultra vires* and unreasonableness ran very much into each other, and stated that in that particular case, it was not necessary to consider the question of unreasonableness separately, and the decision was based on the ground of *ultra vires*.

It does not appear that the Judicial Committee of the Privy Council has yet dealt with the crucial question, hypothetically raised in Slattery v. Naylor, *supra*. There have been conflicting decisions in England, which were finally dealt with by a specially constituted Divisional Court in Kruse v. Johnson, 1898, 2 Q. B. 91; 67 L. J. Q. B. 782. Lord Russell used the following language:

> "The great majority of the cases in which the question of by-laws has been discussed are not cases of by-laws of bodies of a public representative character entrusted by Parliament with delegated authority, but are for the most part cases of railway companies, dock companies, or other like companies which carry on their business for their own profit, although incidentally for the advantage of the public. In this class of case it is right that the Courts should jealously watch the exercise of these powers and guard against their unnecessary or unreasonable exercise to the public disadvantage. But when the Court is called upon to consider the by-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such by-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction. But, further, looking to the character of the body legislating under the delegated authority of Parliament, to the subject-matter of such legislation, and to the nature and extent of the authority given to deal with matters which concern them and in the manner which to them shall seem meet, I think Courts of justice ought to be slow to condemn as invalid any by-laws so made under such conditions on the ground of supposed unreasonableness. Notwithstanding what Chief Justice Cockburn said in Bailey v. Williamson, [1873] 42 L. J. M. C. 49; L. R. 8 Q. B. 118—an analogous

case—I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws made under such authority as these were made as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith, if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*. But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular Judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some Judges may think ought to be there. Surely it is not too much to say that, in matters which directly and mainly concern the people of the country who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be entrusted to understand their own requirements better than Judges. Indeed, if the question of the validity of by-laws were to be determined by the opinion of Judges as to what was reasonable—in the narrow sense of that word—the cases in the books on this subject are no guide, for they reveal, as indeed one would expect, a wide diversity of judicial opinion, and they lay down no principle or definite standard by which reasonableness or unreasonableness may be tested. So much for the general considerations which it seems to me ought to be borne in mind in considering by-laws of this class."

It will be noted that unreasonableness in the view of Lord Russell, is apparently only a way in which a by-law may be *ultra vires*.

The principles laid down in Kruse v. Johnson, *supra*, were applied by the Supreme Court of Canada in Beauvais v. Montreal, 1910, 42 S. C. R. 211, upholding an early closing by-law; by a Divisional Court for Ontario in Dinnick v. McCallum, 1912, 26 O. L. R. 551, upholding building restrictions fixed by by-law; and by the Court of Appeal for Manitoba in Crabbe v. Swan River, 1913, 23 M. R. 14, upholding a by-law regulating pool rooms.

In Leyton v. Chew, 1907, 2 K. B. 283; 76 L. J. K. B. 781, Darling, J., in the Divisional Court said:—

"As it is established that local authorities are to be allowed to make by-laws, and that this Court will not, except in very extreme cases, interfere and say that those by-laws are bad because they are unreasonable, it follows in my opinion that the tribunal which has to administer the by-laws, upon a complaint being made that they have been broken, ought to shew to the person complained against the same indulgence as this Court shews to the makers of the by-laws."

The tendency of the Courts to uphold by-laws which were attacked solely on the ground of unreasonableness, there being no question of bad faith or *ultra vires* in its strict sense involved, has now been recognized by the Ontario Legislature in the new sub-section found in s. 294. Since the coming into force of the Act, Middleton, J., thus dealt with the matter in Rogers v. Toronto, 1915, 33 O. L. R. 91:—

"At one time the Courts assumed jurisdiction to review municipal legislative action, upon the ground that the action was unreasonable. There never was in Ontario any real foundation for such jurisdiction. The supremacy of the municipal legislative authority within the sphere of its delegated jurisdiction was not at first recognised. It was assumed that the municipality occupied some subordinate position, and that the principles applicable to the determination of the validity of by-laws of companies, or the rules and regulations of boards exercising a delegated authority, could be applied to municipal action. This assumed supervisory and paternal jurisdiction of

the Courts, although founded in error, became well established, and was only put an end to by the direct action of the Legislature, which enacted that no municipal by-law should be dealt with by the Courts on the ground of unreasonableness."

Other cases since Kruse and Johnson, *supra*, in which unreasonableness is discussed are: White v. Morley, 1899, 2 Q. B. 34; 68 L. J. Q. B. 702; Salt v. Scott-Hall, 1903, 2 K. B. 245; 72 L. J. K. B. 627; Nokes v. Islington, 1904, 1 K. B. 610; 73 L. J. K. B. 100; Stiles v. Galinski, 1904, 1 K. B. 615; 73 L. J. K. B. 485; Scott v. Pilliner, 1904, 2 K. B. 855; 73 L. J. K. B. 998; Talbot v. Peterborough, 1906, 12 O. L. R. 358; Leyton v. Chew, 1907, 2 K. B. 283; 76 L. J. K. B. 781; Rowland v. Collingwood, 1908, 16 O. L. R. 272; Arlidge v. Islington, 1909, 2 K. B. 127; 78 L. J. K. B. 553.

Reasonableness of Municipal Contracts.—The jurisdiction to quash by-laws for unreasonableness has never been extended to the supervision of municipal contracts that might be regarded as unreasonable wholly or in part. In Crown Tailoring Co. v. City of Toronto, 1903, reported in 33 O. L. R. p. 92 note, Boyd, C., granted an injunction restraining the letting of a contract for firemen's clothing in which it was stipulated that each article should bear the union label, on the ground that the stipulation was objectionable on the same ground that it would be objectionable in a by-law case because it was an unreasonable condition; there being want of equality and fairness in inserting it because it imposed a restriction on the getting of skilled labor. There was a further restriction in the contract requiring a minimum wage to be paid. In this connection, the Chancellor considered that if the contract was allowed to stand, the Labor Unions had it in their power to control the rate of wages and that the contract hampered the employer, and gave the preference to union workers, which he held was wrong in the public point of view. He further held that the contract was a veiled attempt to set up hand-labor as against the employment of machinery. In Rogers v. Toronto, 1915, 33 O. L. R. 89, Middleton, J., refused to follow Crown Tailoring Co. v. City of Toronto, stating this was entirely out of accord with the great bulk of the law on the subject and he refused to restrain the corporation from entering into a contract which contained a fair wage clause, stating that the Courts had nothing to do with the wisdom or unwisdom of the council's action and that redress must be sought at the polls, not through the Courts, following Kelly v. Winnipeg, 1898, 12 M. R. 87, where a similar clause was upheld.

Municipal Council Supreme Within Jurisdiction.—"In my view, the Courts cannot too carefully refrain from entering into matters that by law are made the subject of municipal control. When it is made to appear that the municipal council is acting fraudulently or maliciously and has in fact abdicated its real functions, and is exercising its powers for the attainment of private ends or the gratification of private revenge, then the Court may well interfere; but with respect to matters delegated to the municipality, the council is supreme, and the Court has no power to supervise or criticize. With regard particularly to all questions which arise regarding matters which have or are supposed to have some relation to morals or social questions, nothing could be more dangerous than any attempt to enter upon the motives and reasons which have actuated the legislative body. The members of the councils must answer to the electors, and the electors alone. The annual election enables speedy redress to be had, when any 'representative' ceases to represent the true views of the community at large." Per Middleton, J., in Re Foster and Raleigh, 1910, 22 O. L. R. 27, affirmed 342.

By-law Overlapping Criminal Law.—Taylor, C.J., thus dealt with the subject in R. v. Shaw, 1891, 7 M. R. 518, on appeal from a judgment of Killam, J., granting writ of *certiorari* to quash a conviction under a by-law for suppressing gambling houses:—

"I agree with the learned Judge who made the order moved against, that the term 'criminal law' used in s. 91 must include every Act or omission which was regarded as criminal by the law of the

Provinces when the British North America Act was passed, and which was not merely an offence against a by-law of a local authority. Can then, that which is an offence against the general criminal law, to be dealt with by indictment, or such other mode of procedure, as the Parliament of Canada may provide, be made an offence by a Provincial Act, or by a Municipal by-law enacted under the authority of such an Act.

"The recent case of Reg. v. Wason, 1889, 17 A. R. 221, was relied on for the prosecutor. But what was dealt with by the Act of the Ontario Legislature under consideration in that case was not a crime when the British North America Act was passed. As to whether the Act created a new offence there was a difference of opinion. In the Queen's Bench Division (17 O. R. 58), Armour, C.J., held, that the primary object of the Act was to create new offences punishable by fine, and in default of payment by imprisonment; and Falconbridge, J., agreed with him. Street, J., was of opinion that the true object, intention and character of the Act was the regulation of the dealings and rights of cheese-makers and their patrons, with punishments imposed for the protection of the latter. He held that the punishments imposed by it were directed at the enforcement of a law of the Provincial Legislature relating to property and civil rights in the province, the offences created by it formed no part of the criminal law previously existing; and the apparent object of the Act was to protect private rights rather than to punish public wrongs. Some of the language used by several of the learned judges in the Court of Appeal may be regarded as favouring the contention of the prosecutor here. But, after all, the decision of that Court, reversing that of the majority of the judges of the Queen's Bench Division, was on the ground stated by Hagarty, C.J., that the Act was one to regulate the business carried on at cheese factories, with reasonable penalties to ensure obedience to its regulations. Burton, J., said, the matters dealt with had not the faintest possible connection with the criminal law. Maclennan, J., spoke of the provisions of the Act as designed to regulate dealings between the manufacturers and their customers, in such a way as to secure fairness and good faith which the special circumstances of the business or trade seemed to the Legislature to call for, and not the creation of new offences and their punishment by fine and imprisonment. In the Queen's Bench Division, Street, J., said, that if the Act was one constituting a new crime for the purpose of punishing that crime in the interest of public morality, it would be bad as dealing with criminal law, and with that all the Judges in the Court of Appeal seem to have agreed.

"In R. v. Boardman, 30 U. C. R. 553, the question was whether, by an Act of the Ontario Legislature regulating tavern and shop licenses, and which enacted that any person concerned in compromising or settling any violation of the provisions of the Act should be guilty of an offence under the Act, and on conviction be liable to be imprisoned, a crime was created, and so the Act *ultra vires*. The Court held that the Provincial Legislature having exclusive power to legislate on some subjects, including those dealt with by the Act, and to impose punishment by fine or imprisonment for enforcing laws made by them in relation to these subjects, the Act was not opposed to the provisions of the British North America Act assigning criminal law exclusively to the Government of Canada.

"In Brodie v. Bowmanville, 1876, 38 U. C. R. 580, one objection was that a by-law of the defendant municipality, which provided that no gambling, profane swearing, blasphemous, grossly insulting language, indecency or disorderly conduct, should be permitted in any licensed tavern or shop, was beyond the power of the council to pass.

"Harrison, C.J., said, it seemed to him that municipal councils have, as the guardians of public morals, a police power to prevent gambling, profane swearing, &c., in the municipality. But the objection seems to have been that the Ontario Municipal Act did not empower the council to pass such a by-law, and no question was raised as to its dealing with crimes, and so being inconsistent with the provisions of the British North America Act.

"In Reg. v. Roddy, 1877, 41 U. C. R. 291, the Court dealt with the question, whether a person charged with a violation of the Tavern and Shop License Act could be compelled to give evidence against himself, and decided that the accusation was so far of a criminal nature that he ought not to be compelled to do so.

"Reg. v. Lawrence, 1878, 43 U. C. R. 164, was a case of a conviction under the Liquor License Act, R. S. O. c. 181, s. 57, which provided that any person tampering with a witness before or after he was summoned, or appeared as such witness on any trial or proceeding under the Act, should be guilty of an offence under the Act and liable to a penalty of $50, recoverable under another section in default of distress by imprisonment. The Court, affirming the judgment of Gwynne, J., held the section *ultra vires*, because the acts declared by it to be offences were before the passing of the Act criminal offences at the common law, and so not within the power of a provincial legislature, either as coming under 'Municipal Institutions,' or as enactments to enforce the law as to shop, saloon and other licenses in order to the raising of a revenue for provincial, local or municipal purposes.

"In Reg. v. Matheson, 1883, 4 O. R. 559, where a conviction for playing an unlawful game was quashed on the ground, that, by a later statute, the jurisdiction of the justices had been taken away, leaving the penalty to be recovered by a civil action, Sir Adam Wilson did say that, there was a provision in the Municipal Act against gambling, and a by-law in force under which the defendant might have been prosecuted. But that was a mere suggestion thrown out by the learned Chief Justice, plainly without any consideration as to whether such an enactment and by-law were within the jurisdiction of the provincial legislature or not.

"The learned counsel for the prosecution urged that, if the power to pass the by-law in question is not upheld, then many other provisions of the Municipal Act as to the powers of municipal councils must fall also. It may be so, but in dealing with a question of *ultra vires* such as the present, the principle laid down by the Judicial Committee of the Privy Council, in Citizens Insurance Co. v. Parsons, 7 App. Cas. 96, should be adhered to. 'In performing the difficult duty of determining such questions, it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon the interpretation of the statute than is necessary for the decision of the particular question in hand.' See also Reg. v. Hodge, 1881, 46 U. C. R. 151, 9 App. Cas. 128.

"In my opinion, the keeping a gambling house being an offence against the general criminal law, to be dealt with by the Parliament of Canada, cannot be made an offence by a Provincial Act, or by a municipal by-law passed under the authority of such an Act.

"In Cooley on Constit. Limit. (5th ed.), p. 241, it is said, an act may be a penal offence under the laws of the State, and further penalties, under proper legislative authority, be imposed for its commission by municipal by-law, and the enforcement of the one would not preclude the enforcement of the other. Such, he says, is the clear weight of authority in the United States, though the decisions are not uniform. A large number of the cases are collected in Dillon on Mun. Corp. (4th ed.), in a note to s. 369, and certainly they are far from uniform.

"To hold that an offence may be one under the general criminal law, and also an offence under a municipal by-law, would seem to render an offender liable to be punished twice for the same offence, contrary to all principles of justice.

"It does not follow, from holding that the provincial legislature cannot make keeping a gambling house an offence, that the Act authorizing the by-law has no force. As said by my brother Killam, many things might be done for the purpose of suppressing gambling houses other than punishment for keeping one.

"In my opinion, the motion to set aside the order complained of should be dismissed."

See also R. v. Laughton, 1912, 22 M. R. 520.

Modes of Attacking By-laws.—The validity of a by-law may be incidentally questioned, otherwise than by motion to quash, namely, by a motion to quash a conviction made thereunder: R. v. Osler, 1872, 32 U. C. R. 324; R. v. Belmont, 1874, 35 U. C. R. 298; or in an action of replevin: Wilson v. County of Middlesex, 1859, 18 U. C. R. 348; Haynes v. Copeland, 1865, 18 C. P. 150, 167; or by a mandamus, or in an action for an injunction to restrain the breach of the by-law, or to restrain the municipality from taking proceedings thereunder: Jones v. Town of Port Arthur, 1888, 16 O. R. 474; Rose v. Township of West Wawanosh, 1890, 19 O. R. 294; Smith v. Township of Ancaster, 1896, 27 O. R. 276; Petman v. City of Toronto, 1897, 24 O. A. R. 53; or a declaration that the by-law is invalid: Malott v. Township of Mersea, 1885, 9 O. R. 611; or incidentally upon the trial of an action: Roberts v. Climie, 1881, 46 U. C. R. 264, and many later cases.

Mode of Enforcing By-laws.—See Part XXII.

254. Subject to section 255, and to section 7 of The Ferries Act and to section 8 of The Ontario Telephone Act, a council shall not confer on any person the exclusive right of exercising, within the municipality, any trade, calling, or business, or impose a special tax on any person exercising it, or require a license to be taken for exercising it, unless authorized or required by this or any other Act so to do; but the council may require a fee, not exceeding $1, to be paid to the proper officer for a certificate of compliance with any regulations in regard to the trade, calling, or business. 3 Edw. VII. c. 19, s. 330, *amended*. 3 & 4 Geo. V. c. 43, s. 254.

(2) This section shall not prevent the Council under the powers conferred by paragraph 1 of section 420 from limiting the number of licenses and the number of tables to such number as the Council may deem fit even if the number be limited to one, and this sub-section shall have effect as if it had been passed on the 13th day of April, 1909.

255.—(1) The council of a city may grant to any person, upon such terms and conditions as may be deemed expedient, the exclusive right to place and maintain for any period not exceeding ten years, iron waste-paper boxes on the street corners or elsewhere in the city, under and subject to the direction of the city engineer and the approval of the council.

(2) The location of the boxes shall be subject to change from time to time at the expense of the grantee, by whom the boxes shall be kept clean and painted, and the collections therein removed, to the satisfaction of the city engineer, and as often as he may direct. 4 Edw. VII. c. 22, s. 6, *amended*. 3 & 4 Geo. V. c. 43, s. 255 (1-2).

Power of Municipality to Grant Franchise to Telephone Company.—A municipality has no inherent legislative power to grant a franchise involving user of highways. The public easement in highways is vested in the public and can be divested by nothing short of an exercise of sovereign power. Domestic Telegraph Co. v. Newark, 1887, 49 N. J. Law, 334, 346; Temiskaming Telephone Co., Limited v. Cobalt, 1918, 42 O. L. R. 385. This power can now be obtained by the joint operation of the Companies Act, R. S. O., 1914, ch. 178, sec. 153; the Ontario Telephone Act, R. S. O. 1914, ch. 188, and the Municipal Franchises Act, R. S. O. 1914, c. 197.

Restraint Against Selling Out in Franchise Agreement.—In Toronto v. Toronto Electric Light Company, 1905, 10 O. L. R. C. A. 621; 1906, 11 O. L. R. C. A. 319, the city entered into similar agreements with two companies under which each obtained a franchise and other privileges. By each agreement each company was forbidden to lease to, amalgamate with or sell out to any other company without the consent of the city, and each agreement provided that upon a breach of the said prohibition all rights granted should cease and be forfeited. One company sold all its assets and its shareholders transferred all their shares to the other company. The Court of Appeal held that the purchasing company had not acted contrary to the prohibition for so to hold would be to add the word "buy" to the prohibitory clause, and that the selling company had not acquired any interest in the assets or affairs of the buying company, as what had been done was not an amalgamation.

It was further held that the corporation which did not commence its action to enforce the forfeiture for six years after the amalgamation were disentitled by their laches to complain of their alleged forfeiture, and that they were also disentitled on the ground of waiver which was inferred from conduct which was much more than a mere passive acquiescence, and which amounted to an act of encouragement to the companies to think that the city did not intend to claim the benefit of the forfeiture, all of which conduct was subsequent to the time when knowledge of the "absorption" was common and general throughout the city and might safely be imputed to the council as a whole.

Franchise Agreement giving Municipal Corporation Option to Purchase Undertaking.—In Toronto Street Railway Company v. Toronto, 1893, A. C. 511; 63 L. J. P. C. 10; 20 O. A. R. 125; 22 O. R. 374, the agreement between the railway company and the corporation provided:

> "Eighteenthly. The privileges granted by the present agreement shall extend over a period of thirty years from this date, but at the expiration thereof the corporation may, after giving six months' notice, prior to the expiration of the said term, of their intention, assume the ownership of the railway, and all real and personal property in connection with the working thereof, on the payment of their value, to be determined by arbitration, and in case the corporation should fail in exercising the right of assuming the ownership of the said railway at the expiration of every five years to elapse after the first thirty years, exercise the same right of assuming the ownership of the said railway, and of all real and personal estate, thereto appertaining, after one year's notice, to be given within the twelve months immediately preceding the expiration of every fifth year as aforesaid, and on payment of their value to be determined by arbitration."

The city having decided to acquire the undertaking, arbitrators were appointed who declined to allow anything for the value of the franchise beyond the period of thirty years. The company contended that its privileges or franchise involved the right to the company to exercise them in perpetuity; that the city had no authority or jurisdiction, without the aid of the legislature, to grant these rights, privileges or franchises, and that the title acquired was direct from the sovereign power, from which a franchise can only emanate, the city being a necessary consulting party by reason of its municipal jurisdiction over the streets within its corporation limits, and for the maintenance and keeping in order of the same for the use of the public. It was also contended on behalf of the company, that in regard to the subsequent extension of the railway lines to other streets than those which were constructed by the first company, there was no agreement as to the time the company was to be allowed to use such streets, and therefore there was no limitation of thirty years. But in case the contrary was held, and the thirty years' provision was applicable to more subsequently constructed lines, then the company contended that that time should be calculated from the date when the company was permitted to construct and operate each new line, and not from the time mentioned in the agreement of March, 1861.

An appeal from the award of the arbitrators came before Robertson, J., who reached the conclusion that the privilege or franchise was not limited to thirty years only, but he also reached the conclusion that the arbitrators were correct in not allowing anything for the value of the franchise extending beyond the period of thirty years, holding that the privilege or franchise was not property, the value of which the arbitrators should take into account, and that no provision was made for its valuation. His Lordship's view of the franchise appears to have been a qualified or base fee, which is an interest which may be continued forever, but is liable to be determined by some act or event, and that there could be no reversion of a base fee because an estate having been created which by possibility may last forever, the grantor retains no estate because the fee cannot be in two persons at the same time. His Lordship discussed the following American cases, in which franchises and the right to determine them was a part of the contract: Davis v. Memphis and Charleston R. W. Co., 39 Am. & Eng. R. W. Cas. 65; Brooklyn Steam Transit Co. v. City of Brooklyn, 78 N. Y. 524; Mumma v. The Potomac Co., 8 Pet. 281; Railroad Company v. Georgia, 98 U. S. 359; Mayor, etc., Worcester v. Norwich & Worcester R. W. Co., 109 Mass. 163; New York, Pennsylvania & Ohio R. W. Co. v. Parmlee, 15 Weekly Law Bul. 239; West Wisconsin R. W. Co. v. Board of Supervisors of Trempealeau Co., 93 U. S. 595; The Northern R. W. Co. v. Miller, 10 Barb., at p. 282; Chicago R. W. Co. v. Iowa, 94 U. S. 155; The People v. O'Brien, 111 N. Y. 1.

The judicial committee adopted the opinion of Mr. Justice Burton in the Court of Appeal, who said:

> "The agreement and the by-law expressly limit the grant of the privilege to thirty years, a definite and certain date; but they contain a definite provision that on notice of six months previously to the expiry of that term of the intention of the corporation to assume the ownership of the railway, and all real and personal property in connection with the working thereof, they may do so at a valuation. It is true that the agreement provides that if the corporation should fail to exercise its option of assuming the ownership, the grant shall continue for a further period of five years, and so at the expiration of each succeeding five years; but that contingency never arose. We are dealing, therefore, with the license or consent given for that fixed term of thirty years, at the expiry of which, according to my reading of the agreement, the corporation having elected to exercise its option of purchasing, the privilege or franchise of the railway company ceased."

In re Kingston Light, Heat and Power Co., 1902, 3 O. L. R. 637; 5 O. L. R. 348, C. A., the agreement provided that the city upon giving one year's notice should have the option of purchasing and acquiring all the works, plants, appliances and property of the company at a price to be fixed by arbitration, and that upon the acquisition of the same by the city the company should cease to carry on business. The city exercised option and the arbitrators allowed nothing for the value of the earning power or fran-

chise of the company and refused to add ten per cent. to the price as upon an expropriation under R. S. O. 1887, ch. 164, s. 99, and this course was upheld.

In re Berlin and Berlin and W. St. R. W. Co., 1907, 19 O. L. R. 57 C. A., 42 S. C. R. 581, the city sought to expropriate under provision of R. S. O., 1897, ch. 208, s. 41 (1), which was as follows: " . . . the municipal corporation may, after giving six months' notice prior to the expiration of the period limited, assume the ownership of the railway, and all real and personal property in connection with the working thereof, on payment of the value thereof to be determined by arbitration." The arbitrators decline to acceed to the contention of the company that the proper mode of determining the value was to proceed to ascertain the present net earnings of the company and to capitalize that amount. Britton, J., agreed with the arbitrators, following Stockton and M. Water Board v. Kirkleatham, L. B., 1893, A. C. 444, but the Court of Appeal set aside the award, Moss, C.J.O., dissenting, holding that the net annual value should be capitalized on the ground that the value was to be ascertained upon a profit producing basis and not merely upon the actual value of the material in situ, a view which the majority of the court deduced from the two decisions in the House of Lords: Edinburgh S. T. Co. v. Edinburgh, 1894, A. C. 456, and London S. T. Co. v. London County Council, 1894, A. C. 489. The Supreme Court of Canada restored the judgment of Mr. Justice Britton, applying Toronto S. R. Co. v. Toronto, 1893, A C. 511; 20 O. A. R. 125; 22 O. R. 374. The judgments of Anglin, J., and the S. C. and Moss, C.J.O., contained very valuable discussions of the points involved. Leave to appeal to the Privy Council was refused.

In Hamilton Gas Co. v. Hamilton Corporation, 1910, A. C. 300; 79 L. J. P. C. 76, the town of Hamilton, New Zealand, had the statutory right under the special Act which granted a franchise to the Hamilton Gas Co. at any time " after the expiration of twelve years from the date of the coming into operation of the Act to purchase the gas works and plant at a price to be determined by arbitration." By the Municipal Corporations Act, 1886, sec. 396, councils generally were authorized to purchase existing gas works and were forbidden where a private franchise existed to establish gas works except under the authority of the special Act. The judicial committee held that if the purchase had taken place under the general power that the corporation would have bought not only the works in the material sense, but all rights, powers and privileges in connection therewith, and that these rights and powers were so strong that the corporations were prohibited from establishing rival works except by special statutory authority, and that the corporations were apprised of the wide scope of the term " gas works " so far as the general law of New Zealand was concerned, as were also the Hamilton Gas Company, and their Lordships considered that a more limited signification of the term was not to be placed upon the private Act under which the corporation had proceeded to purchase the company's gas works and plant, and that the corporation must, therefore, pay the commercial value of the whole undertaking including good will.

Monopolies.—In addition to the provisions of s. 254, in Ontario the Statute of Monopolies, R. S. O. 1897, c. 323, corresponding to 21 Jac. 1, c. 3, is in force. See vol. 111, R. S. O. 1914, Appendix A. The amending Act, 5 & 6 Wm. IV. (Imp.) c. 83, is not in force in Ontario. For a history of s. 330 of 3 Edw. VII. c. 19 of which s. 254 is substantially a re-enactment, see dissenting judgment of Riddell, J. in re McCracken and Sherborne, 1911, 23 O. L. R. 92, where the majority of the Court held a by-law restricting the number of tavern licenses to one. to be repugnant to the provisions of s. 330. Following the cases which had been decided under the section which preceded s. 330, with the caution that the following extract is from a dissenting judgment, it is given as a valuable analysis of the cases on the section, of which Re McCracken and United Townships is apparently the latest:—

> " The other section much referred to, R. S. O. 1897, c. 245, s. 20, derives from 1850, 13 & 14 V. c. 65, s. 4: 'The municipality . . . shall have power and authority at any time . . . to make by-laws for limiting the number of inns or houses of public entertainment . . . for which licenses to retail spirituous liquors to be drunk therein shall be issued . . . .' 1853, 16 V. (Can.), c. 184, s. 3: The council may pass by-laws 'for limiting the number of

persons to whom and the houses or places for which such licenses shall be granted,' i.e., 'for places other than houses or places of public entertainment:' this was the statute under consideration in the cases of Baker v. Municipal Council of Paris, 1853, 10 U. C. R. 621; In re Barclay and Municipal Council of Darlington, 1854, 11 U. C. R. 470; In re Barclay and Municipality of Darlington, 1854, 12 U. C. R. 86; and In re Greystock and Municipality of Otonabee, 1855, 12 U. C. R. 458, which will be referred to later; 1859, C. S. U. C. c. 54, s. 246 (4): 'The council of every township, city, town, and incorporated village may respectively pass by-laws for limiting the number of tavern and shop licenses respectively: '1876, 39 V. c. 26, s. 2 (3): 'Limit the number of tavern licenses to be issued;' it was under this state of the law that In re Brodie and Town of Bowmanville, 1876, 38 U. C. R. 580, came up for decision: 1877, R. S. O. c. 181, s. 17; 1887, R. S. O. c. 194, s. 20; 1897, R. S. O. c. 245, s. 20.

"The Act R. S. O. 1897, c. 323, is the same as the 'Statute of Monopolies,' 21 Jac. 1, c. 3—the amending Act of 5 & 6 Wm. IV. (Imp.), c. 83 not being in force in Ontario—and has, of course, always been in force.

"It may be well to see how the cases stand.

"Baker v. Municipal Council of Paris, 10 U. C. R. 621, is not in point, the council there having attempted to make regulations beyond their power.

"In In re Barclay and Municipal Council of Darlington, 11 U. C. R. 470, the council of the township of Darlington had passed a by-law prohibiting altogether the licensing of inns for the sale of wines, etc. It was held that they had exceeded their statutory power. The council then passed a by-law 'that . . . the number of taverns which should receive licenses to sell wines,' etc., 'should not exceed one in number.' The township was ten miles square, and contained 6,000 inhabitants, besides a populous village, through which travellers must pass and repass in going to and from other parts of the province (this was before the Grand Trunk Railway went through), and it was argued that the by-law was not a legitimate use of the powers of the township, but established an unreasonable and unjust monopoly. The Court held that the by-law was an intended evasion of the provisions of s. 4 of the Act 16 V. c. 184, which required an entirely prohibitory by-law to be submitted to the vote of the people, and that it was, 'taken with reference to the subject as it applies and to the whole municipality . . . in its effect, a prohibitory by-law;' and added, 'we can have no doubt it was passed in that spirit.' Nothing turned upon the fact that only one license was provided for—the Court expressly recognising that the question might equally be raised if the number were two or ten or twenty, and saying 'that the tribunals of the country, to whom jurisdiction is given in this respect, must be relied upon for exercising a just and sound discretion.' See In re Barclay and Municipality of Darlington, 12 U. C. R. at p. 92.

"The decision is simply that a by-law passed in bad faith and unreasonable cannot stand. . . . In re Greystock and Municipality of Otonabee, 12 U. C. R. 458, the township council passed a by-law that there should be a license issued for one inn or house of public entertainment, and no more, and that in East Peterborough. In the township were some 4,000 inhabitants, and East Peterborough was in the northwest corner of the township. The Court held this bad, on the authority of the Darlington case, and added no further reasons.

"In neither of these cases was the Statute of Monopolies or 12 V. c. 81, s. 116, referred to or given as a reason for judgment. It is, I think, apparent that none of the very able Judges thought that either Act had any application. This consideration does not affect the rights of the parties before us, but it is not without weight.

"In Terry v. Municipality of Haldimand, 1858, 15 U. C. R. 380, the by-law provided for the issue of licenses to two persons named, and no others. This was held to be good—the Court took occasion to discuss In re Barclay and Municipality of Darlington, 12 U. C. R.

86, and In re Greystock and Municipality of Otonabee, 12 U. C. R. 458, and said (pp. 382, 383): 'The municipality had in those cases granted only one tavern license for the whole township, which gave a strict monopoly to one person, and excluded all competition, so that the one person licensed could exact whatever he pleased for the liquor he retailed. We thought that manifestly unreasonable and objectionable; and, besides, the power given to them to limit the number of inns and shops in a township, etc., was not fairly exercised by allowing only one inn and one shop; and what further weighed with the Court . . . was, that it was not till after the municipality had found that they could not obtain the assent of the inhabitants to a total prohibition, by a proceeding such as the 4th section of the Act 16 V. c. 184 required, that they resorted to the very unusual measure of licensing one inn only in a township, and that not in a situation which shewed that the object was the convenient accommodation of the public. We held that we could not but look upon that as a contrivance by the municipal council to do that indirectly which they could not do directly . . . it was in reality . . . intended to evade the legislative enactment. . . . ' No word of either the Statute of Monopolies or the statutory prohibition.

"In In re Brodie and Town of Bowmanville, 38 U. C. R. 580, at p. 584, Harrison, C.J., interprets the Barclay case thus: 'If a by-law really prohibitory in its character be passed under the pretence of being merely a regulation, the by-law will be quashed: In re Barclay and Municipality of Darlington, 12 U. C. R. 86.' Bowmanville contained 3,300 inhabitants and had six tavern licenses: the council limited the number of shop licenses to one—this part of the by-law was attacked as unreasonable (p. 581), and as an attempt to prohibit absolutely the sale of liquor in shops. The Court (p. 586), after citing Barclay, Greystock, and Terry cases, says: 'In the first two cases by-laws limiting the number of tavern licenses to one were held to be illegal. In the last case the by-law provided for the issue of two shop licenses, and though attacked was sustained. Sir John B. Robinson in delivering judgment said (p. 383): 'This by-law allows the licensing of two shops to retail liquors in a township, in which there are four licensed taverns besides. Then there is competition allowed. The privilege is not confined to one person, but is literally given to a number of persons, though, to be sure, the smallest number possible, if there are to be more than one.' This section of the by-law was accordingly quashed with costs, upon the ground (p. 586) that it was in effect prohibitory, and at all events created a monopoly, but solely upon the authority of the three cases in 12 U. C. R. and 13 U. C. R. It appeared that Bowmanville was situate territorially in the township of Darlington, which had 4,800 inhabitants of its own, and no shop licensed to sell by retail, so that 8,100 people were confined to one retail shop.

"This was, unlike the three former cases, a single Court judgment on a motion to quash, and we are not bound by it, although it is entitled to great respect as the judgment of a Judge of much experience in municipal matters and of undoubted erudition.

"I do not find in the cases (except, perhaps, the Brodie case) any decision that limiting the number of licenses to one is in itself bad."

It would appear to follow that unless expressly authorised so to do, councils or boards of commissioners of police cannot create a virtual monopoly by granting only a single license in cases where the licensing power has been delegated to them.

Reduction of Pool-room Licenses.—In re Stewart and St. Mary's, 1915, 34 O. L. R. 183, Lennox, J., dismissed an application to quash a by-law which limited pool-room licenses to one. After referring to secs. 249 (2) and 250 his Lordship said:

"Taking into account the very large discretionary powers conferred upon the council by these provisions, and that incidental monopoly even where it is to be enjoyed by one individual or company is not foreign to our statutory municipal law, for instance, for the supply of

light, heat and power to the inhabitants under sec. 399, sub-secs. 17, 50 and 64, and the obvious case of an exclusive franchise to a street railway company, I cannot read sec. 254 as necessarily compelling a municipal council to issue licenses for a multitude of pool-rooms, slaughter-houses, pounds and livery-stables within the municipality—some of them noxious and offensive, although necessary or proper to a limited degree—beyond the reasonable requirements of the municipality, even if it may be argued that the reasonable and proper limitation fixed by the council may incidentally and unavoidably result in individual monopoly. It may be still monopoly if two or even more licenses are provided for. One license for 4,000 people is no more a monopoly than two licenses in a town of 10,000 inhabitants. There is no question of practical prohibition here, as in Rowland v. Town of Collingwood, 1908, 16 O. L. R. 272. The people must have hotels until the people say otherwise at the polls—but the council is not bound to provide for pool-rooms; and, having provided for and issued two licenses, can cancel one or both of them. They can regulate charges as they see fit, and by fixing a sufficiently high license fee can prevent unreasonable profit to the licensee and secure revenue for the municipality at the same time."
Caution: see Re McCracken and Sherborne, *supra*.

256. The council of a city may establish and carry on the business of cold storage in connection with or upon the market property of the corporation. 3 Edw. VII. c. 19, s. 331*a*, *amended*. 3 & 4 Geo. V. c. 43, s. 256.

257.—(1) Subject to the limitations and restrictions contained in this Act, a council may borrow money for the purposes of the corporation, whether under this or any other Act, and may issue debentures therefor. *New.*

(2) A debt contracted by the corporation of a city for the construction or maintenance of a street railway shall not be included as part of its debt for the purpose of determining whether the limit of its borrowing power as fixed by any special Act has been reached. 2 Geo. V. c. 40, s. 12, *redrafted*. 3 & 4 Geo. V. c. 43, s. 257 (1-2).

Authentication of By-laws.

258.—(1) Every by-law shall be under the seal of the corporation, and shall be signed by the head of the council, or by the presiding officer at the meeting at which the by-law was passed, and by the clerk.

(2) Every by-law purporting to be so sealed and signed, when produced by the clerk or any officer of the corporation charged with the custody of it, shall be received in evidence in all Courts without proof of the seal or signature. 3 Edw. VII. c. 19, s. 333, *amended*.

(3) Where, by oversight, the seal of the corporation has not been affixed to a by-law, it may be affixed at any time afterwards, and, when so affixed, the by-law shall be as valid and effectual as if it had been originally sealed. *New.*

(4) A copy of a by-law, purporting to be certified by the clerk, under the seal of the corporation, as a true copy, shall be received in evidence in all Courts, without proof of the seal or signature. 3 Edw. VII. c. 19, s. 334, *amended.* 3 & 4 Geo. V. c. 43, s. 258 (1-4).

Sec. 258 (1) is imperative and imposes upon the mayor a ministerial statutory duty enforceable by a summary order of mandamus. If the right and jurisdiction of a municipal council to pass the by-law, are established and the head of the corporation refuses to sign it merely because he disagrees with the policy adopted, the Court would have no hesitation in ordering the discharge of this statutory duty, Anglin, J., in re Galt By-law, Scott v. Patterson, 1908, 17 O. L. R. 270. See also re Kennedy and Boles, 1905, 6 O. W. R. 837 to the same effect, where Meredith, C.J., said: "it would be almost an impertinence for the Court to attempt to interfere by substituting its discretion for that of the council;" and that "it would be a most dangerous thing if . . . the mayor should take it into his own hands to overrule the will of the majority of the council, which is the statutory mouthpiece of the municipality, and to refuse to carry out what they have in a regular manner decided to do."

"On the other hand, where the refusal to sign is based upon the ground that the by-law is beyond the jurisdiction of the municipal council, and that it purports to authorize and require the making of an invalid and illegal contract, I think it is clearly open to the Court, in the exercise of the undoubted discretion which it possesses as to granting or refusing a summary order of mandamus, to consider the objection, and, if it be found sound, to decline to compel the head of the municipality, by this extraordinary process, to assist in the doing of that which is unauthorized and illegal, and it may be, also involves an act of bad faith. I do not at all agree in the view that the mayor or head of a municipality is a mere automaton, bound to place his signature to any document or any instrument, however vicious or illegal, merely because he has been directed to do so by the municipal council." Per Anglin, J., in re Galt By-law, *supra.*

The refusal of a mayor to sign was upheld in Canada Atlantic v. Ottawa, 1885, 12 S. C. R. 365, where the vote on the by-law was premature and irregular.

This section was also considered in Wigle v. Kingsville, 1897, 28 O. R. 378, where a resolution under seal was held not to be a by-law, because not signed as required by a corresponding section of the then Act.

The signature of deeds by the mayor and other officers may be in some cases a duty that is not strictly corporate but public, and in a sense governmental, and the officers of municipality while engaged in performing such duties, are public officers, and not merely the officers or agents of the municipality. This was held to be the case by Taylor, C.J., in McLellan v. Assiniboia, 1888, 5 M. R. 127 & 265.

In re Preston and Manvers, 1862, 21 U. C. R. 626, the reeve refused to sign and by direction of counsel the deputy reeve did so, and the by-law was upheld.

Certificate of Clerk as to Application for By-law.

259.—(1) Where by this or any other Act it is provided that a by-law may be passed by a council upon the

application of a prescribed number of electors or inhabitants of the municipality or locality, the by-law shall not be finally passed until the clerk, or, where there is an assessment commissioner, the assessment commissioner has certified that the application was sufficiently signed. 3 Edw. VII. c. 19, s. 337*a*; 4 Edw. VII. c. 22, s. 7, *redrafted.*

(2) For the purposes of this section, the clerk and the assessment commissioner shall have all the powers of the clerk under section 16 of *The Local Improvement Act. New.*

(3) Where the clerk or assessment commissioner has so certified, his certificate shall be conclusive that the application was sufficiently signed. *New.* 3 & 4 Geo. V. c. 43, s. 259 (1-3).

See note to s. 13, *supra.*

Sec. 16 of the Local Improvement Act gives the clerk power to summon witnesses, and examine them on oath, and for the purpose to cause subpoenas to be issued out of the County Court. It also provides that all complaints by persons that their signatures were obtained by fraud or otherwise improperly, shall be determined by a Judge of the County Court.

If the clerk's certificate is in fact erroneous, it can be quashed. The section does not provide that the certificate shall not be called in question in any Court. It is submitted that after an erroneous certificate has been quashed, any by-law based on it could be quashed or declared invalid.

Many cases dealing with certificates made conclusive by statute were considered by the Court of Appeal for Manitoba in Molison v. Woodlands, 1915, 25 M. R. 634, among which may be mentioned Wenlock v. Dee (No. 2), 1888, 38 Ch. D. 534; 57 L. J. Ch. 946 C. A.

PART X.

VOTING ON BY-LAWS.

260. In this Part,

(*a*) "By-law shall include a resolution and a [question upon which the opinion of the electors is to be obtained.]

(*b*) "Electors" shall mean the persons entitled to vote on the by-law.

(c) "Judge" shall mean Judge or Junior Judge of the County or District Court of the county or district in which the municipality, the council of which submits the by-law, is situate.

(*d*) "Proposed by-law" shall mean a by-law submitted for the assent of the electors. 3 & 4 Geo. V. c. 43, s. 260.

261. This Part shall be subject to the provisions of *The Liquor License Act.* 3 & 4 Geo. V. c. 43, s. 261.

262. All the provisions of this Act prohibiting the doing of any act or making it an offence against this Act, and prescribing penalties therefor, applicable to the election of members of municipal councils shall apply *mutatis mutandis* to the voting upon a by-law, whether the submission of it to the electors is optional with or compulsory upon the council. 10 Edw. VII. c. 85, s. 3; 3 & 4 Geo. V. c. 43, s. 262.

263.—(1) Where a by-law requires the assent, or is submitted to obtain the opinion, of the electors, except where otherwise provided, the council shall, by a separate by-law, appoint the day for taking the votes of the electors, the places where the votes are to be taken, and a deputy returning officer to take the votes at every

such place. 3 Edw. VII. c. 19, s. 338, par. 1, first part *amended*; 3 & 4 Geo. V. c. 43, s. 263 (7).

By a Separate By-law.—Before the revision of 1913, these matters had to be provided for in the proposed by-law. The former practice was very incorrect in requiring the mode of submission to be determined by the by-law to be submitted, as the by-law until passed could have no validity; see remarks of Robinson, C.J., in Boulton v. Peterborough, 1859, 16 U. C. R. 380. In case the separate by-law omits any of the matters required to be done under the terms of s. 263, for example, omits to fix a time and place for the summing up, will this omission be fatal to the by-law to be submitted? It seems reasonable that if the date appointed for the voting does not violate the rule in s.-s. 2, and if the requirements as to publication in s. 5 are observed, the omission to provide for these matters by by-law, if they are in fact provided for otherwise, should not be a ground for quashing the by-law if passed by the electors, and this view is in harmony with the rule in Boulton v. Peterborough, 1859, 16 U. C. R. 380, and Canada Atlantic v. Ottawa, 1885, 8 O. R. 201, at 210, affirmed 12 A. R. 234, 12 S. C. R. 365. In the latter case, Osler, J.A., said:—

> "I am also of opinion that the by-law would not be invalidated by the omission of the clauses which the published copy contained, providing for the time and place at which the sense of the electors should be taken. They are part of the proceedings for ascertaining the assent of the electors, but form really no part of the by-law voted on. I think they ought not to have been omitted, as they are to some extent a voucher of the regularity of the proceedings to persons who may become purchasers of debentures or otherwise interested in the by-law."

The Day for Taking the Votes.—See s. 263 (2).

In re Coxworth and Hensall, 1908, 17 O. L. R. 431, the by-law stated that it would be voted on at the same time and place as the municipal elections, and before the first publication of the by-law the times and places were fixed by the council and inserted in the by-law by the clerk; on motion to quash, this was held to be merely the substitution of one equivalent for another, applying R. v. Willesden, 1900, 82 L. T. N. S. 385.

Shall Appoint the Places Where Votes are to be Taken.—In re Salter and Beckwith, 1902, 4 O. L. R. 51, the by-law simply named Franktown as one of the polling places without naming any house, hall or place. Franktown was a small village, wholly and well known to the electors. Polling took place there year after year at the municipal elections, and any house could be quickly and easily found. On a motion to quash on the ground that the by-law did not sufficiently name the place for taking the vote this objection was overruled.

Deputy Returning Officers.—In re McCartee and Mulmur, 1900, 32 O. R. 69, the statute required the by-law which was to be submitted to name the Deputy Returning Officers, but this was not done. Robertson, J., quashed the by-law, holding that the provision was imperative.

In the foregoing case a material part of the by-law, which was to be submitted to vote, was omitted. The same rule would hardly be applied to quash a by-law which had been carried by vote in a case where the separate by-law required by s. 263 (1), failed to name Deputy Returning Officers.

In re Bell and Elma, 1906, 13 O. L. R. 80, D. C., the township clerk, who had been duly appointed a Deputy Returning Officer, was taken ill and was unable to act. He requested a person to act in his place, who did so. There were other irregularities. The D. C. quashed the by-law on the ground that a positive direction of the statute had not been complied with, and refused to apply the curative s. 204. It does not seem likely that the by-law would have been quashed had the presence of the unauthorized substitute been the only irregularity: see Re Schumacher and Chesley, 1910, 21 O. L. R. 522, D. C.

263.—(2) The date appointed shall not be less than three, or more than five, weeks after the first publication of the notice hereinafter mentioned. 3 Edw. VII. c. 19, s. 338, par. 1, last part; 3 & 4 Geo. V. c. 43, s. 363 (2).

The Date.—In re Armstrong and Toronto, 1889, 17 O. R. 766, Falconbridge, J., was inclined to think it a fatal objection to a by-law that the provisions to the same effect as those in s. 263 (2) had not been complied with, saying:—

> "The first publication here was on 30th November, 1888. The votes were taken on the 7th January, 1889 (three days after the expiry of the five weeks), and on the same day as the ordinary municipal elections were held.
>
> "Taking the vote on the day of the municipal elections was convenient; it saved expense, and it doubtless secured a larger expression of the opinion of the electors than if a separate day and hour had been named. I cannot conceive how any one or any interest could be prejudiced by that day being appointed instead of a day half a week earlier. The objection is of the most technical."

In Re Vandyke and Grimsby, 1906, 12 O. L. R. 211, S. C., the by-law fixed January 1st, 1906, as voting day, and the council entrusted the clerk with the duty of publication.

By mistake he caused the by-law to be published in a newspaper on November 22nd, which would be more than five weeks before voting day. Very shortly after the publication on the 22nd November, the clerk's attention was called to the mistake, and he at once ordered its cancellation; and on November 29th he caused another publication of the by-law to be made in the same newspaper, and on or about January 30th caused four copies of the by-law to be posted, as required by the Act.

Appended to the copies of the by-law so published was the notice required by s.-s. 3 of s. 338, in which the date of the first publication was certified to be November 29th.

The publication on November 22nd was thereafter regarded by the clerk and council as a nullity, and the publication on November 29th as the real first publication.

Teetzel, J., whose judgment was upheld by the D. C., said:—

> "It is manifest that the mistake was unintentional, and there is not in the material any suggestion that the result of the voting was in the slightest degree affected by it.
>
> "The facts in this case entirely distinguish it from the Armstrong case. In that case the first publication was not abandoned, but continued and adopted as one of the series required by the Act. Here a new start was made, and by the subsequent publication the provisions of the Act are literally complied with."

In Re Vandyke and Grimsby, 1909, 19 O. L. R. 402, the council proposed to submit a by-law repealing the local option by-law which was upheld in Re Vandyke and Grimsby, 1906, 12 O. L. R. 211; the first publication was on the 11th of November, and publication continued once in each consecutive week until the 23rd December. The voting was taken on the 4th January, being more than seven weeks after the first publication. Mulock, C.J., held the provision corresponding to s. 262 (2) to be mandatory, and that the council had no power to hold the election after five weeks from the 11th November. Following Re Armstrong and Toronto, *supra*, and Re Henderson and Mono, 1907, 9 O. W. R. 599.

In Re Duncan and Midland, 1907, 16 O. L. R. 132, the first publication was on the 12th of December, 1906, and the day of polling the 7th of January, 1907. Thus three weeks elapsed from the first publication before the day of polling. The Court held that the word week is used in the ordinary signification. An objection based on the theory that twenty-one days must elapse, including Sundays and holidays, was overruled, as was also done in Re Armour and Onondaga, 1907, 14 O. L. R. 606.

(3) A proposed by-law may and in cities having a population of not less than 40,000 shall, where it provides for the purchase or acquiring of any public utility or street railway or for entering into any agreement for that purpose, or for disposing of any public utility or granting any public franchise, be submitted only on the day fixed for taking the poll at the annual municipal election. 4 Geo. V. c. 33, s. 6.

263.—(4) The by-law for taking the vote shall also appoint a time when, and a place where, the clerk will sum up the number of votes given for and against the proposed by-law, or in the affirmative and the negative on the question, and a time and a place for the appointment of persons to attend at the polling places, and at the final summing up of the votes by the clerk, on behalf of the persons interested in, and promoting or opposing the by-law, or voting in the affirmative or the negative on the question. 3 Edw. VII. c. 19, s. 341, redrafted; 3 & 4 Geo. V. c. 43, s. 263 (4).

Time When and Place Where the Clerk Will Sum up.—In Brunker v. Mariposa, 1892, 22 O. R. 120, on a motion to quash a local option by-law, one of the objections was that the by-law announced an improper date for the declaring of the result by the clerk. The day fixed was two days after the polling. It was held that having reference to then s. 160 (now s. 126), the second day after the polling would not be an improper date for the performance of this duty.

In Re Bell and Elma, 1906, 13 O. L. R. 80, the statutory requirement was that the by-law to be submitted should fix the time and place for summing up. The council did not by the by-law fix the time and place, and the clerk, who was ill, did not attend, but a substitute attended, who only obtained possession of five out of eight ballot boxes, and relied on a memorandum in writing from the clerk as to the other three. The D. C. held that positive directions of the statute had not been complied with as an essential part of the by-law, which was more than an irregularity, had been omitted, and that the curative s. 204 did not apply, and that the by-law must be quashed.

Appointment of Persons to Attend Polling and Summing up.—In Re Bell and Elma, 1906, 13 O. L. R. 80, the by-law omitted to fix the time and place for the appointment of persons to attend the various polling places, and at the final summing up, and the by-law was quashed on the ground that the requirement was imperative.

As the fixing of the time and place for the appointment is by separate by-law, if there is proper publication as required by s. 263, giving notice of a time and place, and if the persons are actually appointed, it would seem reasonable that the by-law if carried by the votes should not be quashed.

Re Bell and Elma, was followed in Shaw v. Portage la Prairie, 1910, 20 M. R. 469, C. A., where the by-law failed to provide for the appointment of scrutineers, the Court holding that the omission was fatal.

When the by-law makes provision for the appointment, but no appointment is made: see s. 264 (1).

263.—(5) A copy of the proposed by-law, or a statement of the question submitted, as the case may be, shall be published once a week for three successive weeks, together with a notice signed by the clerk stating that the copy is a true copy of a proposed by-law, or a correct statement of the question submitted, as the case may be, and in the case of a by-law that, if the assent of the electors is obtained to it, it will be taken into consideration by the council after the expiration of one month from the date of the first publication, which date shall also be stated, and in the case of a money by-law stating that a tenant who desires to vote must deliver to the clerk not later than the seventh day before the day appointed for taking the vote the declaration provided for by sub-section 2 of section 265. 3 & 4 Geo. V. c. 43, s. 263 (5).

Publication.—The combined operation of s. 263 (5) and s. 2 (O.) makes it imperative if there is a newspaper in a municipality to make the publication in that newspaper, and publication in a newspaper published in an adjoining municipality is not publication within the meaning of the Act, and an irregularity of this kind cannot be cured under the provisions of s. 150 because the statutory duty to publish is imperative, and failure to do so is a disregard of the principles of the Act.

263.—(6) The notice shall also state the day and places appointed for taking the votes, except where the votes are to be taken at the same time as the annual election, and, in that case, shall state that the votes will be taken at the annual election, and shall also state the day appointed for persons to attend at the polling places and at the final summing up of the votes by the clerk. 3 Edw. VII. c. 19, s. 338, pars. 2 and 3, redrafted; 3 & 4 Geo. V. c. 43, s. 263 (6).

Rule as to Necessity for Publication.—In Re Ostrom and Sidney, 1888, 15 A. R. 372, where a by-law opening a road was passed without previously giving the statutory notices, the principle was fully established that whenever a statute forbids the passing of a by-law interfering with private property except on stated conditions as to notice, etc., the conditions must be strictly fulfilled, and the earlier cases on the subject are reviewed.

In Re Huson and South Norwich, 1892, 19 A. R. 343, affirmed in the Supreme Court. Hagarty, C.J.O., referring to Re Ostrom and Sidney, said:—

> "The same rule must, I presume, apply where any proceeding is directed in express terms as a condition precedent to jurisdiction.
>
> "But the Courts from the earliest date have striven to avoid undue strictness in the insistence of exact performance of statutable formalities, where they could see that the objection did not reach either to the

clear omission of some condition precedent required to be performed—where a mistake had been made in perfect good faith and with an honest purpose of obeying the law, although unintentionally deviating from its strict formal observance—where the objection was wholly technical and nothing had occurred to create a suspicion of unfair dealing, and there was no reason whatever to believe that the result of the whole proceedings had been affected."

In Cartwright v. Napanee. 1905, 11 O. L. R. 69, 8 O. W. R. 65, a section provided that no by-law of the kind in question should be passed until there had been publication for one month. Publication took place for four successive weeks only; it was held that observance of the requirements of the section was essential to the jurisdiction to pass the by-law and that the remedial s. 204 could not cover a substantial omission of a positive requirement as to publication, but Meredith, J., refused to exercise its jurisdiction to quash the by-law, and allowed it to become validated under the provisions of s. 296; but on appeal a different view was adopted: see full discussion under ss. 282-286.

In Re Rickey and Marlborough, 1907, 14 O. L. R. 587, D. C., the Act required publication in a newspaper each week for three successive weeks. Maybee, J., held that three successive weeks meant three successive seven-day periods, each beginning on Sunday and ending on Saturday, and that because one of the three publications appeared on a day in each of such periods respectively, there was a compliance with the statute.

The D. C., rejected this view, Teetzel, J., in giving the judgment of the Court, saying:—

"The dictionaries, with practical uniformity, define the word 'week' as a period of time commencing with Sunday and ending with Saturday night, and also, as a period of seven days' duration without reference to the time such period commences; the latter meaning not being confined to what is commonly known as the biblical or calendar week.

"Having these two recognized meanings, it must follow that the exact meaning in each case must depend largely upon the context.

"I think it is very plain that the words 'shall not be less than three, nor more than five weeks, after the first publication,' in the first sub-section, and 'one month from the first publication,' 'stating the date of the first publication,' in the first sub-section, shew that the Legislature intended to fix the day of the first publication as the starting point for future calculations, and as that day would not, of necessity, be a Sunday, the biblical week could not have been intended in the first sub-section. There is nothing to shew that the Legislature intended to use the word 'week' or 'weeks' in the second sub-section in a different sense from that in which it is used in the first sub section. Reading the three sub-sections together, therefore, I think the intention is that the period of publication 'for three successive weeks' should embrace three successive periods of seven days each, beginning on the first day of actual publication, and not on the first day of the biblical week in which the first publication appears, and that there should be at least one publication in a newspaper in each of the seven-day periods.

"If the word 'week' is construed otherwise, it would be possible to have the publications appear in a period having only eight clear days between the first and the last publication, where a daily paper was available. For example, the first publication on Saturday the 15th, the second on Monday the 17th, and the third on Monday the 24th.

"Under the interpretation placed by me on these sub-sections, there have in the matter been two publications in the first week or seven days' period, one in the second, and none in the third, and, consequently, the statute was not complied with.

"The following cases support the view I have adopted: Hall v. The Rural Municipality of South Norfolk, 1892, 8 Man. L. R. 430; In the Matter of Coe and the Corporation of the Township of Pickering, 1865. 24 U. C. R. 439; Raunn v. Leach, 1893, 53 Minn. 84; Early v. Doe, 1853 (U.S.), 610, and Leach v. Burr, 1903, 188 U. S. 510."

The Court adopted the view expressed by Meredith, J., in Cartwright v. Napanee, *supra*, that s. 204, the remedial section, now 150, could not be applied to save the by-law, and distinguished Re Robinson and Beamsville, 1906, 8 O. W. R. 689, 9 O. W. R. 273, on the ground that the only point in regard to publication in that case was whether or not one of the places where the notice had been posted was one of the most public places in the municipality, and that there was no question as to the sufficiency of the publication in the newspaper.

Manitoba Cases as to Publication.—In Hall v. South Norfolk, 1892, 8 M. R. 430, the statute required publication for at least one month before the poll, but provided that no more than one insertion each week should be necessary. The notice appeared on the 6th, 13th, 20th, 23rd, 27th and 30th of April only. Killam, J., pointed out that month meant calendar month; as the publication began with the 6th of April, the month must be taken as beginning then and as ending with the 5th May. He also held that the statute required at least one publication in each week of the month, and that for the purpose of reckoning the weeks one must begin with the day of the first publication and not with the first day of an ordinary week; the first week began on the 6th April and ended on the 12th April, and the fourth week began on the 27th April and ended on the 3rd May, and that there had been one publication in each of the first three of the weeks and two in the fourth week. The month was not then ended; a fifth week began and although there were only two days remaining to complete the month, in order to comply with the statute, there should have been a publication in that week, which could and should have been made on the 4th May, and he accordingly held the by-law invalid on the ground that the provisions of the publication were imperative and had not been complied with, following the cases on the Temperance Act cited above.

In Shaw v. Portage la Prairie, 1910, 20 M. R. 469, C. A., the statute required that the notice should be published in the Manitoba Gazette and in a newspaper for at least one month before the vote was taken, but provided that no more than one insertion each week should be necessary. The notice was published on the 14th, 21st and 28th October, and on the 4th and 11th November in a newspaper, and on the 16th, 23rd and 30th October and the 6th and 13th of November, and the voting took place on the 31st of December. Howell, C.J.M., said:—

> "I cannot think that from the 16th of October to the 13th of November, could be held by anyone to be at least one month. Of course, by our Interpretation Act, it must be a calendar month, but it is argued that the words following the above, 'but no more than one insertion each week shall be necessary,' really shorten the period or explain the first mentioned imperative language. It seems to me that the whole section can be made reasonable by putting this construction upon it. The notice shall be published as soon as possible after the first and second reading, and in any event it shall be published for a period of at least one month, but in the interval between the first and last publication, marking the period of at least one month, you need not publish daily: once in each week shall be sufficient, and this shall be considered a continuous publication for one month; to hold otherwise is to hold the publication on the 11th as to be deemed publication on the 14th.
>
> "In my view the statute has not been complied with."

Richards, J.A., said:—

> "As to both the newspaper and the Gazette there was, from the day of the first publication to the day of the last one (inclusive of each), a period of 29 days. It is argued that, to comply with the Act, the publication must be such as to contain a complete calendar month between the first and last days of publication. If that is correct the notice was not sufficient.
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> "If it were not for the words: "But no more than one insertion each week shall be necessary,' I should consider myself bound to follow the above contention. Even with those words, the construction to be put upon the clause is by no means clear. It may mean that the advertisement must be continued till, between the first and last publications, a period of at least one calendar month shall be con-

tained, though the publication need not, during that time, be made more frequently than once in each week. Or it may mean that it shall be sufficient if the advertisement appears in each once-a-week issue that would occur within a calendar month, beginning with, and including the day of the first publication.

"The question was referred to by Mr. Justice Killam in Hall v. South Norfolk, 8 M. R. 430. But there the publication was such that it did not comply with either of the above views. I am not wholly certain that there the learned Judge intended to express a decided opinion as to which view was the correct one. If he did so intend, as I am disposed to think he did, he held that five successive weekly publications on the same day of each week were sufficient. Any opinion of his, even though but an *obiter dictum*, is entitled to much weight.

"I think that the proper view is that five successive weekly publications as above, and as in this case, are sufficient."

Cameron, J.A., said:—

"I would say that these words can be paraphrased thus: 'And such notice shall be published in such newspaper for a period of not less than one calendar month before the day the vote is taken on the by-law, but one insertion only of such notice during each week of that period of one month in such newspaper shall be deemed sufficient, and all that is necessary to constitute the publication required by this section.

"Now if that is the meaning of these statutory words, then it seems clear that the requirements of the statute have in this case been met. For we have here the first week of publication in the newspaper commencing October 14th and ending October 20th (notice published October 14th), the second week commencing October 21st, ending October 27th (notice published October 21st), the third week commencing October 28th, ending November 3rd (notice published November 28th), the fourth week commencing November 4th, ending November 10th (notice published November 4th), and the fifth week commencing November 11th, and ending November 18th (notice published November 11th).

"I have read with care the judgment of the late Chief Justice Killam in Hall v. South Norfolk 8 M. R. 430, and it appears to me that what I have stated above in the form of a paraphrase was present in his mind when dealing with these very words of the statute. In that case he pointed out that the month must, for the reason he gives, be taken as beginning with April 6th (the first day of publication), and ending with May 5th and that there was one publication in each of the first three weeks and two in the fourth. 'But the month was not then ended; a fifth week began, although there were only two days remaining to complete the month; and in my opinion, to comply with the statute, there should have been a publication in that week, which could and should have been made on the 4th May.' In this present case there was one publication in each of the first, second, third and fourth weeks; but the month was not then ended; a fifth week began (because this month began October 14th and ended November 13th), although there were only three days remaining to complete the month, viz., November 11th, 12th and 13th, and there should have been, and there in fact was, a publication in that week, the same being on November 11th, which completed one insertion during each week for a period of one calendar month prior to the day of voting, as required by the section in question.

"The decision in Hall v. South Norfolk has been frequently referred to and cited as an authority in the Courts of Ontario, and of this province. It seems, in my judgment, to be in accordance with the meaning and intention of the statute, and, though I am sensible that the words are capable of another construction, I do not feel justified in departing from Chief Justice Killam's interpretation."

Publication Cases Under the Canada Temperance Act, 1864. —Section 5 provided: "The clerk . . . shall . . . cause such by-law . . . to be published for four consecutive weeks . . . and also by posting up copies of the same in at least four public places . . . with a notice signed by him signifying that on some day within the week next after such a meeting of the municipal electors . . . will be held for the taking of a poll . . . ."

In Re Coe and Pickering, 1865, 24 U. C. R. 439, the dates were: First publication 12th January, 1865; polling, 7th February. Held, time too short, but that the last week ended 8th February.

In Re Miles and Richmond, 1869, 28 U. C. R. 333: First publication 2nd October, 1868; polling, 4th November. Held, that the first publication was bad, in that it stated the hour of polling at 10 p.m., instead of 10 a.m.; but it was further said that the first publication was good, having been made 9th October, the fourth week ended 6th November.

In Re Brophy and Gananoque, 1876, 26 C. P. 290: First publication, 6th March, 1875; polling, 1st and 2nd April. Held, that this was not four weeks.

In Re Mace and Frontenac, 1877, 42 U. C. R. 70: First publication, 9th October, 1876; polling, 6th November. Held, that for those townships in which the first publication was on the 9th October the time was sufficient; but where, as in the township of Loughboro, the first publication was 10th October, or, as in the township of Oso, the 12th or 13th October, the time was too short, and the by-law was accordingly quashed.

Four or more of the Most Public Places of the Municipality. —Section 355 (B.) of the Municipal Act, R. S. M. 1913, c. 155, provides that the notice shall be posted up in four or more of the most public places of the municipality. A similar provision was made in the Ontario Municipal Act until the revision of 1913. This provision has given rise to numerous cases.

In re Mace and Frontenac, 1877, 42 U. C. R. 70, three out of four notices were put up in one village in a large township, and the fourth notice within a mile of the same village. There were other villages in the township where the notices could more properly have been put up. The by-law was quashed.

In Re Salter and Beckwith, 1902, 4 O. L. R. 51, a by-law was quashed for want of proof of posting up by the council of the by-law. The facts as stated by Britton, J., were:—

> "The affidavits shew that one copy was put up by P. F. Sinclair, who was and is a member of the council. He says he has been informed and believes that five copies of the by-law were duly posted, etc., and that he himself personally posted one copy at Scotch Corners in said township. Joseph Kidd, who was reeve of the township in 1901, swears as follows: 'Copies of said by-law, with said notice appended, were posted up in at least five of the most public places in said township of Beckwith, namely, Franktown post office Derry school house, Prospect post office, Kemp's blacksmith shop at Black's Corners, town hall at Black's Corners, all of which said notices I did personally see. I have also been informed and believe that said by-law, with said notice attached, was posted at the Scotch Corners in such township."
>
> "It will be noticed that no time is mentioned. It is not attempted to be shewn who put any of these copies up, or when, or by whose authority other than above stated. Apparently, the matter was not discussed in council or by the councillors either at or before or after any meeting."

In Re Pickett and Wainfleet, 1897, 28 O. R. 464, one of the objections was, the copies of the by-law and notice of the polling were not posted at four of the most public places in the township, or at all at any place whatever in the municipality, but it was contended in extenuation that there was general interest in the subject of the by-law, and that the necessary information was given by posters, which were freely distributed, and at meetings, and it was pointed out that a substantial vote was cast; though the majority was only fourteen, there were nearly four hundred unpolled votes. Osler, J.A., said:—

> "Had the majority been large, or had the posters calling the meetings specified the time and places at which the votes were to be taken, I might have arrived at a different conclusion. Everybody does not take a newspaper, and the posting of the by-law and notice is one of the methods specially required by the Legislature to be observed for giving notice to the electors. I think that the unexplained omission to comply with that requirement is one very difficult to excuse, and needs much more convincing evidence that it was harmless than the respondents have

adduced. I refer to Re Coe and Township of Pickering, 24 U. C. R. 439; Re Miles and Township of Richmond, 28 U. C. R. 333; Re Mace and County of Frontenac, 42 U. C. R. 70. Even if the direction I am considering is not imperative, as Armour, C. J., seems to have thought in the latter case, it is clear that the onus of proving that the omission to comply with it has not affected the result, is upon the respondents, and I am of opinion that they have failed to sustain it. Sections 175 and 306 of the Act were relied on, but they merely enable the Court to refrain from declaring the by-law invalid for want of compliance with forms or rules as to taking the poll, or counting the votes, or by reason of any irregularity, if it appears that the proceedings were conducted in accordance with the principles laid down in the Act, and that the non-compliance, mistake or irregularity, did not affect the result. I am not satisfied with respect to the latter condition, while as to the former, there is evidence that at more than one polling place the voting was conducted with an entire disregard of some of the safeguards provided by the Act for ensuring the secrecy of voting. . . .

"Everything was conducted in the loosest way, and with a disregard of the plain directions of the Act, which is surprising. Had there been nothing else, it is possible that the election might have been upheld under s. 175, even as against those I have noted. But the very least that can be said of them is that they do not diminish the force of the objection on which I have held that the by-law must be quashed."

In Re Begg and Dunwich, 1910, 21 O. L. R. 94, Riddell, J., considered that the requirements of the publication had not been complied with, and that following Re Pickett and Wainfleet, the onus of proving that the omission had not affected the result was on the respondents, and as they had wholly failed to meet this onus, he refused to apply s. 204, and quashed the by-law. The postings which were considered were as follows: The clerk personally posted a notice in the town hall where the council met inside the building; the building was kept locked when not opened for council meetings and was constantly locked up a good part of the time. The caretaker of the hall said he never saw a notice. As to this Riddell, J., said: "It would be an abuse of language to call a hall kept locked up against the public one 'of the most public places in the municipality.' The notice might, for all practical purposes, as well have been put at the top of a telegraph pole." Another notice was put up in the postoffice in D., at which one-third of the township people got their mail. D. formed no part of the municipality but was surrounded by it. Another notice was put up in a private office in D. The last two were both outside the township, though geographically within its outside limits. That in the private office was rejected as not being "one of the most public places," even supposing D. to be "in the municipality." There was evidence by a post mistress that a notice of some kind, which she had had not read, had been put up in her office, which was admitted to be one of the most public places. No one could be found who had seen the notice. It was held that this posting was not proved. There was no proof that other notices which the clerk handed out to councillors to post up had ever been posted.

In Re Angus and Widdifield, 1911, 24 O. L. R. 318, Riddell, J., thus stated the facts, and his conclusions thereon:—

"The council did not select the places for posting up the copies—the whole matter was left to the reeve, Murphy. He put up four on telegraph poles, all within about three-quarters of a mile, and all within the part of the township to be annexed, not one more than three-quarters of a mile from the centre of North Bay, but all on the streets leading from the country district. The reeve knows of no other posters, of his own knowledge. But he says that he gave one to Mr. Meadows, who said he put it up in the post office at Woodland. One was given to a policeman, but that seems to have been put up in or near North Bay.

"There is another post office, Trout Lake, it is said, although I cannot find it in the post office list. Then there is apparently another at Widdifield. It appears, also, that several public meetings were held in opposition to the by-law in parts of the township remote from North Bay and from the territory to be annexed.

"It is argued that the statute has not been complied with in respect of the posting of the notices. First, it is said that the council did not put up the copies—the council exercised no judgment at all, but left the whole matter to Murphy. This is true, and it may be that in some cases something might turn upon such a fact. It may be that the Court would not enter into the inquiry at all, if the council were to exercise a discretion and judgment, and in good faith select certain places for the posting—whereas, if the council did nothing of the kind, the Court might inquire with some strictness into the locus and whether the statute was in fact complied with. I do not decide this, however; simply saying that the statute seems to call upon the council to exercise a judgment, and it would be well that councils should pay strict attention to the requirements of the statute. And, once again, the attention of municipalities should be drawn to the advisability of preserving regular proof by statutory declarations of the postings. I have in Re Begg and Township of Dunwich, 21 O. L. R. 94, at p. 95, cited a case as early as 1850, in which our Courts have said this in substance: In Re Lafferty v. Municipality Councils of Wentworth and Halton, 1850, 8 U. C. R. 232.

"His Lordship then dealt with the contention that on the fact Re Mace and Frontenac and Parker v. Pittsburgh, 8 C. P. 517, concluded the township. He pointed out that the language of the statute in those cases was not quite the same as in the statute under consideration, and added: 'It may be that the decision (Mace v. Frontenac) goes so far as to say that posting at one part only of the township is not a sufficient compliance with the statute—but, as at present advised, I should hesitate before so holding. He held that the evidence did not show that any other place or places in the township were more public than the points selected, and while Parker v. Pittsburgh might help the applicants, he refused to decide the case on that ground, placing his decision on the ground of unreasonableness, under which head the case is discussed *infra*.

263.—(7) Instead of publishing a copy of the proposed by-law, the council may publish a synopsis of it, containing a concise statement of its purpose, the amount of the debt or liability to be created or the money to be raised by it, how the same is to be payable, and the amount to be raised annually for the payment of the debt, and the interest, or the instalments, if the debt is to be paid by instalments. 3 & 4 Geo. V. c. 43, s. 263 (7), taken from R. S. M. 1913, c. 116, s. 376 (*b*).

263.—(8) Where more money by-laws than one are submitted at the same time, they may be all placed upon one ballot paper. 10 Edw. VII. c. 85, s. 4; 3 & 4 Geo. V. c. 43, s. 263 (8).

264.—(1) The head of the council, or a member of it appointed for that purpose by resolution, shall attend at the time and place appointed, and, if requested so to do, shall appoint, by writing signed by him, two persons to attend at the final summing up of the votes by the clerk, and one person to attend at each polling place on

behalf of the persons interested in, and desirous of promoting, the proposed by-law, or voting in the affirmative on the question, and a like number on behalf of the persons interested in, and desirous of opposing, the proposed by-law, or voting in the negative on the question. 3 Edw. VII. c. 19, s. 342, *amended*; 3 & 4 Geo. V. c. 43, s. 264 (1).

Failure to Appoint Scrutineers.—In Re Kerr and Thornbury, 1906, 8 O. W. R. 451, the by-law fixed the time and place for the appointment of these persons, but the mayor neglected and failed to attend, and consequently the provisions of the section were not complied with. Anglin, J., said: "If failure to comply with the provisions of s. 341 (now as amended 263 (4)), would be fatal, then I think failure to comply with the provisions of s. 342 (now 264 (1)), must also be fatal. It prevents persons attending as scrutineers for the polling and final summing up. I think the by-law must be quashed."

In Re Schumacher and Chesley, 1910, 21 O. L. R. 522, D. C., Riddell, J., with whom the other members of the Court agreed, refused to follow Kerr v. Thornbury, on the ground that even if s. 341 (now as amended 264 (4)), was obligatory, and failure to observe its requirements could not be cured by s. 204 (s. 150), the same rule should not necessarily be applied to s. 342 (now 264 (1)), as the latter could be considered a provision "as to the taking of the poll," and so covered by s. 204, while s. 341 could not.

In Re Rickey and Marlborough, 1907, 14 O. L. R. 587, one of the irregularities complained of was that there was no scrutineer against the by-law in one of the polls. The D. C. in quashing the by-law did not deal with this objection.

In Re Schumacher and Chesley, 1910, 21 O. L. R. 522, the provision as to the appointment of scrutineers was held to be a provision as to the taking of the poll, and so covered by s. 204, the original remedial section. In view of this decision it seems probable that non-compliance with all the directions of s. 264 may be cured by s. 150, in a proper case.

264.—(2) Before any person is so appointed, he shall make and subscribe a declaration, Form 19. 3 Edw. VII. c. 19, s. 342, *amended*; 3 & 4 Geo. V. c. 43, s. 264 (2).

FORM 19.

I, the undersigned, *A. B.*, declare that I am an elector in this municipality, and that I am desirous of promoting (or opposing, as the case may be) the passing of the by-law to (here insert object of the by-law), submitted by the Council of this municipality (or of voting in the affirmative or in the negative, as the case may be), on the question submitted.

Declared before me this
day of 19 .

A. B.

3-4 Geo. V. c. 43, Form 19.

264.—(3) A person so appointed, before being admitted to the polling place, or to the summing up of the votes, shall, if so requested, produce and show his appointment to the deputy returning officer. 3 Edw. VII. c. 19, s. 344, amended; 3 & 4 Geo. V. c. 43, s. 264 (3).

264.—(4) In the absence of a person so appointed, or if no person has been appointed, any elector, upon making and subscribing, before the returning officer or the deputy returning officer, a declaration, Form 20 (19?), may be present at a polling place, or at the final summing up of the votes, as the case may be. 3 Edw. VII. c. 19, s. 345, amended; 3 &4 Geo. V. c. 43, s. 264 (4).

265.—(1) The persons qualified to vote on a money by-law shall be those entitled to vote at an election with the following exceptions:—

(*a*) Tenants, other than those mentioned in sub-section 2.

(*b*) Farmers' sons.

(*c*) Income voters.

265.—(2) The nominee of a corporation assessed upon the last revised assessment roll of the municipality which, if it had been a male person, would have been entitled to have been entered on the voters' list from which the list of voters mentioned in section 266 is to be prepared or in the case provided for by section 94 would, had it been a male person, have been entitled to be entered on such list of voters, shall also be qualified to vote. See 3 Edw. VII. c. 19, s. 353 (1).

265.—(3) A tenant, whose lease extends for the time for which the debt or liability is to be created, or in which the money to be raised by the proposed by-law is payable, [or for at least twenty-one years], and who has by the lease covenanted to pay all municipal taxes in respect of the property other than local improvement rates, if he makes and files with the clerk not later than the tenth day before the day appointed for taking the vote, a declaration, under *The Canada Evidence Act,* so stating, shall be entitled to have his name entered on the list of voters prepared by the clerk, under section 266. 3 Edw. VII. c. 19, s. 354 (1), *redrafted.*

265.—(4) Where a corporation entitled to appoint a nominee to vote on its behalf desires to vote on a money by-law it shall not later than the tenth day before the day appointed for taking the vote file with the clerk of the municipality an appointment in writing of a person to vote as its nominee and on its behalf, and the name of every such nominee shall be included in the list. 3 & 4 Geo. V. c. 43, s. 265 (1-4).

Persons Qualified to Vote on Money By-laws.—The persons entitled to a vote at an election are to be ascertained by the rules laid down in ss. 56 and 57, as modified by ss. 58 and 61. Three classes of these electors, namely, certain tenants, farmers' sons and income voters, are excluded from voting on money by-laws, and a new class of voter is created, namely, corporations assessed under circumstances which if the assessment had been of a male person he would have been entitled to vote.

On a scrutiny or motion to quash, the Court may in certain respects go behind the voters' list and inquire into the qualifications of those who voted, and deduct illegal votes. See discussion under s. 266.

266.—(1) Where the proposed by-law is a money by-law or one on which all the municipal electors are not entitled to vote, the clerk, after the passing of the by-law for taking the vote, and not later than the tenth day before the day appointed for taking the vote, shall prepare a list of the persons entitled to vote on the proposed by-law and, subject to section 267 and to section 24 of *The Ontario Voters' Lists Act,* the list so prepared shall be final and conclusive as to the right of every person named therein to vote, except in the case of a local option by-law where he is not at the time of the taking of the vote thereon, and has not been for the three months before that time a *bona fide* resident of the municipality, and that no person not named therein is entitled to vote.

Section 24 of the Ontario Voters' Lists Act, R. S. O. 1914, c. 6, is as follows:—

> "The certified list shall, under the Ontario Election Act, or the Municipal Act, be final and conclusive evidence that all persons named therein, and no others, were qualified to vote at any election at which such list was, or was the proper list to be used: except
>
> "1. Persons guilty of corrupt practices at or in respect of the election in question, or since the list was certified by the Judge;
>
> "2. Persons who, subsequently to the list being certified, are not or have not been resident within the municipality to which the list relates, or within the electoral district for which the election is held, and who by reason thereof are, under the provisions of the Ontario Election Act, or the Municipal Act, disentitled to vote;
>
> "3. Persons, who under ss. 12 to 15 of the Ontario Election Act are disqualified and incompetent to vote. 7 Edw. VII. c. 4, s. 24; 2 Geo. V. c. 4, s. 3."

Sections 12 to 15 of the Ontario Election Act, R. S. O. 1914, c. 8, as amended by 7 Geo. V. c. 6, are:—

"12.—(1) Judges of the Dominion and Provincial Courts, clerks of the peace, crown attorneys, and police magistrates in cities and towns having a population of 5,000 and over, shall be disqualified and incompetent to vote.

" (2) If any person mentioned in this section votes, he shall incur a penalty of $2,000, and his vote shall be null and void. 8 Edw. VII. c. 3, s. 12.

"13.—(1) No returning officer or election clerk shall be entitled to vote; but this provision shall not affect the duty of the returning officer to give a casting vote.

" (2) No person shall be entitled to vote who, at any time, before or during the election, has been employed as counsel, agent, solicitor or clerk, or in any other capacity by a candidate or by any person at or in reference to the election, or for the purpose of forwarding the same, and who has received or expects to receive, either before, during or after the election, from any candidate or from any person, for acting in such capacity, any sum of money, fee, office, place or employment, or any promise, pledge or security therefor.

" (3) The next preceding sub-section shall not apply to any person who performs any official duty in connection with the election and who receives the fees to which he is entitled. 8 Edw. VII c. 3, s. 13."

" 15.—No person shall be entitled to be entered on the voters' list, or shall vote, who is a prisoner in a gaol or prison undergoing punishment for a criminal offence, or is a patient in a hospital for the insane, or is maintained in whole or in part as an inmate receiving charitable support or care in a municipal house of refuge or house of industry. 8 Edw. VII. c. 3, s. 15."

Finality of the List.—In re Mitchell and Campbellford, 1908, 16 O. L. R. 578, was a motion to quash a local option by-law. It was contended by the applicants that on a motion to quash the lists were not final. Clute, J., said:—

"When once the Municipal Act applies, and the voters' lists are brought in as the lists to be used to designate the persons who are entitled to vote, such lists are not to be dissociated from the quality of finality, which the Act gives them, and which was the chief cause of their being. They have, so to speak, the quality of finality as an integral part of them. They indicate the persons entitled to vote in such manner that their qualification cannot be further inquired into. They are not lists under the Act, if stripped of their essential quality. See in re Port Arthur and Rainy River Prov. Election, Preston v. Kennedy, 1907, 14 O. L. R. 345; Re Saltfleet Local Option By-law, 1908, 16 O. L. R. 293; Reg ex rel. McKenzie v. Martin, 1897, 28 O. R. 523; In re Armour and the Township of Onondaga, 1907, 14 O. L. R. 606, 608."

In Re McGrath and Durham, 1908. 17 O. L. R. 514, D. C., a motion to quash a local option by-law, the same question was considered. Riddell, J., gave a history of the legislation and a review of the cases, and reached a conclusion in accord with Re Mitchell and Campbellford, that the list is final and conclusive as to the right of the persons named in such list, and not within the exceptions mentioned, to vote on the by-law.

In re Dale and Blanchard, 1910, 21 O. L. R. 497; 23 O. L. R. 69, C. H., was a motion to quash a money by-law. The C. A. decided that s. 24 of the Ontario Voters' Lists Act did not apply to make a list prepared by the clerk for voting on a money by-law conclusive, nor did any other provision in the then Act have any effect, and thus the vote followed in Re McGrath and Durham, and Re Mitchell and Campbellford, was reversed. Meredith, J.A., thus dealt with the question:—

"In neither its words, nor its purpose, does s. 24 of the Ontario Voters' List Act comprehend such a case as this.

"It is applicable only to a scrutiny 'under the Ontario Election Act or the Municipal Act:' that is, a scrutiny of the same character, a scrutiny regarding qualification 'to vote at any election at which such list was used, or was the proper list to be used.'

"The enactment was passed because of the scandalous length to which scrutinies were carried in Parliamentary election cases: see Re Port Arthur Election, 1906, 13 O. L. R., at pp. 22-9, and effectually put an end to it.

"Municipal elections are within the mischief intended to be cured by, and within the very words of, the section; but they are elections of the same character, and, generally speaking, at them the voters' lists referred to in the section are the lists of voters proper to be used.

"But in no sense is this applicable to voting on 'money by-laws' under the provision of the Municipal Act. Such voting is not an election in the sense in which that word is used in s. 24, or, accurately speaking, at all; nor are such lists the lists proper to be used upon such voting: the proper lists, or list, are, or is, those, or that, to be prepared and delivered, or prepared and used by the clerk of the municipality under s. 348, or under s. 349, as the case might require: and the words 'provided such person is named or intended to be named on the voters' list' contained in s. 353 of the Municipal Act, do not alter the fact, or in any way bring the case within the provisions of s. 24."

As the statute now stands the rule laid down in Re McGrath and Durham has been upheld by the Legislature.

While in Re Dale and Blanchard settled that under the former law the list prepared by the clerk was not conclusive on a motion to quash, a series of scrutiny cases finally led up to Re West Lorne Scrutiny, 1911, 23 O. L. R. 598, 25 O. L. R. 267, 277; 26 O. L. R. 339, 47 S. C. R. 451, in which the Supreme Court held that a County Court Judge on a scrutiny could go behind the voters' list and enquire respecting the qualification of the voters whose names appeared therein. The reasons for the decision given by Idington, J., and concurred in by the Chief Justice, were:—

"The voters' list is the foundation of the vote taken, and but for the 'Voters' List Act' containing s. 24, no trouble could arise in the way of carrying out this scrutiny. His Lordship then read the section, which was in the same form as given above, excepting that in clause 2, after the words 'Ontario Election Act' the words 'Or the Municipal Act' did not appear, and then proceeded:

"Appellant argues that the exception in s.-s. 2 forms no part of the law governing this election, and has nothing to do with the matter.

"The first part of the section is set up against scrutiny, but its limitations expressed in that exception are to be excluded. Needless to answer that, I imagine.

"But we are asked, despite recent amendment in 1907, to read s.-s 2 so as to make the last member of the sentence govern the whole, and say it can only refer to Ontario elections, and thus render nugatory and nonsensical the first part referring to a municipality, I do not think that mode of interpretation commends itself or falls within either the latter part of the rule in Heydon's case (1), above referred to or the 'Interpretation Act,' in force here.

"I am also unable to read the language of this s.-s. 2 as it is said it has been read elsewhere.

"I am unable to so read that as to treat the non-resident at the time of voting as entitled to vote. If tendered the proper oath he could not take it. But his vote cannot be effectively counted, and if in the result the learned trial Judge is thus disabled from reporting the by-law has been carried, he must say so."

Duff, J., adopted the reasoning of Garrow, J.A., who said:—

"Clause 2 of s. 24 should, perhaps, have contained a reference to the Municipal Act, as well as to the Ontario Election Act. As it is, its proper construction is, I think, to regard the later words 'and who by reason thereof are, under the provisions of the Ontario Election Act, disentitled to vote,' as referring only to the words, 'or within the electoral district for which the election is held,' which immediately pre-

cede them. It is unreasonable to suppose that the Legislature, while carefully preserving the provisions as to residence contained in the Election Act, intended, in such an indirect manner, to repeal the very similar provisions as to residence contained in the Municipal Act, affecting as they do every class of voter except a freeholder.

"The question, however, in the view I take, is not vital, for the real disqualification arises, in my opinion, not under the Voters' List Act so much as under the plain language of s. 86 of the Municipal Act, which, while fully accepting the finality of the voters' list, cannot be ignored as to events subsequently occurring or existing."

See In re Aurora Scrutiny, 1913, 28 O. L. R. 475, for an application of the rule laid down in Re West Lorne Scrutiny.

In so far as all the exceptions contained in the Municipal Act as to tenant voters, income voters, and other persons not entitled to vote, notwithstanding provisions of s. 266, the list is not conclusive to the right of any such person to vote on a by-law. This seems to follow from the reasoning of Garrow, J.A., In re West Lorne Scrutiny.

The clerk is justified in treating as included in the list of voters the names added by the Judge, under s. 40 of the Voters' List Act: Wynn v. Weston, 1907, 15 O. L. R. 1.

266.—(2) The clerk shall prepare such a list from the last revised voters' list, and in the case provided for by section 94 from the last revised assessment roll, omitting from his list the names of all persons whose names are entered on such voters' list or assessment roll, but are not entitled as appears by such list or roll to vote on the by-law, and in the case of money by-laws including in the list the nominees of corporations who are entitled to vote on the by-law.

(3) When the voting is to take place at the same time as the annual municipal elections, it shall be sufficient in the case of persons whose names are entered on the voters' list as tenants, if there is written on the voters' list used for the purpose of the election opposite to the name of such of them as are entitled to vote on the by-law the words "entitled to vote on the by-law," and it shall be deemed that the names of all others of such persons are omitted from the list within the meaning of subsection 2.

(4) The list prepared by the clerk shall be certified by him to be a true and correct list of all persons entitled to vote on the proposed by-law, and shall be forthwith posted up in his office. *New.* *See* 1 Geo. V. c. 57, s. 4; 3 & 4 Geo. V. c. 43, s. 266 (1-4).

267.—(1) At any time not later than five days before the day appointed for taking a vote, a Judge, upon the application of any person whose name is entered on the list of voters prepared by the clerk, or of any person entitled to be entered on that list, may strike from the list the name of any person who is dead or whose name has been wrongly entered on it, and may add to the list the name of any person whose name has been wrongly omitted from the list, or who, if a tenant, though he had not made the declaration prescribed by sub-section 2 of section 265, establishes that he has the qualification prescribed by that section.

Evidence of Identity.—The proof of identity in case a person named in the list dies out of the province where the certificate specified in the section cannot be obtained, may be a matter of difficulty. The following evidence may be given to prove personal identity:—

Thus Phipson on Evidence, 4th ed., p. 119, says:—

"When a party's identity with an ascertained person is in issue, it may be proved or disaproved, not only by direct testimony (*ante* 53), but presumptively by similarity or dissimilarity of characteristics (*e.g.*, of age, height, size, hair, complexion, voice, handwriting, manner, dress, distinctive marks, faculties or peculiarities), as well as of residence, occupation, family relationship, education, travel, religion, knowledge of particular people, places or facts, and other details of personal history (R. v. Orton, *passim*). In this connection too, identity of mental qualities, habits and disposition may become relevant, though it would be excluded in more specific inquiries (*inf*). (Taylor, Med Jurisp., 5th ed., 101-7; Hubback, Ev. of Success, 438-68; Wigmore, Ev., ss. 410-16."

Again at p. 367:—

"The opinions or beliefs of witnesses who are not experts are admissible in proof of the matters mentioned below on grounds of necessity, more direct and positive evidence being often unobtainable.

"Identity, resemblance, photographs: Witnesses may state their belief as to the identity of persons, whether present in Court or not; and they may also identify absent persons by photographs produced and proved by a competent testimony, not necessarily, of course, that of the photographer, to be accurate likenesses (R. v. Tolson, 4 F. & F. 103; Frith v. Frith, 1896, P. 74; Hindson v. Ashby, 1896, 2 Ch. 21-2, 27). In matrimonial cases, however, the Court will not, unless under very special circumstances, act upon identification by photograph alone (Frith v. Frith, *supra*). As to photographic copies of documents, handwriting, buildings, places, etc.: see post c. XLIII.

"So they may give their opinion as to the resemblance of an engraving to a picture not produced (Lucas v. Williams, 1892, 2 Q. B. 113, 116); or of a portrait, that is produced, to one of the parties in Court (Milles v. Lamson, Times, October 29, 1892; McQueen v. Phipps, Times, July 1, 1897)."

Also at p. 317:—

"The mere similarity of names has been held sufficient evidence of identity, for where the jury are satisfied the Court will not interfere: Hubbard v. Lees, L. R. 1 Ex. 255; cf. La Cloche v. La Cloche, L. R. 4 P. C. 325, 333; R. v. Weaver, L. R. 2 C. Cr. 85; *contra*, Miller v. Wheatley, 28 L. R. Ir. 144."

Certificate of the Registrar-General or of the Division Registrar.—Section 7 (2) of the Vital Statutes Act, R. S. O. 1914, c. 49, provides as to the certificate of the Registrar-General as to the details of any death as follows:—

> "The certificate shall be *prima facie* evidence in any Court, or in any proceeding before a Justice of the Peace, of the facts certified to be recorded."

There is no similar provision in c. 49 to the effect of the certificate of the Division Registrar.

> "At common law 'foreign registers are evidence of matters properly and regularly recorded therein when proved to the satisfaction of the Judge to have been kept under the sanction of public authorities, and to be recognized by the tribunals of their own country: Lyell v. Kennedy, 14 App. Cas. 437; Abbot v. Abbot, 29 L. J. P. & M. 57; Tay, s. 1593.' Phipson on Evidence, 4th ed., p. 314.
>
> "A register is evidence of the particular transaction, if it was the officer's duty to record, even though he had no personal knowledge of its occurrence; thus entries made by an incumbent of parish burials reported to, but not performed by him are admissible; so of entries of births and deaths under the Births and Registrations Act, 1836, s. 38, as amended by the Births and Deaths Registration Act, 1874, 39. Phipson, 4th ed., p. 315.

Certificate of Judge as to Correctness of List.—See Re North Gower, 1918, 24 O. W. R. 489, 25 O. W. R. 224, 5 O. W. N. 249, and the remarks of Middleton, J., in Re Ryan and Alliston, 1910, at 22 O. L. R. 203.

267.—(2) For the purpose of proving a death, the certificate of the Registrar-General, or of the Division Registrar, shall be sufficient evidence, but if the identity of the person who is dead with the person whose name is sought to be struck off is disputed, or open to reasonable doubt, proof of the identity shall be required. *New.*

(3) The proceedings shall be the same, as nearly as may be, as prescribed by sub-section 2 of section 23 of *The Ontario Voters' List Act.* *New.* 3 & 4 Geo. V. c. 43, s. 267 (1-3).

268. Where all the municipal electors are entitled to vote on the proposed by-law the same lists shall be used in taking the vote as would be the proper voters' list to be used at a municipal election, and such lists shall be as final and conclusive as to the right to vote as when used at a municipal election. *New.* 3 & 4 Geo. V. c. 43, s. 268.

This section makes the law uniform as to the finality of the list when all municipal electors are entitled to vote on a proposed by-law and disposes of the questions which were raised in Re West Lorne and Re Mitchell and Campbellford: see s. 266, and s. 57.

269. In a municipality divided into wards, a voter shall be entitled to vote on a money by-law in each ward in which he has the prescribed qualification, but shall not be entitled to vote more than once on any other by-law or on any question submitted to the electors unless it is otherwise expressly provided by the Act, by-law, or other authority under which the vote is taken. 3 Edw. VII. c. 19, s. 355, *amended*. 3 & 4 Geo. V. c. 43, s. 267.

Plural Voting.—See *supra*, p. 195, and the review of the legislation which preceded the clear-cut provision of s. 269 given by Davies, J., In re Sinclair and Owen Sound, 1907, 39 S. C. R. 237.

270. The clerk, if otherwise qualified, shall be entitled to vote, but not to give a casting vote. 3 Edw. VII. c. 19, s. 365, *amended*; 3 & 4 Geo. V. c. 43, s. 270.

Right of the Clerk to Vote.—In re Schumacher and Chesley, 1910, 21 O. L. R. 522, D. C., the printing of the voters' lists was done by the town clerk. Riddell, J., and Meredith, C.J., in the Court below, held that there was no incompatibility in the dual position of the clerk and printer, such as existed in R. v. Tizzard, 9 B. & C. 418, and that he was not disqualified by reason of having printed the voters' list, nor because he printed certain literature for the temperance party, the latter service being covered by a provision now found in s. 61.

In Re Sturmer and Beaverton, 1911, 24 O. L. R. 65; 25 O. L. R. 190 and 25 O. L. R. 567, C. A., it was held that the clerk under the then law had a right to vote on a local option by-law. This case overruled an apparent decision to the contrary in Re Ellis and Renfrew, 1911, 23 O. L. R. 427.

See also Re Fitzmartin and Newburgh, 1911, 24 O. L. R. 102.

Casting Vote on a By-law or Question.—The Act is now clear that the clerk has no casting vote on a by-law. Before the Act dealt with the matter explicitly, it was contended that by an application of then ss. 299 and 152 (now ss. 274 and 127), the clerk had a casting vote on by-laws, but this view was definitely overruled by the Supreme Court in Canada Atlantic v. Cambridge, 1888, 15 S. C. R. 219.

271. The ballot papers shall be according to Form 20 when the voting is on a by-law, and according to Form 21 when it is on a question. 3 Edw. VII. c. 19, s. 340; 3 & 4 Geo. V. c. 43, s. 27.

FORM 20.

BALLOT PAPER FOR VOTING ON A BY-LAW.

.....19

Voting on By-law to (*here insert object of the By-law*), submitted by the Council of the of

FOR

The By-law

AGAINST

The By-law

3-4 Geo. V. c. 43, Form 20.
Amended 7 Geo. V. c. 42, s. 20.

FORM 21.

BALLOT PAPER FOR VOTING ON QUESTION.

.....19

Voting on the following question (*here state question*).

YES

NO

3-4 Geo. V. c. 43, Form 21.

Form of Ballot Papers. — While this section is imperative in language, where a mistake in the use of the form or a deviation from the prescribed form is shewn, it lies on the party seeking to support what was done to shew that it did not affect the substance of the voting, or was not calculated to mislead, within s. 28 (a) of the Interpretation Act, R. S. O. 1914, c. 1, and did not affect the result of the former remedial s. 204, and under present s. 150 the difficulty of upsetting the proceeding will be still greater. See Re Milne and Thorold, 1911, 25 O. L. R. 420, C. A., distinguishing Re Giles and Almonte, 1910, 21 O. L. R. 362, D. C., both of which cases are discussed under s. 150,

272. The printed directions to voters shall be according to Form 22. 3 Edw. VII. c. 19, s. 352; 3 & 4 Geo. V. c. 43, s. 272.

Recently s. 352 which was taken from 39 V. c. 35, s. 12 (1876).

FORM 22.

Directions for the Guidance of Voters in Voting.

The voter will go into one of the compartments, and with the pencil provided in the compartment, place a cross (thus **X**) on the right hand side, in the upper space if he votes for the passing of the by-law [or in the affirmative on the question], and in the lower space if he votes against the passing of the by-law [or in the negative on the question.]

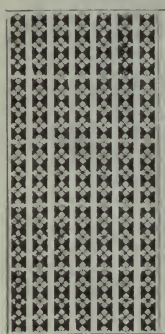
The voter will then fold up the ballot paper so as to show the name or initials of the Deputy Returning Officer (*or* Returning Officer, *as the case may be*) signed on the back, and leaving the compartment will, without showing the front of the paper to any person, deliver such ballot so folded to the Deputy-Returning Officer (*or* Returning Officer *as the case may be*) and forthwith quit the polling place.

If the voter inadvertently spoils a ballot paper, he may return it to the Deputy-Returning Officer (*or* Returning Officer *as the case may be*), who will, if satisfied of such inadvertence, give him another ballot paper.

If the voter places on the paper more than one mark, or places any mark on his ballot paper by which he may be afterwards identified, or if the ballot paper has been torn, defaced or otherwise dealt with by the voter so that he can thereby be identified, it will be void, and will not be counted.

If the voter takes a ballot paper out of the polling place, or deposits in the ballot box any other paper than the one given to him by the Deputy-Returning Officer (*or* Returning Officer *as the case may be*) he will be subject to imprisonment for any term not exceeding six months, with or without hard labour.

In the following form of Ballot Paper, given for illustration, the elector has marked his ballot paper in favour of the passing of the By-law:



Voting on By-law to (*here insert object of the By-law*) submitted by the Council of the ..... of 19

FOR The By-law	**X**
AGAINST The By-law	

3 Edw. VII. c. 19, Sch. L.; 3 & 4 Geo. V. c. 43, Form 22. 7 Geo. V. c. 42, s. 20.

Omission to Furnish Directions to Voters.—In Re Salter and Beckwith, 1902, 4 O. L. R. 51, a by-law was quashed because of failure to furnish directions, the Court refusing to apply the then remedial s. 204. For discussion of this irregularity and other cases, see notes to s. 150.

273.—(1) Where all the municipal electors are entitled to vote the voter's oath shall be the same *mutatis mutandis* as at a municipal election where the members of the council are elected by general vote.

273.—(2) In the case of a money by-law a voter shall not be entitled to select the form of oath he will take, but the oath to be taken by him shall be that applicable to his qualification as a freeholder or tenant, as it appears in the list of voters. 3 & 4 Geo. V. c. 43, s. 273 (1-2).

Form of Oath.—For discussion of voters' oath see s. 204, which provides that the only oath to be required shall be according to Form 9.

Mutatis Mutandis.—The necessary changes in the oath will consist of the elimination of all references to an "election," and the substitution therefor of references to the voting on the by-law or question as the case may be.

Oath of Voter on a Money By-law.—Sub-section 2 is necessary because of the provisions contained in s. 265. The voter must qualify as tenant or free-holder or as the nominee of a corporation. See notes embodied in Form 9 at the end.

274. Except as otherwise in this Part provided, Part III shall apply *mutatis mutandis* to voting on a by-law. 3 & 4 Geo. V. c. 43, s. 274; see 3 Edw. VII. c. 19, s. 351.

275. After the clerk has summed up the number of votes cast he shall declare the result of the voting and shall forthwith certify to the council the number of votes cast for and against the by-law. 3 Edw. VII. c. 19, s. 364, last part *amended*; 3 & 4 Geo. V. c. 43, s. 275.

Illness or Death of Clerk.—These contingencies have not been provided for, except in a general way by s. 220. A scrutiny cannot be initiated until after the clerk has declared the result, see s. 279, and the by-law cannot be passed until the expiration of two weeks after the result had been declared, s. 280 (3).

In Re Bell and Elma, 1906, 13 O. L. R. 80, the clerk was taken ill and was unable to attend to any of his duties. He appointed a substitute who acted, apparently on insufficient information as to the result in several polls. The by-law in question did not contain certain essential parts, and was quashed for the latter reason.

It seems reasonable that the council might appoint an acting clerk to receive returns from deputy returning officers and sum up the vote and declare the result: see s. 220.

Where a Two-thirds Vote is required.—See formula given after s. 278.

Mode of Certifying the Result.—Where a by-law requires a two-thirds or three-fifths or other vote the method of computation to be followed in arriving at the result has been well explained by Riddell, J., on numerous occasions. In Re Armour and Onondaga, 1907, 14 O. L. R. 606, he thus discussed the subject:—

"1. The votes for the by-law were 152
Against 91

In all 243

"The by-law required, under 6 Edw. VII c. 47, s. 24 (O.), to have in its favour three-fifths of 243 or 146 votes, so it will be seen that there were 6 votes to spare.

It was argued that about 19 votes were bad, and that it required only 10 votes to be proved invalid (as 6 equals three-thirds of 10). That the majority should be wiped out. This is bad arithmetic, and therefore, bad law—it reminds one of the familiar calculation whereby schoolboys prove 1 equals 2.

"The proper course to pursue if and when votes are proven to be improperly cast is to deduct these votes from the total and then take three-fifths of the remainder.

"In this case a simple calculation shews that it requires a reduction of 16 votes from the successful side to overcome the majority, thus:—

Votes for by-law, 152 minus 16 136
Votes against by-law 91

Total 227

"Three-fifths of 227 equals 137 (136.2). Whereas, if only 15 be struck off, we have votes for the by-law, 152 minus 15.... 137
Votes against the by-law 91

Total 228

"Three-fifths of 228 equals 137 (136.8), and the vote is sufficient."

Again in Re Ellis and Renfrew, 1910, 21 O. L. R. 86, the same learned Judge again applied the rule: his finding was upheld by the Court of Appeal, see 23 O. L. R. 427. His Lordship observed:—

"In view of the many cases in which mistakes have been made by solicitors in computing the number of votes necessary to be struck off, I here add the general method on the hypothesis that all the votes struck off are to be deducted from the majority:—

Let A equal total number of votes.
" B " number for the by-law.
" X " number to be struck off to bring the majority to the statutory minimum.

"Then B—X equal 3/5 (A—X)
5B—5X equal 3A—3X
2X equal 5B—3A
X equal $\frac{5B-3A}{2}$

"Or stating the formula in the shape of a rule:—

"Subtract three times the total vote from five times the number of votes for the by-law; then divide by 2; and the quotient will be the number of votes necessary to be struck off to reduce the majority to the statutory minimum; of course, if the quotient contain a fraction, the whole number only is to be taken."

N.B.—The formula is given for a case where a three-fifths vote was required. Where a two-thirds vote is required the necessary changes can be readily made.

Three-fourths Vote of all the Members of the Council.—See s. 2 (t).

276. Subject to section 278, a by-law shall be deemed to have been assented to by the electors if a majority of the votes cast is in favour of the by-law. 3 & 4 Geo. V. c. 43, s. 276.

277. Where the by-law is proposed to be passed by a county council the proceedings shall be similar to those in the case of a by-law proposed to be passed by the council of a local municipality except that the list of voters for each local municipality shall be prepared by the clerk of it and not by the clerk of the county council, and that the declaration provided for by sub-section 2 of section 265 shall be filed with the clerk of the local municipality. 3 & 4 Geo. V. c. 43, s. 277.

Requisites of Bonus By-laws.

278.—(1) In the case of a by-law for granting a bonus in aid of a railway, or to a waterworks or water company, or for taking stock in, or for lending money to, or for guaranteeing the payment of money borrowed by a railway company, the assent of one-third of all the persons entitled to vote, as well as of a majority of all those voting, shall be necessary. 3 Edw. VII. c. 19, s. 366 (1), *amended*; 3 & 4 Geo. V. c. 43, s. 278 (1).

278.—(2) Subject to sub-section 3, in the case of a by-law for granting a bonus in aid of a manufacturing industry, the affirmative vote of three-fourths of all the members of the council and the assent of two-thirds of the electors who vote on the by-law shall be necessary. 3 Edw. VII. c. 19, s. 366*a* (1), first part and (4) *redrafted*; 2 Geo. V. c. 40, s. 14; 3 & 4 Geo. V. c. 43, s. 278 (2).

278.—(3) In the case of a by-law for granting a bonus for the promotion of iron works, rolling mills, works for refining or smelting ore or for the establishment of grain elevators, or in aid of a beet sugar factory, an arena, a sanitarium or a hospital, the assent of one-third of all the persons entitled to vote, as well as of a majority of those voting, shall be necessary. 3 Edw. VII.

c. 19, s. 700 (*a*), *amended;* 3 & 4 Geo. V. c. 43, s. 278 (3). 5 Geo. V. c. 34, s. 17.

278.—(4) In the cases provided for by sub-sections 1 and 3 of this section the clerk shall add to the prescribed certificate of the result of the voting, a statement of the total number of persons entitled to vote upon the by-law. 3 & 4 Geo. V. c. 43, s. 278 (4).

Name Occurring Twice on Voters' List.—The name of the person may be repeated on the voters' list, but this does not increase the number of persons who appear by the list to be qualified to vote, and where a certain fraction of the number of persons is required repetition must not be counted, and an unimpeached affidavit as to the actual number of persons will be accepted: Re Owen Sound Local Option By-law, 1915, 35 O. L. R. 48.

279.—(1) Within two weeks after the clerk has declared the result of the voting, any person who was entitled to vote upon the by-law or the council, after giving notice of the application to such persons as the Judge directs, may apply to a Judge of the County or District Court of the county or district in which the municipality is situate for a scrutiny of the votes, and if it is shewn by affidavit that there are reasonable grounds for the application, and, if the application is by a person entitled to vote on the by-law, he enters into a recognizance before the Judge and to be allowed by him, in the sum of $100, with two sureties in the sum of $50 each, conditioned to prosecute the application with effect, and to pay to any person to whom costs may be awarded, the costs awarded to him, the Judge may order a scrutiny of the votes to be had, and shall appoint a time and place, within the municipality, for proceeding with it. 3 Edw. VII. c. 19. s. 369, *redrafted*; 3 & 4 Geo. V. c. 43, s. 279 (1).

279.—(2) At least one week's notice of the time and place appointed, shall be given by the applicant to such persons as the Judge directs, and to the clerk. 3 Edw. VII. c. 19, s. 371; 3 & 4 Geo. V. c. 43, s. 279 (2).

279.—(3) At the time and place appointed, the clerk shall attend before the Judge with the ballot papers, and the Judge after hearing such evidence as he may

deem necessary, and the parties, or such of them as attend, or their counsel, shall, in a summary manner, determine whether the by-law has been assented to as required by this Act, and shall forthwith certify the result to the council. 3 Edw. VII. c. 19, s. 371; 3 & 4 Geo. V. c. 43, s. 279 (3).

279.—(4) Where it is proved that any person interested in, and promoting or opposing the by-law, was guilty of bribery or of a corrupt practice in respect of a voter who voted on the by-law, or if any person who is disqualified under s.-s. 1 of s. 61 from voting at an election or is disqualified under clause (*a*) of s. 396, is proved to have voted there shall be struck off the number of votes given for the by-law, if the person guilty or so disqualified was promoting the by-law, or given against the by-law if the person guilty or so disqualified was opposing the by-law, one vote for every ballot cast by such voter. 3 & 4 Geo. V. c. 43, s. 279 (4).

279.—(5) The Judge shall have the like power and authority as to all matters arising upon the scrutiny, as would be possessed by him upon a trial of the validity of the election of a member of a council, but shall not have power to set aside the voting on the ground of general bribery or corrupt practices; and the costs shall be in the discretion of the Judge, who may direct by whom, to whom, and in what manner they shall be paid. 3 Edw. VII. c. 19, s. 372, *redrafted*; 3 & 4 Geo. V. c. 43, s. 279 (5).

279.—(6) The decision of the Judge shall be final and not subject to appeal. 3 & 4 Geo. V. c. 43, s. 279 (6).

History of Provisions as to Scrutiny.—The following was given by Riddell, J., in Re McGrath and Durham, 1908, 17 O. L. R. at 523, D. C.:—

> "The provisions for a scrutiny were not introduced until 1876, by 39 V. c. 35, s. 21, s.-s. 19 (O.), nearly thirty years after the provisions for quashing had been in force in some form. Then the history proceeds: (1877), R. S. O., c. 174, ss. 313 *et seq.*; (1882), 46 V. c. 18, ss. 325, *et seq.*; (1887), R. S. O., c. 184, ss. 323 *et seq.*; (1892), 55 V. c. 42, ss. 323 *et seq.*; (1897), R. S. O., c. 223, ss. 369 *et seq.*; (1903), 3 Edw. VII. c. 18, s. 80; 3 Edw. VII. c. 19, ss. 369 *et seq.* The statutory scrutiny was at the time of the passing of the Voters' List Act of 1907, a well-known proceeding."

Shewn by Affidavit That There are Reasonable Grounds, etc. Contrast this with the requirements of s. 129, dealing with recount where it must be "made to appear by affidavit that a deputy returning officer has improperly counted," etc., and see the cases cited under s. 129.

Scope of Enquiry on a Scrutiny.—In Re Saltfleet, 1908. 16 O. L. R. 293, D. C., there was a motion to prohibit the County Judge in his certificate as to the result of a scrutiny of the ballots at the voting on a proposed by-law from making any allowance for, or from taking into consideration any votes which he may have considered illegal by reason of the disqualification of the voter. An order of prohibition was granted by Teetzel, J., and the order was upheld by the D. C. Two preliminary objections were overruled: (1) That the applicants had no status qualifying them to object, as to which it was held that as s. 378 of the then Act (now as amended s. 285 (1)), recognized the right of a resident or other person interested, in a by-law to apply for an order to quash, therefore the applicant, who was a resident and an elector, was a party interested and qualified to make the application for prohibition. (2) That the motion was too late because all that remained to be done by the County Court Judge was only a ministerial act, he having performed all the judicial functions, and that, therefore, there was no jurisdiction to prohibit him from certifying as required by then s. 371 (now 279 (3). As to this objection it was held that the certifying was a judicial and not a mere ministerial act, and that the Judge might be prohibited from allowing his certificate of the result to be affected by any matter which he should not have considered in arriving at the result.

As to the substantial question involved, Teetzel, J., said, referring to then s. 369, which referred to "reasonable grounds for entering into the scrutiny of the ballot papers," and to 372, which conferred the power now found in the first clause of 279 (5) :—

> "I do not read s. 369, and the three following sections, as conferring upon the County Court Judge any power or right beyond a scrutiny of the ballot papers. I can find in those sections no authority for scrutinizing the votes of the electors, in the ordinary sense of that term. In my opinion the word 'vote' and the words 'ballot paper' are not synonymous or interchangeable expressions, but are quite distinct.
>
> "While a scrutiny of votes involves a scrutiny of ballots, as well as the qualification of the voters, I am of the opinion that an authority to scrutinize the ballot papers does not also involve any authority to scrutinize or ascertain the qualification of the voters who marked those ballot papers. . . .
>
> "Section 369 authorizes an application to the Judge to enter into a scrutiny of the ballot papers. It seems to me that the purpose of this legislation was not only to give the County Judge the powers that are conferred upon him upon a recount under the Ontario Election Act—that is, to scrutinize the marks upon the ballots and count them—but also that he is authorized to call evidence such as he may deem necessary with reference to the ballots, so that he can ascertain exactly the number of ballots cast for and against respectively, and that he may determine upon something more than the mere ballot itself, if necessary, as to its validity or invalidity as a ballot.
>
> "I think that the purpose of s. 372 was to confer that additional right upon a County Judge, and to give him the authority to have brought before him the voters' lists and all the material used at the election, and to call any evidence bearing upon the ballots, and for the purpose of a scrutiny of the ballot papers only, he should have the like powers possessed by him upon the trial of the validity of the election of a member of the council.
>
> "I think that if the Legislature had intended to authorize the County Judge to determine whether certain voters had the right to mark a ballot paper at all, and to authorize him to strike off votes for or against the by-law of persons who were not by law qualified to vote, it would have said so clearly and distinctly. I do not think that jurisdiction of this kind should be read into the Act, unless the language is sufficiently plain to make it quite clear that that was the intention.
>
> "Other provisions of the Act are sufficiently ample to allow those questions to be ascertained upon motions to quash. The Judges have in all these motions entertained evidence to shew that the by-law was supported by illegal or disqualified votes."

An order was therefore made prohibiting the County Judge as applied for. This order was upheld by the D. C., but for entirely different reasons, involving an entirely different view of the nature of a scrutiny. Boyd, C., in the D. C. pointed out that s. 24 of the then Voters' Lists Act made the list conclusive with certain exceptions upon a scrutiny under the Municipal Act, and held that the Judge could only investigate cases within the exceptions in s. 24, saying:—

> "I may add that had our attention been called during argument to the present Voters' List Act, I, for one, should have been saved much trouble in the way of exploring the origin of the sections in the Municipal Act relating to recount and 'scrutiny.' The action of the Legislature, in the last Voters' List Act, has had the effect indirectly of clearing up points which, I confess, appear to me involved in great obscurity and difficulty. As it now stands, the by-law scrutiny of ballots is something different and more comprehensive than a simple recount. The extent of it is to be measured by what can be done on inspection of the ballot papers, and the ascertainment of what the votes are void *ex facie*, and the scope of investigation contemplated by the exceptions to the finality of the voters' list."

In accordance with the above interpretation of the sections applicable, it was held that the County Court Judge had exceeded his jurisdiction in investigating the votes of two aliens and of two married women, and he added:—

> "If the name of the voter called a married woman is on the revised list, she is entitled to vote, whether married at that time or subsequently. For it is not within the list of excepted cases referred to in the Voters' Lists Act, 1907, s. 24: a subsequent change of residence, which would disqualify, may be investigated under sub-clause (2), but not a subsequent change of status. If her name was not rightly put on the roll because she was then a married woman, that was the proper subject of investigation and correction before the final settlement of the lists.
>
> "If the farmers' sons' votes struck off as non-resident, because so non-resident subsequently to the list being certified, that might be dealt with upon proper evidence by the County Judge.
>
> "The Judge has, therefore, exceeded his jurisdiction in going behind the ballot papers and the voters' list in these particulars, and he should be enjoined."

In Re West Lorne, 1911, 23 O. L. R. 598, 25 O. L. R. 267, 26 O. L. R. 339, 47 S. C. R. 451, an elector moved for an order prohibiting the County Court Judge upon a scrutiny from determining the question whether tenants who had voted were disentitled to vote by reason of not having resided within the municipality for one month next before the election, and from making an allowance for such votes in his certificate. There were five votes in question, and the applicant contended that he should be allowed to shew that one or more of these five votes was in fact cast against the by-law, and that to deny him this right was to enable one who had no right to vote, really to vote against the by-law, as the effect of his improper act was to subtract one from the votes cast in favour of the by-law. Middleton, J., made an order "to prohibit the learned County Court Judge from certifying to the municipal council that the by-law had not been approved by three-fifths of the qualified voters voting thereon, until he has made inquiry and ascertained how the five spurious votes, or a sufficient number of them to enable him to certify, marked the ballots improperly cast and placed in the ballot box, and directing the learned Judge to enter into the inquiry indicated for the purpose of ascertaining the facts necessary to enable him to certify as a matter of fact, and not as the result of an assumption that the improper votes must be deducted from those cast in favour of the by-law."

An appeal was heard by a D. C., which disagreed, and the appeal was re-heard by a second D. C., which varied the order made by Middleton, J., by striking out all the words after "qualified voters voting thereon." The C. A. reversed the D. C., leaving the County Court Judge at liberty to certify the result, and the Supreme Court of Canada upheld this result. Sir Charles Fitzpatrick, C.J., pointed out that a scrutiny is an entirely dis-

tinct proceeding from a re-count, in that it is an inquiry into the validity of the votes, and in that its object is to ascertain who had the majority of the legal votes. He refused to adopt the view that the expression "scrutiny of the ballot papers" in s. 369, and "inspection of the ballot papers" in s. 371, could be given such a restricted meaning as to limit the duty and power of the Judge to a mere inspection of the ballot papers with respect to their physical aspect, and he observed that even if the words in s. 369 had been "scrutiny of the votes" instead of "scrutiny of the ballot papers," there would be no difference in the nature of the duty imposed upon the Judge. He then held that paragraph 2 of s. 24 of the Voters' Lists Act read with s. 86 (now 57), made an exception to the general rule that the voters' list is conclusive, in that continuous residence of a tenant in the municipality up to the time the poll is held is made a condition of the exercise of the right to vote, and he finally held that there could be no inquiry as to how any vote, even an illegal vote was cast, notwithstanding that the result is to enable one who has no right to vote to cast his ballot against the by-law, as pointed out by Middleton, J., saying:—

> "If that incongruous result follows on the application of settled legal principles to the construction of the statute, the remedy is with the Legislature that has attempted to apply a procedure devised for the contestation of municipal elections to a case in which the question at issue is whether or not the requisite majority of the legal votes is for or against a by-law."

NOTE.—The observations of Sir Charles Fitzpatrick are of interest because s. 279, as amended, contains the expression "scrutiny of the votes" in the place of the expression "scrutiny of the ballot papers" found in former s. 269, and because s. 279 (3) omits the expression upon "inspecting the ballot papers" found in former s. 371. The result is that the rule laid down in Re West Lorne still applies notwithstanding the changes in the Act.

In Re Orangeville, 1910, 20 O. L. R. 476, the County Court Judge proposed to enter upon an inquiry as to the qualification of certain persons who voted to vote. Meredith, C.J., granted an order prohibiting the Judge from entering upon any inquiry as to the right to vote of any person whose name is entered on the voters' list, upon which the voting took place, unless, under the provisions of the Consolidated Municipal Act, 1903, subsequently to the list being certified, he had become, by change of residence, disentitled to vote. This order was based on the decision of the D. C. in Re Saltfleet, to the effect that the certified list is final and conclusive as to all persons named in it, and no others, except such as come within the exceptions mentioned in s. 24 of the Voters' List Act, which are applicable to a municipal election. And he thus discussed the course which the County Court Judge proposed to follow:—

> "The learned Judge differs from the view enunciated by the Chancellor in the Saltfleet case, and concurred in by the other members of the Court, that it is only a subsequent change of residence which would disqualify, that may be investigated. It was his duty, whatever may have been his own opinion, as it is my duty, to follow the Saltfleet case, and, in so far as it is shewn that he is entering upon an inquiry beyond the limits of his jurisdiction as determined by that case, it is the duty of the Court to interfere by prohibiting him from so doing.
>
> "The opinion of the learned Judge, as I understand it, is that he may go beyond these limits, and that, where a person whose name is entered on the voters' list, at any time subsequent to its having been certified, is not a resident within the municipality, the list as to him is not final and conclusive, but his right to be entered upon it may be questioned, and, if it appears that he had not that right, his vote may be disallowed, even in a case such as that of a freeholder, where residence in the municipality is not required to entitled him to vote.
>
> "The error into which I venture to think the learned Judge has fallen is due, in the first place, to his divorcing the words in paragraph 2 of s. 24 of the Voters' List Act, 'persons who subsequently to the list being certified are not or have not been resident within the municipality to which the list relates,' from the subsequent words of the paragraph, which, in my view, plainly control them, 'and who by reason thereof are, under the provisions of the Ontario Election Act, disentitled to

vote.' The learned Judge, if, as I think, in error as to this, errs in the good company of a Divisional Court, if I am right in my view as to the effect of the section. But not only does he err in that respect, but also in treating the mere fact that a person whose name appears on the list has subsequently not been a resident within the municipality to which the list relates, although such non-residence in no way affected his right to vote, as in the case of a freeholder under the Municipal Act, as taking away the conclusive character of the list and warranting an attack upon his right to be entered on it.

"Such a view is, in my opinion, entirely opposed to the policy on which the Voters' List Act is based, which is, that the list is to be final and conclusive as to the right of every person whose name is entered on it to vote, unless, by something happening subsequently, such as change of residence, he has lost that right (par. 2). or unless he has been guilty of corrupt practices at the election at which he voted or since the list was certified by the Judge (par. 1), or unless he is a person incompetent or disqualified from voting under ss. 4 to 7 of the Ontario Election Act, par. 3, and par 2 being, in my opinion, applicable only to elections under that Act.

"To attribute to the Legislature the intention of opening the door to an attack on the voters' list simply because a person whose name is entered on it, whose right to vote is challenged, may have ceased temporarily, it may be, to reside in the municipality, where his ceasing to do so did not affect his right to vote, is not, I venture to think, very complimentary to the good sense of that body.

"A reference to the sections of the Ontario Election Act, R. S. O. 1897, c. 9, which deal with residence as affecting the right to vote (ss. 8 to 11), shews clearly. I think the cases which par. 2 was intended to provide for, and that that want of good sense is not fairly chargeable to the Legislature.

"Limiting the scope of the inquiry before the County Court Judge, as I have held it is to be limited. the question of his jurisdiction to deduct the bad votes from the number cast in favour of the by-law, as I understand the facts, becomes in this case academical, as, these being deducted, the majority is still sufficient to carry the vote.

"My present impression is, that—while a Court may have that power when dealing with a motion to quash—the jurisdiction of the County Court Judge being purely statutory, when the bad votes are sufficient in number that if cast for the by-law it would be defeated, he has not that power, and that his proper course is to certify the facts to the council; but, if the question is or becomes material in determining the fact of the by-law, I will hear counsel further as to it."

In Re Aurora Scrutiny, 1913, 28 O. L. R. 475, Lennox, J., refused an order of prohibition, following in Re Saltfleet and in Re West Lorne, and making an instructive application of the principles laid down in those cases. There were six votes involved.

Two were of persons who were residents of Aurora when the lists were finally revised, but afterwards abandoned their residence and were not residents at the time of voting (the by-law in question was a local option by-law, on which only residents were entitled to vote). Inquiry authorized.

Two persons were non-residents at the time of the revision of the lists and were improperly put upon the list. They continued to be non-residents at the time of voting. There was no jurisdiction to inquire by reason of finality of the list, but these cases were, before the voting, made the subject of inquiry by s. 23 of 1 Geo. V. c. 64. (See s. 266 referring to residence qualification for voting on a local option by-law).

One person voted twice, and another person appeared on the voters' list as a resident freeholder in two wards. Subsequently to the revision of the list he sold the property he was living upon and took up his residence on the other. He voted in the ward in which he was not residing, Lennox, J., pointing out that the jurisdiction for a scrutiny as to these men had not been determined in any case, said:—

"This is not a question of the existence of a legal vote, but is a question of the valid exercise of a legal right to vote; and this was evidently the attitude of the County Court Judge. He says: 'In reach-

ing my conclusion I have not in any way gone behind the voters' list but have treated it, so far as these votes were concerned, as to the right of these parties to vote as indicated by the voters' list, as being final and conclusive. It must be borne in mind, however, that the grounds upon which the votes of Sisman and George are attacked are entirely apart from the independence of their right to vote, as apparent on the voters' list.

"It seems to me clear then, that the courts having declared that a scrutiny under s. 371 of the Consolidated Municipal Act, 1903, includes the jurisdiction to investigate as to the voters' qualification, so long as it does not conflict with the finality of the lists already referred to, it follows that the Judge has jurisdiction also to investigate as to whether or not, in a given case, the right to vote, finally and absolutely certified by the lists, was subsequently so exercised as to constitute the ballot paper deposited in the ballot box a legal vote.

"I have, therefore, come to the conclusion that the Judge has also jurisdiction to inquire into the validity of the votes of these two men."

Secrecy of Voting Even When Voter had no Right to Vote.—See valuable discussion by Mabee, J.A., in Re West Lorne Scrutiny, 1912, 26 O. L. R., at 354.

Scrutiny Under Canada Temperance Act.—A scrutiny under this Act is confined to an inspection of the ballots: see Chapman v. Rand, 1885, 11 S. C. R. 312; Murdock v. Kilgour, 1914, 33 O. L. R. 412, App. Div.

Scrutiny Equivalent to a Recount Only.—There was a large body of opinion in Ontario in favour of the view that the County Court Judge upon a scrutiny was confined to an inspection of the ballot papers, and to taking evidence to identify them or in relating to them. See Biggar's Municipal Manual, p. 371, and the remarks of Meredith, C.J., in Re Orangeville, 1910, 20 O. L. R. 476. The Manitoba Municipal Act, R. S. M. 1913, c. 133, ss. 381 to 384, provide for a recount of the ballot papers.

The Decision of the Judge Shall be Final, etc.—If the Judge actually conducts an inquiry where he has jurisdiction and reaches an erroneous conclusion, prohibition will not lie, unless, by the error in law he has created for himself a fictitious jurisdiction: In Re Aurora Scrutiny, 1913, 28 O. L. R. 475; in Re Long Point v. Anderson, 1891, 18 A. R. 401; Elston v. Rose, 1868, L. R. 4 Q. B. 4; 38 L. J. Q. B. 6; Colonial Bank of Australasia v. William, 1874, L. R. 5 P. C. 417; 43 L. J. P. C. 39, where it is said: "That the objection that the Judge has erroneously found a fact which though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the enquiry, but miscarried in the course of it. . . . The question is whether the inferior Court had jurisdiction to enter upon the enquiry and not whether there has been miscarriage in the course of the enquiry."

Scrutiny not Final.—A Court upon a motion to quash where the objection is raised that the by-law was not carried by a majority of the valid votes, has all the powers of a Judge holding a scrutiny, and if there already has been a scrutiny, is not concluded by the certificate of the result of such scrutiny. See discussion by Riddell, J., in Re McGrath and Durham, 1908, 17 O. L. R. 523, and Part XI. Quashing By-laws.

Passing By-laws by Council.

280.—(1) Where a proposed by-law, which the council has been legally required by petition or otherwise to submit for the assent of the electors has received

such assent, it shall be the duty of the council to pass the by-law, within six weeks after the voting took place.

280.—(2) In other cases it shall not be incumbent on the council to pass the by-law, but if the council determines to pass it, it shall be passed within six weeks after the voting took place and not afterwards. 3 Edw. VII. c. 19, s. 373, *redrafted*; 3 & 4 Geo. V. c. 43, s. 280 (1-2).

280.—(3) The by-law in either case shall not be passed until the expiration of two weeks after the result of the voting has been declared, or if within that period an order for a scrutiny has been made, until the result of the scrutiny has been certified by the Judge.

280.—(4) The time which intervenes between the making of an application for a scrutiny and the final disposition of it shall not be reckoned as part of the six weeks. 3 Edw. VII. c. 19, s. 375, *redrafted*; 3 & 4 Geo. V. c. 43, s. 280 (3-4).

280.—(5) Provided that the Ontario Railway and Municipal Board may in the case of any by-law heretofore passed, or hereafter to be passed, upon the application of the Council, extend the time for passing the by-law beyond such period of six weeks, and such extension of time may be made although the application for the same is not made until after the expiration of such period of six weeks, and in such case the by-law may be passed within such extended time. 4 Geo. V. c. 33, s. 7.

Legally Required by Petition or Otherwise to Submit.—The initiative with respect to certain classes of by-laws rests with the electors and not with the council, for example where a petition is presented for the erection of a village under s. 13 it is provided that the council "shall . . . pass a by-law." Again where a petition is presented under s. 46 (6), it is provided that the council "shall submit the question," and if the voting is in favour of the change "shall without delay pass a by-law." Similar imperative duties are imposed on council by various Acts, *e.g.*, the Factory, Shop and Office Building Act, R. S. O. 1914, c. 229, s. 84 (4). The imperative duty finally to pass the by-law may be enforced by mandamus. The imperative nature of the duty follows from the use of the words "it shall be the duty of the council to pass." Former s. 373 read: "A by-law which is duly carried by the vote of the qualified electors, shall within six weeks thereafter be passed by the council." This was held merely to prescribe the time within which the by-law was to be taken into consideration and perfected, and not to cast upon the council an imperative duty to pass the by-law at all events, and if the by-law was not passed within the time

limit it lapses; see Re Canada Atlantic v. Ottawa, 1885, 12 S. C. R. 365, and Canada Atlantic v. Cambridge, 1887, 14 A. R. 299, but see dictum of, Killam, J., below. These decisions were based upon a consideration of the effect of another section of the Act requiring the council to publish a notice stating when the by-law would be finally taken into consideration. See also Re Dewar and East Williams, 1905, 10 O. L. R. 463, D. C.

Defective Third Reading Where Council Must Pass By-law.—In Re Duncan and Midland, 1907, 16 O. L. R. 132, C. A., Osler, J.A., said:

> "In the present case the council passed the by-law—that is to say, gave it its third reading—too soon, but the question remains whether, under all the circumstances, the Court ought to interfere. What the council did is spoken of as the passing of the by-law, and if the by-law depended wholly upon the action of the council—that is to say, if it was *ab initio* and throughout the by-law of council—I should be of opinion that, in order to prevent it from being acted upon, it ought to be set aside as being plainly bad on its face But I regard a by-law of this kind as essentially different from an ordinary by-law. It is a by-law which derives its force from the electors themselves, and not from the council, whose action in giving it a third reading is formal and ministerial only. They may be compelled to do this, and "the let alone lies not in their good will.' It is simply the formal authentication of the action of the electors, and the recording of it or adopting of it for the purpose of proof or evidencing it in the way in which remedial legislation is usually evidenced. Here the carriage of the by-law by the electors is not attacked, nothing is complained of, or rather, nothing could be set aside but the faulty third reading or formal passage of the by-law, leaving the council free (and obliged) to give it another and now unobjectionable one. It appears not only that no attempt was made to obtain a scrutiny of the ballot papers, but that they were, in fact, inspected and examined, and that only one was found to be defective. There is no evidence, in short, that a scrutiny would have had any effect in altering the result or that those opposing the by-law were in any way deterred from applying for one by the improper action of the council. We could not set aside or quash the by-law simply, as there is nothing wrong but its third reading, and to set aside that would now be a useless and futile proceeding."

From the foregoing it would appear that even if the councillors voting on the third reading were disqualified by bias or interest the ministerial act of giving the third reading will not be interfered with, and such cases as Re Baird and Almonte, 1877, 41 U. C. R. 415; Re L'Abbe and Blind River, 1904, 7 O. L. R. 230, do not apply.

Manitoba Provisions.—Sections 386 and 387 of the Municipal Act, R. S. M. 1913, c. 133, are as follows:—

> 386.—A by-law which is duly carried by the vote of the qualified electors shall, within six weeks thereafter, be finally passed by the council. The council passing said by-law need not be composed of the same members as the council which introduced or submitted said by-law to vote.
>
> 387.—If a recount be applied for the by-law shall not be passed by the council until after the application has been disposed of; and the time which intervenes between the making of the application and the final disposal thereof shall not be reckoned as part of the six weeks within which the by-law is to be passed.

Killam, J. (see In re Cloutier, 1896, 11 M. R. at 226), dealing with an earlier section where the wording was "the council shall within one month after the receipt or presentation of such application pass a by-law," said:—

> "I incline also at present to think that under the section the delay beyond the period of one month would not render it the less obligatory on the council to act, or invalidate the by-law."

Time for Passing.—Provisions of s. 280 now make plain the duty of the council with respect to by-laws which have received the assent of the electors. The provisions of s.-s. 5, the last to be added, enable the situation which arises when the statutory period has passed without action by the council to be dealt with. In Acts where machinery corresponding to s.-s. 5 has not been provided, a difficulty still arises.

Promulgation of By-laws.

281.—(1) The promulgation of a by-law shall consist in the publication of a true copy of it, with a notice, Form 23, appended thereto, at least once a week for three successive weeks. 3 Edw. VII. c. 19, s. 375, *re-drafted*; 3 & 4 Geo. V. c. 43, s. 281 (1).

FORM 23.

NOTICE ON PROMULGATION OF BY-LAW.

The above is a true copy of a by-law passed by the municipal council of the of on the day of , 19 . And all persons are hereby required to take notice that anyone desirous of applying to have such by-law, or any part thereof, quashed, must make his application for that purpose to the Supreme Court of Ontario within three months after the first publication of this notice in the newspaper called the , or he will be too late to be heard in that behalf.

3-4 Geo. V. c. 43, Form 23.

(2) If an application to quash the by-law, or part of it, is not made within three months after the first publication, the by-law, or so much of it as is not the subject of, or is not quashed upon any such application, shall be valid and binding, according to its terms, so far as the same ordains, prescribes or directs anything within the proper competence of the council. 3 Edw. VII. c. 19, s. 377, *amended*; 3 & 4 Geo. V. c. 43, s. 281 (2).

Promulgation of By-laws.—The early history of the provisions as to promulgation and a discussion of their effect was given by Haggarty, C.J., in Connor v. Middagh, 1889, 16 A. R. 356, where an action of trespass was brought in respect of acts done under the authority of a by-law which had not been quashed. The Chief Justice said:—

"As early as 1858, 22 V. c. 99, consolidated in the following year (C. S. U. C. c. 54), there were certain 'promulgative' clauses. As to by-laws imposing rates, an application to quash must be made within six months from promulgation; and s. 201 provides that if not quashed on application within the time limited, the by-law 'so far as the same ordains, prescribes or directs anything within the proper competence of the council to ordain, prescribe or direct, shall, notwithstanding any want of substance or form, either in the by-law itself or in the time or manner of passing the same, be a valid by-law.

"The same provisions appear in the Act of 1883 (s. 333), and in the last Revised Statutes, 1887.

"This last citation as to the rate by-laws duly promulgated, being within 'the proper competence of the council,' seems the only reference in the statutes that I have seen beyond the usual expression as to the by-laws, 'illegal in whole or part.'

"I doubt if it carry the question any further than the requirement that the by-law be on a subject properly cognizable by the municipality as within their general jurisdiction.

"If their 'competence' depend on the due observance of every formality as to notice, time, application of parties, neglect or refusal of others to do the work, then, of course, the protection intended by the Legislature to those acting under the by-law is narrowed as to be practically useless.

"Every by-law is illegal if not passed with all substantial requirements of the law being complied with, and, on application to the Courts within the limited time, will be quashed.

"But the serious question which we have to determine is this, is the effect of the legislation past and present to require all objectors to the validity of a by-law, like that before us, to have such validity questioned and settled by the appointed legal tribunal; and, if the time limited for such questioning be past, then how far is protection given to persons acting under it?

"We need not embarrass the case by any *argumentum ad absurdum*, such as the effect of the by-law to regulate the color of each ratepayer's coat, or the number of windows he may open in his house.

"We need only discuss the effect of a by-law passed on a subject, which, under certain conditions and requirements, is within the general competence of the council. . . .

"I think our Legislature recognized fully the position of persons acting like constables in carrying into effect the directions of a by-law interfering possibly with private rights, by the protection extended to them under the Municipal Acts.

"It would be unreasonable as it would be unfair to require the executive officer to obtain a legal opinion as to the validity of a by-law before venturing to enforce it.

"I think the defendant here is protected against this action."

In Re Knudson and St. Boniface, 1905, 15 M. R. 317, a by-law closing a street was quashed because it was found to have been passed for an improper purpose, and to be in abuse of the powers conferred on the council. The by-law had been promulgated under sections similar in effect to s. 281. Perdue, J., said:—

"It appears to me that this proceeding simply cures defects in the substance or form of the by-law, and in the preliminary steps leading up to the passing of it. Promulgation would not make valid a by-law not within the proper competence of the council to pass. The sections dealing with it are not to be construed in such a manner as to confer on councils powers not otherwise conferred by the Act. A by-law, in the passing of which the council has exceeded its powers, cannot be made valid or brought within the powers of the council by the simple process of promulgation."

Effect of Promulgation.—Promulgation will not avail to render a by-law valid in a case where some condition precedent must exist to bring the subject-matter of the by-law within the proper competence of the council, and if such condition did not exist before the council acted, and much more promulgation will not avail when the by-law is entirely *ultra vires*, or even if *intra vires* where the council has acted in bad faith, or where unreasonableness is still a ground for quashing, and the council has acted unreasonably, or has shewn discrimination. Promulgation will merely cure irregularities in procedure. So far as these are covered by s. 150, promulgation is unnecessary. Irregularities at council meetings for example are not covered by s. 150 and may be cured by promulgation.

In Canada Atlantic v. Cambridge, 1884, 11 O. R. 392, 14 A. R. 299, 15 S. C. R. 219, the majority of the electors did not assent to the by-law, and it was held not to be within the proper competence of the council. The defect which rendered the by-law utterly void, and in fact no by-law was held to be something that could not be cured by the promulgation clauses of the Act. The principle thus laid down was applied in Gesman v. Regina, 1909, 10 W. L. R. 136, where the defect was a failure to give a notice which was held to be a condition precedent without which the council had no jurisdiction to pass the by-law.

PART XI.

Quashing By-laws.

282. In this part by-law shall include an order or resolution. 3 & 4 Geo. V. c. 43, s. 282.

283.—(1) The High Court upon the application of a resident of the municipality, or of a person interested in a by-law of its council, may quash the by-law, in whole or in part, for illegality.

283.—(2) Notice of the application shall be served at least seven days before the return day of the motion. 3 Edw. VII. c. 19, s. 378 (1-2), *redrafted*; 3 & 4 Geo. V. c. 43, s. 283 (2-3).

283.—(3) Before the application is made, the applicant [or, if the applicant is a corporation, some person in its behalf] shall enter into a recognizance before a Judge of the County or District Court of the county or district in which the municipality is situate, himself in the sum of $50, and two sureties each in the sum of $50, conditioned to prosecute the application with effect, and to pay any costs which may be awarded against the applicant.

283.—(4) The Judge may allow the recognizance upon the sureties making proper affidavits of justification, and after it is allowed, the recognizance with the affidavits shall be filed in the central office of the High Court.

283.—(5) In lieu of the recognizance, the applicant may pay into Court $100, and the certificate of the payment into Court shall be filed in the central office.

283.—(6) After the determination of the proceedings, the Judge may order that the money paid into Court be applied in payment of costs, or be paid out to the applicant. 3 Edw. VII. c. 19, s. 378 (4-7), *redrafted*; 3 & 4 Geo. V. c. 43, s. 283 (4-6).

284. A by-law, in respect of the passing of which a violation of any of the provisions of ss. 187 to 189 has taken place, may be quashed. 3 Edw. VII. c. 19, s. 381, *amended*; 3 & 4 Geo. V. c. 43, s. 284.

285.—(1) Where it is alleged that a by-law injuriously affects another municipality or any ratepayer of it, and that the by-law is illegal, in whole or in part, the corporation of such other municipality or any ratepayer of it may apply to quash the by-law.

In Village of Merritton v. County of Lincoln, 1917, 41 O. L. R. 6, App. Div., the village brought an action for a declaration of a by-law of the county by which it assumed a highway which passed through the village under the Highway Improvement Act was illegal. The App. Div. held that the by-law was legal. Meredith, C.J.O., who delivered the reasons for judgment, after giving the foregoing opinion, said:

> "If I had been of a different opinion, I should have been nevertheless of opinion that this branch of the respondent's case failed; because the respondent has no *locus standi* to bring or maintain an action to set aside the by-law on the ground I am now considering.
>
> "According to the provisions of s. 285 of the Municipal Act, it is only where the by-law injuriously affects another municipality or a ratepayer in it that the corporation of that other municipality, or that ratepayer, may apply under the Act to quash the by-law.
>
> "If the by-law improperly imposes a rate on the municipalities exempted by the special Act, it does not injuriously affect the respondent, but it is ease of it.
>
> "The policy of the Act, as indicated by s. 285, ought, I think, to be applied to an action by which it is sought to obtain a judgment quashing a by-law, for it would be anomalous indeed if a municipal corporation, which has no *locus standi* to apply under the statute to quash a by-law, could obtain that relief by bringing an action instead of proceeding under s. 283 by motion; or, at all events, in the exercise of our discretion, we ought, in view of that policy, to refuse to quash the by-law."

Re Alliston and Trenton, 1917, 28 O. W. R. 341, 579; and Merritton v. Lincoln, 1917, 41 O. L. R. 6.

285.—(2) Where the application is made by a municipal corporation, security for costs shall not be required. 3 Edw. VII. c. 19, c. 378 (*a*), *redrafted*; 3 & 4 Geo. V. c. 43, s. 281 (1-2).

285.—(3) Where the application is based on an allegation of a violation of any of the provisions of ss. 187

to 189, either alone or in conjunction with any other ground of objection, the High Court may direct an inquiry as to the alleged violation to be had before a special examiner or a Judge of the County or District Court of the county or district in which the municipality is situate, and the witnesses upon the inquiry shall be examined upon oath.

285.—(4) After the completion of the inquiry, the special examiner or the Judge shall return the evidence taken before him to the proper officer of the High Court, and the same may be read in evidence upon the motion to quash. 3 Edw. VII. c. 19, s. 383, *redrafted*; 3 & 4 Geo. V. c. 43, s. 285 (3-4).

285.—(5) Where an order, directing an inquiry, under s.-s. 3, has been made, and a copy of it has been left with the clerk of the municipality, nothing shall be done under the by-law, unless the High Court otherwise orders, until the application is disposed of. 3 Edw. VII. c. 19, s. 383, *redrafted*; 3 & 4 Geo. V. c. 43, s. 285 (5).

285.—(6) In other cases the Court may direct that nothing shall be done under the by-law until the application is disposed of. 3 & 4 Geo. V. c. 43, s. 285 (6).

286. An application to quash, in whole or in part, a by-law which has not been promulgated or registered under the provisions of s. 296, shall not be entertained unless the application is made within one year after the passing of the by-law, unless it required the assent of the electors, and had not been submitted for, or had not received their assent; but in that case an application may be made at any time. 3 Edw. VII. c. 19, s. 379, *redrafted*; 3 & 4 Geo. V. c. 43, s. 286.

History of Statutory Power to Quash.—The following was given by Riddell, J., in Re McGrath and Durham, 1908, 17 O. L. R. at 523:—

"The history in (1849), 12 V. c. 81, s. 155 (not 165 as given in the text writers, and in Re Gill and County of Peterborough (1853), 9 U. C. R. 562); (1858), 22 V. c. 99, s. 194; (1866), 29-30 V. c. 51, ss. 198, *et seq.*; (1875), 36 V. c. 48, ss. 240 *et seq.*; (1877), R. S. O. c. 174, ss. 322, *et seq.*; (1882), 46 V. c. 18, ss. 334, *et seq.*; (1887), R. S. O. c. 184, ss. 332, *et seq.*; (1897), R. S. O. c. 223, s. 378; (1903), 3 Edw. VII. c. 19, s. 378."

Nature of the Jurisdiction to Quash.—In Cartwright and Napanee, 1905, 11 O L. R. 69, an application was made to quash a by-law for constructing and operating electric light and power works. Upon the ground of certain irregularities in the voting and another irregularity consisting of the omission to appoint and give notice of the appointment of a day for finally considering a by-law, and upon a further ground of the admission of a substantial and positive requirement as to publication, not within the curative operation of then s. 204 (see s. 150). Meredith, J., in refusing to quash the by-law, said:—

> "The question whether the Court is or is not bound to quash an illegal by-law does not at all depend upon the permissive words 'may quash,' used in s. 378 of the Consolidated Municipal Act, 1903, 3 Edw. VII. c. 19. That legislation was enacted for the purpose of creating the power to quash, not of indicating the circumstances under which the power should be exercised, nor whether the power is or is not discretionary. It means no more than that it shall be lawful for a Judge of the High Court to quash on summary motion. To have used imperative instead of permissive words—to have said 'shall quash' instead of 'may quash'—would have been obviously absurd. There was no choice between such words, and so there is no indication in those words of the permissive or imperative character of the jurisdiction conferred. Whether an illegal by-law must, or need not, be quashed depends upon entirely different considerations.
>
> "The purpose of the legislation is very plain—to provide a prompt, simple and inexpensive means of getting rid of any invalid by-law; to save the obvious inconvenience, and sometimes great loss, arising from want of such means. In cases in which there is no good reason why the validity of a by-law should not be tested before it is acted upon, instead of waiting until, it may be, extensive and expensive operations have been carried on under it, the legislation creates jurisdiction of a highly convenient and remedial character, and so one which ought to be exercised in every case to which its benefits are applicable; in other words, the jurisdiction ought, generally speaking, to be exercised in every case of an illegal by-law which cannot be validated. It would be against the interests of those who support the by-law, as well as of all others, to permit it to stand if incurably bad.
>
> "In the case of an invalid by-law which can be cured, again generally speaking, the jurisdiction ought to be exercised when the irregularities which render it invalid affected, or might have affected, the passing of it; but ought not to be exercised when they could not. For why should not irregularities which are innocuous be allowed to become cured by lapse of time, after notice, under the provisions of an Act passed for the purpose of curing them? I speak, of course, of by-laws such as the one in question."

His Lordship then dealt with the substantial omission mentioned above, and after pointing out that it rendered the by-law invalid and could not be cured by then s. 204, he proceeded:—

> "So the by-law in question comes within the category of the invalid ones which can become validated, see Part VI., Title II., Division VII. of the Act (now s. 296), and the question is whether the facts of this case bring it within the class which ought to be allowed to take the curative process, that is, does it clearly appear that the irregularities did not affect the result?
>
> "Some of the material facts of the case are: That the application is not really made in the interests of the ratepayer nor in respect of the applicant's rights as a ratepayer merely, but is made in the interests of a company, the business of which, if continued, must be carried on in competition with the business to be done by the municipal corporation under the provisions of the by-law; that the applicant was not, nor were any of the voters, in any manner prejudiced or affected by an irregularity in the proceedings (that the applicant was not, is made very plain, he and all those interested in the company were well aware of the day of voting, and took all such steps as were deemed advisable to oppose the by-law, and protect their interests, at the polls; instead of objecting to the proceedings, they communicated with the council of the municipal corporation with a view of an arrangement

which would save the expense of scrutineers in their behalf); that, through an officer of the company, another motion was made to quash the by-law on the other ground upon which the motion is based, and this application was not launched until after the question of its validity had been argued upon that question, and months after the passing of the by-law; that the ratepayers are, almost unanimously, in favour of the by-law, which undoubtedly would again be passed if now quashed, practically nothing but the interests of the rival company opposing it; and that extensive proceedings and operations had been taken under it, so that much loss and delay would be caused, and nothing gained, by giving effect to this motion, for the little delay which would be caused by going over the ground again in order to make the proceedings regular, and the by-law unobjectionable from a legal point of view, can hardly be considered real gain even to the rival company, however hard it may be hit by the by-law.

"The case, therefore, seems to me to be one, and very plainly one, for allowing the curative provisions of the Act to operate; for declining to exercise a jurisdiction which would compel the respondents to march up the hill merely to march down again at their will."

The applicant appealed, but before the appeal was argued the Legislature validated the by-law, enacting however that such legislation was not to affect the costs of the then pending appeal, but that the Court might deal with them as if the validating Act had not been passed; and the Court of Appeal awarded costs to the appellants, observing: The appellants were quite within their rights in objecting when and as they did to the . . . municipality . . . assuming to act upon a by-law which was passed without due regard to the provisions of the statute": Re Cartwright and Town of Napanee, 1906, 8 O. W. R. 65, 67.

Setting Forth Grounds of Application.—If the affidavits set forth the grounds clearly an error in stating them in the notice of application will not be a ground of objection. Re Devitt and Osborne, 1911, 18 W. L. R. 662, Sask., Full Court.

In Re St. Boniface By-law, 1912, 19 W. L. R. 943. 1 W. W. R. 759, the applicants did not set out the grounds on which they proposed to ask that the by-law be quashed, and the charter of the city did not expressly require the grounds to be stated. Robson, J., said:—

"There can be no question that a party whose proceeding is impeached for alleged illegality has an absolute right, *ex debito justitiæ*, to notice of the grounds of attack in due time to enable him to meet the attack.

"To avoid injustice, it should be implied in s. 517 of the St. Boniface city charter, that the grounds shall be stated in the summons. By inadvertence, the summons in this case omits a statement of the grounds upon which the applicant proceeds. In Re Peck and Township of Ameliasburgh, 1888, 12 P. R. 664, although there was an irregularity in the period of notice, Street, J., did not dismiss the application, but retained it, and required that proper notice be given. It seems to me that in the present case I should, if the applicant alleges adequate grounds, amend the summons and require it to be re-served, making it returnable again at such a date as will allow of ten days' notice. This course may save the repetition of the work and expense of another application. There is no lapse of any limitation period or other circumstance to prejudice the respondents. Should adequate grounds not be suggested, there would, of course, be the discharge of the summons. The respondents must be protected in the matter of costs."

At Least Seven Days Notice of Application is Required.—That is seven days must elapse, not counting the day of service and the return day. In Re Sweetman and Gosfield, 1889, 13 P. R. 293, Street, J., dismissed an application on the ground that he had no power to shorten the four clear days' notice of application to quash required by the then Act, refusing to apply then Cons. Rule 485, now rule 176, but he gave the applicant leave to renew the motion. Re Peck and Ameliasburgh, 1888, 12 P. R. 664, is to the same effect.

The Rural Municipalities Act, Sask., provides that the notice shall be served at least seven clear days before tthe date on which the motion is made. That is not the same as seven clear days before the return day, and the meaning is that the municipality shall have seven full days at least in which to make preparations, and if the defendant appears on the return day and gets an enlargement, giving at least seven days for preparation, the whole object of the statutory provision is accomplished, Re Devitt and Osborne, 1911, 18 W. L. R. 662, Sask. Full Court.

Appearance is a waiver of any objection in respect of the return: Perry v. Whitby, 1855, 13 U. C. R. at 567; Randell v. Grundy, 1895, 1 Q. B. 16, followed in Re Devitt and Osborne.

Grounds for Quashing—Extraneous Illegality.—In Re Fenton and Simcoe, 1885, 10 O. R. 27, was a motion to quash a by-law incorporating a village on the ground that certain statutory conditions precedent to the passing had not been present, and that there was illegality in the manner of the passing. Wilson, C.J., exhaustively discussed the following early authorities: Lafferty v. Wentworth, 8 U. C. R. 232; Hill v. Walsingham, 1849, 9 U. C. R. 310; Grierson v. Ontario, 10 U. C. R. 626; Simmons v. Chatham, 21 U. C. R. 75; Michie v. Toronto, 1862, 11 C. P. 386; Secord v. Lincoln, 24 U. C. R. 147; Grant v. Puslinch, 1868, 27 U. C. R. 154; Re Revell and Oxford, 1877, 42 U. C. R. 337, stated the rule as follows:—

> "The language of Mr. Justice Burns, in Grierson v. Ontario, 9 U. C. R. at p. 632 . . . is: 'I am of opinion the best construction to give to the power vested in the Court to quash by-laws, is, that unless the by-law be illegal on the face of it, it rests discretionary with the Court upon extraneous matters to say whether there is such a manifest illegality that it would be unjust that the by-law should stand, or that it had been fraudulently or improperly obtained.
>
> "That is the interpretation which I put upon the enactment, and I accept the language which I have quoted as expressing the opinion I entertain. I may say also, that it appears to me, if a by-law is so defective or objectionable, although shewn to be so by matter extraneous to it, that it would be held void in law if an action were brought for anything which was done under it, that it should properly on a motion to quash it, be held to be illegal; for a by-law which is void in law, must be so because it is illegal; and that appears to me to be a good reason for holding that illegality in a by-law must be equally an objection to it, whether the objections do or do not appear upon the face of the by-law.
>
> "The statute does not say the illegality shall be that only which is apparent upon the by-law. Illegality without qualification is the expression of the Act, and that must apply to illegality generally, however that illegality may be made to appear.
>
> "I feel no difficulty then in considering the question of alleged illegality of this by-law, whether that illegality be shown to be upon the face of the by-law, or to be independent of or extraneous to it.
>
> "The question then is, whether there were over 750 inhabitants in the area, since constituted the village of Beeton, at the time of the passing of the by-law which created it? That requires I should make a scrutiny of the census, such as it was, which was taken, and upon which the by-law was passed.
>
> "The learned Chief Justice here entered upon the scrutiny and found that there were not more than 715 inhabitants."

And he quashed the by-law, overruling certain objections that the applicants were too late, and that they were estopped dealt with elsewhere.

In Re Huson and South Norwich, 1892, 19 A. R. 343, the Court in the exercise of its discretionary power refused to quash a local option by-law, where the poll was large and the proceedings had been taken in good faith, and it did not appear that the informalities complained of misled anyone. The alleged irregularities were as to publication, and the designation of one polling place. Hagarty, C.J.O., said:—

> "It is not necessary to attempt any exhaustive review of the cases. In 1885, the late Sir Adam Wilson, with his usual painstaking industry, reviewed the cases for the purpose of extracting the principle which has generally governed the Courts: Re Fenton and the County of Simcoe, 10 O. R. 27.

"My learned brother Osler fully considered the question in this Court: Re Ostrum and the Township of Sidney, 15 A. R. 372 (1888).

"This last case fully established the principle that whenever a statute forbids the passing of a by-law interfering with private property, except on certain stated conditions as to notice, etc., the conditions must be strictly fulfilled. If a month's notice is required, its full period must be allowed. He reviews many of the cases. The same rule must, I, presume, apply where any proceeding is directed in express terms as a condition precedent to jurisdiction.

"But the Courts from the earliest date have striven to avoid undue strictness in the insistence of exact performance of statutable formalities, where they could see that the objection did not reach either to the clear omission of some condition precedent required to be performed; where a mistake had been made in perfect good faith, and with an honest purpose of obeying the law, although unintentionally deviating from its strict observance; where the objection was wholly technical and nothing had occurred to create a suspicion of unfair dealing, and there was no reason whatever to believe that the result of the whole proceedings had been affected.

"It has been often remarked that where a rural population is entrusted with limited powers to pass local laws, we must not be hypercritical as to exactitude of procedure.

"I think the case before us eminently calls for an application of this leniency of construction."

His Lordship then dealt with the irregularity, and found that an error had been made in complying with the statutory requirements as to publication (see discussion of this under s. 150), and he then proceeded:—

"From any knowledge I possess of the general practice of our Courts for nearly half a century in dealing with such objections, I think I may venture now to use the discretionary power of the Court, and to refuse to hold this honest mistake to be necessarily fatal."

Grounds for Quashing—Non-compliance With the Provisions as to Taking of the Poll or Anything, or as to the Counting of the Votes Preliminary Thereto—Mistake in use of Forms—Mistake or Irregularity in Proceeding at the Voting.—See s. 150, which is made applicable by voting on by-laws by s. 274, and the other sections of part of the Act which apply to voting on by-laws.

Grounds for Quashing — Unreasonableness—Ultra Vires—Not Passed in the Public Interest—Discrimination—Not Passed Bona Fide—Uncertainty—Absence of Condition Precedent.—See s. 249 and cases there cited.

Grounds for Refusing to Quash — Lapse of Time.—In Re Fenton and Simcoe, 10 O. R. 27, Wilson, C.J., in disallowing an objection that the application to quash was too late, said:—

"The order *nisi* was moved for and granted on the 5th of June, 1885, while the by-law was passed on the 18th of June, 1884. The Municipal Act, 1883, s. 335, provides that: 'No application to quash a by-law, order or resolution, in whole or in part, shall be entertained by any Court unless such application is made to such Court within one year from the passing of such by-law, order or resolution.

"The exceptions in that section do not apply to a by-law of this nature.

"It was granted by the respondents' counsel that, although the Court could not quash a by-law after a year from its being passed, it did not follow the party moving against it was to be allowed the year within which to move, and that the rule of delay in moving it still is applicable as ever, although the motion was made within the year. I am rather of that opinion. But in this case the section has been so wantonly and unjustifiably violated in every way, the proceedings have been so irregularly and, as I think, so recklessly and untruthfully taken, that I am not in the least inclined to take from the applicants any part of the year within which the motion can be lawfully made."

The application is made when the notice is served, and the affidavit in support, having been already filed, and the application will be good, though the return day is after the expiry of the year: Re Sweetman and Gosfield, 1889, 13 P. R. 293; Re Shaw and St. Thomas, 1899, 18 P. R. 454, C. A.

In re Arthur and Meaford, 1915, 34 O. L. R. 231, the affidavits in support of an application to quash were not filed before the service of the notice of motion, as required by Cons. Rule 298, and before they were filed the year after the passing of the by-law had elapsed (although copies had been served and acted on). Middleton, J., applied Cons. Rule 184, saying:—

> "I feel that I should sin against light and reason if I should hold that the Court had no power to relieve against this unfortunate slip, and that I was bound to cast upon a litigant a great burden of costs and deny him a hearing on the merits, because a law student forgot to file papers the day when they were given him for that purpose."

See also as to similar slips: Devlin v. Devlin, 1871, 3 Ch. Chrs. 491; Re Backhouse v. Bright, 1889, 13 P. R. 117; Graham v. Sutton Carder, [1897] 1 Ch. 761; Bank of Hamilton v. Baine, 1888, 12 P. R. 439; Princess of Wales v. Earl of Liverpool, 1818, 1 Swanst. 114.

Grounds for Refusing to Quash—Council Illegally Elected.—In Re Vandyke and Grimsby, 1906, 12 O. L. R. 211, D. C., one ground of the application was that the council which passed the by-law had not been legally elected. Teetzel, J., in overruling this objection, said:—

> "Being *de facto* members of council, the validity of their legislative acts cannot be impeached on the ground that their election was invalid in law.
>
> "In Scadding v. Lorant (1851), 3 H. L. Cas. 418, it was held that a rate for the relief of the poor which was legally made in other respects was not rendered invalid by the circumstance that some of the vestrymen who concurred in making it were vestrymen *de facto* and not *de jure*. . . .
>
> "See also Brice on Ultra Vires, 3rd ed., 304 and 613; and Dillon on Municipal Corporations, 4th ed., s. 276."

And he was upheld by the D. C.

The same rule was followed in Re Armour and Onondaga, 1907, 14 O. L. R. 606, and Re Duncan and Midland, 1907, 16 O. L. R. 132, C. A.

Grounds for Refusing to Quash—Irregularities at Council Meetings.—In Re Jones and London, 1899, 30 O. R. 583, Rose, J., refused to quash certain by-laws where the procedure at council meetings was not in accordance with the procedure by-law, saying:—

> "I think, the discretion which is vested in me should be exercised to sustain the by-law against such an objection, an objection not founded in merit nor, as it seems to me, sustained by law."

In Re Kelly and Toronto Junction, 1904, 8 O. L. R. 162, an application to quash was based on irregularities in procedure at the meeting of council. Falconbridge, C.J., in dismissing the application, said:—

> "I agree with the contention that these matters are matters of internal regulation, and that the mayor was the judge thereof, subject to the appellate jurisdiction of the council. . . .
>
> "I am of opinion that as a matter of strict law this application ought not to succeed. But if I had to exercise any discretion it would be in the same direction. It would be a serious matter to declare judicially that the by-law of some rural municipality was invalid because some minute point in parliamentary practice had been overlooked."

In Re Caldwell and Galt, 1905, 10 O. L. R. 618, Teetzel, J., in dismissing an application to quash, said:—

> "Being of opinion that the by-law is valid on its face, and is the will of the majority of the council, and that none of the objections now raised were raised by any member of the council, and that the matters

now objected to were matters of internal regulations, effect should not be given to such objections, founded as they are on extrinsic evidence as to regularity of procedure, unless there is such a manifest illegality that it would be unjust that the by-law should stand."

See also Re Brewer and Toronto, 1909, 19 O. L. R. 411, C. A., where Osler, J.A., referring to a variation from the regular course of procedure of the council, said:—

"But this procedure was merely a matter of the internal regulation of the business of the council, which, in the absence of statutory obligation, they were at liberty to alter and suspend at formal discretion, and failure to observe it, even in the absence of formal alteration or suspension, cannot, as a general rule, be invoked for the purpose of attacking a by-law which is within the jurisdiction of the council, and is good on its face."

See also Re Dewar and East Williams, 1905, 10 O. L. R. 463, D. C.

Merritton v. Lincoln, 1917, 41 O. L. R. 6, App. Div., the court said: "It is well settled that failure to conform with the rules of procedure of a municipal council does not invalidate a by-law passed by it."

Grounds for Refusing to Quash—Estoppel or Acquiescence of Applicants.—In Re Fenton and Simcoe, 1885, 10 O. R. 27, Wilson, C.J., dealing with the objection that the applicants were disqualified and estopped from moving against the by-law which incorporated a village, and from disputing the validity of the incorporation because they had participated in an election of councillors for the village so incorporated, one as a candidate for reeve at the first election and the others by both nominating and voting for candidates at the first election, after discussing R. v. Lofthouse, L. R. 1 Q. B. 440; R. v. Peck and Galt, 1881, 46 U.C.R. 211, and R. ex rel. Regis v. Cusac, 1876, 6 P. R. 303, said.—

"In this case the county council had jurisdiction to pass the by-law incorporating the village. The by-law, while it is unquestioned, is binding upon all persons. If fraud can be imputed to the parties procuring the passing of it, or if any gross misconduct can be charged against them, or any wilful disregard of the provisions of the statute, by which the by-law is made to operate against the truth of the facts upon which it assumes to be founded, is established, the by-law may be impeached by any one interested in the matter, so long as such person was not concerned in the fraud, misconduct or wilful disregard of the statute complained of.

"I do not think that any one of the parties moving to quash this by-law can be said to be estopped from making this motion by reason of the part which he took under the by-law at the election of municipal officers, which was held under it; not even Mr. Fenton, who was a candidate for the office of reeve, but certainly not Mr. Brawley, who merely voted at the election.

"This is not a matter affecting the election, but a matter affecting the impeaching the rightful and lawful incorporation of the village; and although the applicants took a part in the election, they took no part whatever in the proceedings for the incorporation, and they are therefore competent and qualified applicants on this application to quash the by-law, and invalidate the act of incorporation."

This subject was discussed by Boyd, C., in Re Sturmer and Beaverton, 1911, 24 O. L. R. 65, D. C., as follows:—

"Apart from the statute, the doctrine of laches and acquiescence applies to protect the outcome of *de facto* elections, when the parties complaining have been aware of the irregularities and have concurred therein by taking part in the election: The Queen v. Ward, L. R. 8 Q. B. 210. The cases against allowing parties to play fast and loose in these municipal contests are collected by Harrison, C.J., in Regina ex rel. Regis v. Cusac, 1876, 6 P. R. 303."

The foregoing opinion was *obiter*. Riddell, J., in Re Quigley and Bastard, 1911, 24 O. L. R. 622, D. C., after discussing the rule as to acquiescence operating to disqualify a relator applying in *quo warranto*, said:—

> "Assuming that the rule in *quo warranto* applies to applications to quash liquor license by-laws (which I should require consideration before assenting to), there is no evidence of any actual knowledge and acquiescence of these applicants.
>
> "And I am unable to convince myself that the knowledge and acquiescence of the 'agents' can have the same effect; they are appointed by the head of the municipality to attend at the polling places on behalf of the persons interested in and desirous of promoting or opposing the passing of the by-law (3 Edw. VII. c. 19, s. 342), but, in my view, it is going quite too far to say that they must make an objection at the time to an irregularity, or no one can take advantage of such irregularity on a motion to quash.
>
> "In Re Hickey and Town of Orillia, 1908, 17 O. L. R. 317, D. C., there was no objection taken by any one to the various irregularities, but the Divisional Court thought the by-law could not stand.
>
> "The personal disqualification—for that is really what it is—of one who stands by and acquiesces in an irregularity, does not attach to one who does not, but, against whom the facts alleged are, but that some one appointed by the head of the municipality to represent all who who have the same interest and desire as himself in reference to the proposed by-law does not object to irregularities."

See remarks of Meredith, C.J.O., in Re Cartwright and Napanee, *supra*.

Status of Electors to Support the By-law When Council Takes no Action.—In Re Mace and Frontenac (1877), 42 U. C. R. at p. 76. Sir Adam Wilson allowed counsel to appear on behalf of certain interested electors, and in Re Salter and Beckwith, 1902, 4 O. L. R. 51, Britton, J., as the council upon being served with notice of the application to quash, took no action, allowed counsel to appear for the township and to argue the case for and at the cost of interested electors by whom he was retained.

Status of Electors to Carry on Application Notwithstanding Desire of Applicant to Drop Further Prosecution. — In Macdonald v. Toronto, 1897, 18 P. R. 17, Moss, J., said:—

> "If it were made to appear that the plaintiff was acting in collusion with the defendants to drop the further prosecution of the action, and that the result would be a serious detriment or prejudice to the other ratepayers, respondents in the proceeding, the Court might see its way to intervene, and by substituting another plaintiff prevent the carrying out of such a design."

In Re Ritz and New Hamburg, 1902, 4 O. L. R. 639, D. C., Ritz, after giving notices of motion served on the village corporation a notice countermanding the notice of motion to quash. When the countermand was served, the time for making the application to quash had expired. An elector moved for an order allowing him to be added as an applicant, and filed the consent to his name being substituted for that of Ritz, or to his name being added as one of the applicants to the motion to quash made by Ritz. MacMahon, J., refused to make the order asked for, but the D. C. reversed this, and allowed the elector to continue the proceedings in Ritz's name upon the terms that they should indemnify him against costs, and should undertake to speed the hearing, and should at the end of the litigation pay the corporation's costs of the motion and the appeal so that the corporation might be put in the same position as it was in with respect to the original motion. The appeal was allowed upon the strength of new material which shewed that Ritz had in fact undertaken the motion on behalf of a number of interested ratepayers who had combined to make the necessary deposit to answer costs, and that he had been bribed to discontinue the proceedings, and the rule laid down in MacDonald v. Toronto, *supra*, was applied.

[Had new material not been filed, shewing that the application was in realty on behalf of the applicant and others, there would have been no

authority to make the order asked for. Had Ritz in his notice of motion alleged that he was acting on behalf of himself and all other ratepayers interested, the Court would permit one of the class to be joined: see remarks of MacMahon, J.]

Status of interested Corporation to Support By-law When Council Refuses to Support it.—In Re Henderson and West Nissouri, 1911, 23 O. L. R. 651, C. A., there was an application to quash a by-law to authorize the issue of debentures for establishing a township continuation school. The School Board asked to be allowed to intervene in support of the by-law. The application was refused by Middleton, J., and the D. C. After an appeal to the C. A. was lodged, the township council, owing to a change in personel, proposed not to support the by-law. The C. A. adopted the rule of practice laid down in Langtry v. Dumoulin, 1885, 11 A. R. 549, 13 S. C. R. 258, that where there is an interest to be supported, and the withdrawal of the party by whom it has hitherto been protected, leaves it practically unrepresented before the Court. The party interested should be permitted to intervene.

In re McKinnon and Caledonia, 1873, 33 U. C. R. 502. on an application for a rule *nisi* to quash a by-law giving a railway company certain privileges, the opinion was expressed that properly the company should have been a party to the rule.

Jurisdiction as to Costs.—In Re Sturmer v. Beaverton, 1911, 25 O. L. R. 190, 566 D. C., 577 App. Div., the corporation moved for an order requiring the applicant to give additional security for costs. Middleton, J., said:—

> "It is here shewn that this proceeding is not in truth taken by the applicant, but he is put forward by Overend and Hamilton, who are the real actors.
>
> "The Court has inherent jurisdiction to prevent abuse of its process, and, as part of this jurisdiction, will stay proceedings, as being taken against good faith, when a man of straw is put forward by those really litigating, until they either give adequate security or consent to be added as parties, so that an order for costs may be made against them in the event of failure. This jurisdiction may be exercised as well in the case of a summary application to the Court as in an action.
>
> "The statutory requirement of security to a certain sum, in any case, does not take away the right of the Court to require those invoking its aid to come personally before it and assume full responsibility for their actions, or to supply such security as will be adequate to meet the respondent's costs.
>
> "If the real applicant consent to be added, no further order need be made—if they do not, they must give further security by paying $200 further into Court or by a bond in twice this amount. In the event of the applicants failing to give this security or to file a consent to be added, duly verified, in a month, the motion against the by-law should be dismissed with costs, and in the meantime the hearing of the motion must be stayed.
>
> "Costs of this motion will be to the respondents (the corporation) in any event of the main motion.
>
> "This motion might well have been made in Chambers, and the order should issue as a Chamber order."

Later the costs having exceeded the amounts paid in, the corporation moved for an order requiring Hamilton to pay the excess. Boyd, C., said:—

> "Sturmer is a man of straw; and they feared to appear lest they might be liable for costs; he became responsible to the solicitor, who acted for Sturmer for costs; and the proceeding was really an abuse of the process of the Court. The real litigants are these two hotelkeepers; and this application is against one only, to make him pay the balance of costs, $384, payable by Sturmer to the corporation, or the dismissal of the application to quash. There is inherent power in the Court to make a person who has set the Court in motion pay the costs of his unsuccessful application, and this though the person be not formally a party, but one who is the instigator and supporter of the movement: In Re Bombay Civil Fund Act (1888), 33 Sol. J. 107,

40 Ch. D. 288; Attorney-General v. Skinners Co. (1837), C. P. Coop. (Prac.) 1, 7. Under the Judicature Act, there is now ample jurisdiction to deal with costs; full power is given to determine by whom and to what extent costs are to be paid, s. 119: In re Appleton French and Scrafton Limited (1905), 1 Ch. 749; Corporation of Burford v. Lenthall (1743), 2 Atk. 551, 553.

"As to inherent jurisdiction to give costs apart from any statutory enactment, it is said in the Encyclopædia of the Laws of England, 2nd ed., Vol. 4, p. 43, tit. 'Costs': 'The Court of Chancery assumed from its commencement the power to deal with all questions of costs, without the aid of the Legislature.' The subject is discussed by Fry, L J., in Andrews v. Barnes (1888), 39 Ch. D. 133, 138, 139 and adverted to by Lord Hehschell in Guardians of West Ham Union v. Churchwardens, etc., of St. Matthew, Bethnal Green (1896), A. C. 477, at p. 483. See also Merrifield on Attorneys and Costs, p. 613. Again, every Court has inherent jurisdiction, independently of any statute, to order costs to be paid by any one who puts it in motion wrongly in a fruitless and unjustifiable application: In Re Bombay Civil Fund Act, 40 Ch. D. 288. Like power as to costs is now given by the Judicature Act; and it is not necessary to invoke the direction that the rules of common law as to costs, must give way to those of equity, see s. 58 (13).

'The practice has long prevailed in ejectment that, wherever the Court finds that there is a real plaintiff or defendant behind the nominal plaintiff or defendant, the Court will compel him to pay the costs in a summary way. This rule is based on equitable principles and in the exercise of equitable jurisdiction, for the very good reason that it is intended to prevent great michief. As said by Campbell, C.J., in Hutchison v. Greenwood (1854), 4 E. & B. 324, 326: 'The persons really interested as landlords never would appear themselves, if they could cause an appearance to be entered in the name of a pauper tenant and defend the suit without risk to themselves of having to pay the plaintiff's costs.'

"This is a case in which the equitable rule should be applied in ordering the real applicant, Hamilton, to pay these costs, and that will be the order of the Court. Order to pay $384 and costs of application to the corporation."

This order was upheld by the D. C., applying R. v. Greene, 1843, 4 Q. B. 646, and leave to appeal was refused by the App. Div.

Only a By-law That has Been Finally Passed can be Quashed.—In Re Liquor License Act, 1913, 29 O. L. R. 475, App. Div., Meredith, C.J.O., delivering the judgment of the Court, said:—

"There is no proceeding by which a proposed or inchoate by-law can be quashed, or set aside, or be declared invalid. Proceedings of that kind can be taken only with respect to something that has, at all events, *prima facie*, the force of law.

"The steps taken with respect to a by-law submitted to the electors, which are mentioned in the section—the submission of the by-law to the electors, and the declaration of the clerk or other returning officer, that it has received the assent of three-fifths of the electors—are but steps, necessary ones, on the way to the passing of the by-law; and what is submitted to the electors, and declared to have received the assent of three-fifths of those voting upon it, does not become a by-law until it is finally passed by the council."

Invalid Provisions May be Quashed Without Affecting Valid Provisions.—See Re Fennell and Guelph, 1865, 24 U. C. R. 238, and R. v. Van Norman, 1909, 19 O. L. R. at 447.

Motion to Quash is the Appropriate Remedy in Certain Cases, Not an Action for an Injunction.—In London v. Newmarket, 1912, 20 O. W. R. 929, 3 O. W. N. 565, 1 D. L. R. 244, 2 D. L. R. 244, the council was proceeding to pass a bonus by-law, which was in conflict with the provisions of then s. 591 (12e), (now 396 (b), and the plaintiff sought to restrain them by injunction. Middleton, J., held the action premature, and that the plaintiffs had mistaken their remedy. They should have waited till the by-law was passed and then moved to quash it.

In Keay v. Regina, 1912, 22 W. L. R. 185, Wetmore, C.J., in refusing an injunction under similar circumstances, followed London v. Newmarket, saying:—

> "I may merely add that, in my opinion, when there is a procedure provided by statute which will practically serve the same purpose as an injunction, the injunction ought not to be granted. I am of opinion that a proceeding under s. 242 of the City Act would practically serve every purpose that the injunction would serve. If the city council acted wrongfully or without authority, and a proceeding is properly taken, under s. 242, the by-law would be quashed (or I must assume that it would), and any act done by the city under it would fall with it. There was no necessity for proceeding before the by-law was passed that I can see."

On the other hand in Brock v. Robson, 1914, 25 M. R. 64, Galt, J., granted an injunction to restrain the municipality from submitting a local option by-law to vote, on the ground that a condition precedent to the power to submit such a by-law was absent, namely, a petition signed and verified in a certain way. The Act contained a provision that no local option by-law should be quashed or declared invalid because of a defect in, or the absence of a petition, and the decision was based on the ground that the requirements as to the petition were imperative, and that if the plaintiff were to wait until after the by-law was passed his rights would be gone. In giving this decision, Galt, J., followed an unreported decision of the C. A. of Manitoba: In re Strathclair, 1910. In Stephenson v. Cowan, 1914, 25 M. R. 67, Metcalfe, J., distinguished Brock v. Robson, on the ground that the plaintiff was not sincere, and had not shewn that he would be injured. The petition in Stevenson v. Cowan was defective in the same way as the petition in Brock v. Robson.

In Hair v. Meaford, 1914, 31 O. L. R. 124, App. Div., an injunction was asked to restrain the town from passing a local option by-law. Middleton, J., granted an interim injunction, see 5 O. W. N. 783. At the trial, Hodgins, J.A., in dissolving the interm injunction, said that:—

> "If the by-law were not carried that would end the matter, and if it were carried its opponents would have the right to apply to quash it upon all grounds open, including the one on which the action was based, and which he thought he could not properly investigate in the action, pointing out that a proper investigation could be obtained on a motion to quash."

The notice of appeal was given, and the appeal was set down. Three days later the council passed the by-law. Mulock, C.J.Ex., in giving the decision of the App. Div., dismissing an appeal, said:—

> "Whether or not the injunction was then in force, the by-law had been passed, and became law, and nothing short of its rescission would secure to the plaintiff any relief which it is open to the Court to grant him in this action.
>
> "Such relief could only be enforced by mandatory order. . . .
>
> "It is open to the plaintiff to raise these questions on the motion to quash the by-law; nevertheless we are in effect asked to compel the council by mandamus to repeal the third reading.
>
> ". . . . we are aware of no jurisdiction to compel legislation such as would be involved in repealing the third reading.
>
> "Further, even if it were open to the Court to issue a mandatory order directing such repeal, it is to be observed that the Court exercises extreme caution in granting mandatory orders, only doing so in cases where the remedy of damages is inadequate in order to meet the ends of justice, or where procedure by mandamus in order to restore matters to their former condition, is the only available remedy.
>
> "There being here another remedy open to the plaintiff, the Court should not exercise its extraordinary jurisdiction of dealing with the matter by way of mandamus."

By-laws of Police Commissioners cannot be quashed on an application under Part XI. See s. 422.

Quashing Market Regulations.—See s. 401.

Corrupt Practices to Secure Passage of By-law, s. 284.—See cases collected in Part V., ss. 187 to 189.

PART XII.

Money By-laws.

[By s. 257 (1) a council may, subject to the limitations and restrictions contained in the Act, borrow money for the purposes of the corporation whether under this or any other Act and may issue debentures therefore.

This section was first passed in 1913 (3 & 4 Geo. V., c. 43, s. 257 (1), which displaced s. 384 of the former Act.

The jurisdiction of each council is confined to the municipality which it represents, and its powers shall be exercised by by-law [s. 249 (1)]. No by-law or resolution for, or which involved, directly or indirectly, the payment of money, shall be passed by any council after the 31st day of December in the year for which its members were elected [s. 252], except in cases of extreme urgency or unless the Act is one which the council is required by law to do [Ibid.].

Except where otherwise provided by this or any other Act, a corporation shall not incur any debt the payment of which is not provided for in the estimates for the current year, unless a by-law of the council authorizing it has been passed with the assent of the electors [s. 289 (1)]. See s. 289 (2) as to those which do not need such assent.

A money by-law is defined as a by-law for contracting a debt or obligation or for borrowing money (s. 2, s.-s. j), and the same definition is used in the Acts of the other provinces.

Alberta.—The Towns Act, 1911-12, c. 2, s. 178, gives towns [defined, s. 7], power to pass borrowing by--laws for incurring debts not payable in the current year. Such by-law is to receive the consent of two-thirds of the burgesses voting on it before final passing, s. 179. For a short discussion of the borrowing power of villages in Alberta given by the Villages Act (1913), c. 5), see p. 442. The Rural Municipalities Act, 1911-12, c. 3, s. 227, contains powers to pass certain debenture by-laws.

British Columbia.—The Act of 1914, s. 97, contains general borrowing powers to be exercised "under the formalities required by law." Section 165 requires money by-laws to receive the assent of the electors. This section, as amended in 1915 (c. 46, s. 25), provides that every by-law shall be for a distinct purpose, and no by-law shall group together two or more subjects of expenditure, and where two or more by-laws are submitted each shall be voted on separately. The amendment of 1916 (c. 44, s. 33), provides that the main purpose of the by-law may include such purposes as are incidental thereto.

Manitoba.—R. S. M., 1913, c. 133, contains similar general borrowing provisions as the Manitoba Municipal Act: borrowing by villages is governed by s. 393; and all such by-laws require the assent of three-fifths of all qualified electors voting, s. 395.

In New Brunswick and Nova Scotia the borrowing powers are given by special statutes passed for that purpose.

Quebec.—R. S. Q. 1909, article 5776, contains similar powers, and see articles 5785 and 5787.

Saskatchewan.—The Cities Act (1915), c. 16, ss. 286 and 287), which applies to the cities of Regina, Moose Jaw, Saskatoon, and Prince Albert and all other city municipalities which may hereafter be created or established within Saskatchewan (see s. 8), and The Towns Act (1916), c. 19, ss. 283 and 284), which applies to all towns or town municipalities now existing in the province, and all towns or town municipalities hereafter created

(and see s. 8), contain provisions almost identical with those found in the Towns Act of Alberta. The Villages Act, 1916, c. 20, s. 175, contains powers similar to those given by the Rural Municipality Act of Alberta, as to which see p. 442, and the Rural Municipalities Acts, R. S. S. 1909, c. 87, s. 228, and R. S. S. 1909, c. 89, s. 174, contain the same general powers.]

287.—(1) In this Part "Debt" shall include liability and the borrowing of money.

(2) "Rateable property" when used in this Act or in any by-law heretofore or hereafter passed which directs the levying of a rate on the rateable property in the municipality or any part of it, shall include income and business assessment as defined by *The Assessment Act*. 3 Edw. VII. c. 19, s. 383*a*, *amended*; 3 & 4 Geo. V. c. 43, s. 287.

[In 1913, by 3-4 Geo. V. c. 43, the sections of this part were carefully redrafted and their phraseology almost completely changed. No changes were made in the revision of 1914, s.-s. (1) first appeared in 1913.

The Assessment Act, R. S. O. 1914, c. 195, s. 2 (e) defined "income" as "the annual profit or gain or gratuity whether ascertained, and capable of computation as being wages, salary, or other fixed amount or unascertained as being fees or emoluments or as being profits from a trade or commercial or financial or other business or calling directly or indirectly received by a person from any office or employment or from any profession or calling or from any trade, manufacture or business, as the case may be; and shall include the interest, dividends or profits, directly or indirectly received, from money at interest upon any security or without security, or from stocks, or from any other investment, and also profit or gain from any other source." "Business assessment" is defined at length by s. 10].

288.—(1) A money by-law shall recite:

(*a*) The amount of the debt intended to be created, in brief and general terms, the object for which it is to be created;

In re Pafford and Lincoln, 1884, 24 U. C. R. 16, the recital and money by-law stated that the whole rateable property was $6,434,773, but the actual amount was $6,435,476. On a motion to quash the Court refused to give weight to a difference too small to require serious notice.

Money By-law.—A money by-law is defined by s. 2 (*j*) as follows: "Money by-law" shall mean a by-law for contracting a debt or obligation or for borrowing money.

A debt is a sum of money due from one person to another. Wharton's Law Lexicon.

An obligation is an act which binds a person to some performance. Wharton's Law Lexicon.

A debt is a sum payable in respect of a liquidated money demand. Stroud's Judicial Dictionary.

For the purpose of the Local Government Act, 1888, 51 and 52 Vict. c. 41, it is provided in s. 100:—

The expression "liabilities" includes liability to any proceeding for enforcing any duty, or for punishing the breach of any duty, and includes all debts and liabilities to which any authorities are or would, but for this

Act, be liable or subject to, whether accrued, due at the date of transfer or subsequently accruing, and includes any obligation to carry or apply any money to any sinking fund or to any particular purpose.

Object not Clearly Specified.—In re Caldwell and Galt, 1898, 30 O. R. 378, a by-law was passed authorizing the borrowing of money for the purpose of opening a road. The reference to the lands intended to be taken was ambiguous, and no steps had been taken to purchase or expropriate the lands required. The by-law was held defective on the ground that no definite scheme was embodied in it so that the ratepayers could intelligently vote on it.

In Canada Company v. Middlesex, 1852, 10 U. C. Q. B. 73, Robinson, C.J., held a by-law illegal which recited that it intended to pay off certain debts without specifying the amount of the debt intended to be provided for.

Recital of the Amount of Debt Intended to be Created.—In Forbes v. Grimsby, 7 O. L. R. 137, the by-law recited that it was proposed to raise the sum of twelve thousand five hundred dollars, by the issue of debentures, and authorized the issue of debentures for that amount. It was contended that the recitals were untrue, that the recital must show the amount of the debt to be created, and not as had been done the amount of money applied for, and that there might be considerable expense or loss in realizing upon the debentures. Street, J., held that the by-law sufficiently recited the amount or the debt intended to be created.

It would, of course, be improper to recite merely the amount of money expected to be borrowed as this after paying discounts, commissions and expenses is less than the debt which is created.

Money by-law contingent on arrangements with other municipalities held invalid: see Re Nichol and Alnwick, 1877, 41 U. C. R. 577, where the Court said:—

> "I have not, as was arranged on the argument, considered the main question, whether the by-law for raising money can be sustained to carry out an arrangement with the other named municipalities which have not yet been efficiently completed.
>
> "I expressed my opinion on the argument very strongly against a by-law, which enacts 'that an arrangement shall and may be entered into,' and then directs money to be raised to carry it out, when it has not yet been made.
>
> "The other municipalities it appears are in no way bound to carry out the arrangement said to have been agreed upon, and the parties are disputing the performance by the other bodies of their portion of the work, and the township of Alnwick has no remedy against them if they really are in default.
>
> "I give no judgment on this point, but I intimated before and intimate again what my opinion may probably be if I am required to decide it. The work, as far as I can judge, is to extend over a number of years, and it is important the rights of each contracting municipality should be fully secured, and the liability be made plain and declared, and it is manifestly a most unbusinesslike manner of doing work of so much importance to every resident in those municipalities."

[This clause is taken from 22 Vict. c. 99, and appeared before the redrafting in 1913 as s. 384 (10). No change has been made in its language.

Identical provisions appear in the statutes of British Columbia, [s. 97 (2) of 4 Geo. V., c. 52, as amended by 6 Geo. V., c. 44, s. 21]; Alberta, [Towns Act s. 181 (a)]: Saskatchewan, [Cities Act, s. 290; Towns Act, s. 287, and Rural Municipalities Act, c. 89, s. 179]; and Manitoba, [s. 396 f. (1)]].

As to the validation of by-laws, see s. 295 and notes.

288. (1)(*b*) The amount of the whole rateable property of the municipality according to the last revised assessment roll, or, in the case of a county, the last re-

vised and equalized assessment rolls of the local municipalities of which the county is composed.

[This section is taken from 22 Vict. c. 99, s. 222 (6), as amended by 29 & 30 Vict., c. 51, s. 226 (6). The words in brackets were added in 1913.

"RATEABLE PROPERTY" is defined in s. 287 (2), supra. The former s. 411, which authorized the passing of by-laws containing exemptions from taxation was dropped in 1913; certain exemptions now appear in the Assessment Act, ss. 5, 6 and 7.]

ALBERTA.—The Towns Act, s. 181 (d).

BRITISH COLUMBIA.—4 Geo. V., c. 52, amended by 6 Geo. V., c. 44, s. 21, corresponds to the first clause.

MANITOBA.—Section 396 f. iii., corresponding to the first clause.

SASKATCHEWAN. — The Cities Act, s. 290 (d); the Towns Act, s. 287 (d), and the Rural Municipalities Act, c. 89, s. 179, are similar.]

288. (1)(*c*) The amount of the debenture debt of the corporation, and how much if any of the principal or interest is in arrear. 3 Edw. VII. c. 19, s. 384 (10) redrafted; 3 & 4 Geo. V. c. 43, s. 288 (1c).

[Taken from 42 Vict. c. 31, s. 11. Until 1913 the clause had at A. the word "existing."

ALBERTA.—The Towns Act, s. 181 (e).

BRITISH COLUMBIA.—There is no such section in British Columbia.

MANITOBA.—Section 396 (f) iv., corresponds to this clause as it stood before 1913.

SASKATCHEWAN.—The Cities Act, s. 290 (e); The Towns Act, s. 287 (e), and The Rural Municipalities Act, c. 89, s. 179 (d).

This section formerly required an express recital of the total amount required by the Act, to be raised annually, for paying the new debt and interest, s. 384 (10) (b). This section stood in this form from 1858 until it was redrafted as s.-ss. 3, 4 and 5 immediately following. The former section is still retained in Alberta Towns Act, s. 181 (b); British Columbia, s. 98 (2); Manitoba, s. 396, ss. f (ii), and c. 412 (b). and Saskatchewan Cities Act, 290 (b), and Towns Act, 287 (b), and Rural Municipalities Act, c. 89, s. 79.]

Mis-statement in Recital.—In re Lloyd and Elderslie, 1879, 44 U. C. R. 235, Hagarty, C.J., refused to quash a by-law attacked on the ground that it did not correctly state the amount of the existing debt of the municipality, the mistake having been honestly made, saying:—

> "I therefore assume that everything was done in good faith. The by-law is good on its face. I have now to consider whether I am bound to set it aside for the mistake that has been made.
>
> "From the well-known case of Grierson v. The Provisional Municipal Council of Ontario, 9 U. C. 623, downwards, the Courts appear to have acted on the principle that where the by-law on its face appears to be legal and within the powers given by the Legislature, and following its general directions as to necessary declarations and provisions, without which it is not to be valid (see s. 330, Municipal Act), the disclosure on affidavit of the non-compliance with certain requirements, or the inaccuracy of some statements, does not make it the

absolute duty of the Court to set it aside, but that it is to be dealt with according to judicial discretion exercised on all the facts.

"This principle is fully stated by Draper, C.J., in Secord and the Corporation of Lincoln, 24 U. C. 147: 'I agree (he says)' with what is said by Burns, J., (in Grierson v. The Municipality of Ontario), as to the extent to which the Court is bound to give way to objections which may be made to the legality of by-laws which depend upon extraneous matter; and where errors in computation only, even though extensive, were shewn (the good faith in which the council were seeking to execute the powers given them being unquestioned), I should lean *totis viribus* to support their by-law, and especially where it had been acted upon. In the words of my late brother Burns, 'I am of opinion that the true construction to give to the powers vested in the Court to quash by-laws is, that unless the by-law be illegal on the face of it, it rests discretionary with the Court upon extraneous matters to say whether there is such a manifest illegality in it that it would be unjust that the by-law should stand, or that it had been fraudulently or improperly obtained.'"

In Ward v. Welland, 1899, 31 O. R. 303, a by-law did not correctly set out the debt of the corporation as required by then s. 685 (2), in that it omitted to refer to some thirty-two hundred dollars debt on local improvement debentures secured by special assessment of which nine hundred dollars was a direct liability on the town. Boyd, C., holding that it was right not to add this to the debenture debt to be mentioned in the by-law, because then s. 685 (2) provided that it should not be necessary to recite the amount of local improvement debt secured by special rates, saying:—

"So far then the by-laws are not open to objection under s. 384, and there is nothing affecting their validity under that section which would vitiate these by-laws.

"The point of difficulty arises in the closing words of s. 685 (2), which is, that it shall be sufficient to state in any such by-law that the amount of the general debt of the municipality as therein set forth, is exclusive of local improvement debts secured by special rates or assessments. This is, I think, a directory provision, the omission to observe which would not be fatal to a by-law otherwise valid on its face. This appears to be rather a provision added *ex abundanti cautela* than one which affords any information. The effect of the municipal legislation is to except the local improvement debts specially provided for from being counted as part of the general debt of the municipality, and this being mentioned on the face of the by-law merely suggests that there are no such local improvement debts. While the direction so to specify on the face of the by-law should be observed as a matter of legislative requirement, I do not think that the Court should for that omission alone exercise its discretionary power against the validity of the by-law otherwise unimpeachable: see In re Lloyd & The Corporation of Elderslie (1879), 44 U. C. R. 235.

"Section 685 is a comparatively new provision as compared with s. 384, being first introduced in 1883 (46 Vict. c. 18, s. 623), and it contains no provision that the failure to observe what is now complained of shall render the by-law bad: see In re Sells and the Municipality of St. Thomas, 1853, 3 C. P. 291.

"Debenture Debt" Under 288 (1c), Does not Include Owners' Portion of Cost of Local Improvement Works for Which the Corporation has issued Local Improvement Debentures.—This follows from the provisions of s. 40 (6) of The Local Improvement Act, R. S. O. 1913, c. 193, which is as follows:—

"(6) The amount borrowed under the provisions of s.-s. 2, in respect of the owners' portion of the cost, shall not be deemed to be part of the existing debenture debt of the corporation within the meaning of s. 288 of The Municipal Act. See also in Re Lloyd and Elderslie, 1879, 44 U. C. R. 235.

Variance Between By-law and Debentures as to Time of Payment.—In re Michie and Toronto, 1861, 11 U. C. C. P. 379, a by-law provided that debentures should be spread over more than twenty years, but the debentures which were actually issued were payable within the period prescribed by the statute. The offending clause was quashed as unnecessary, on the ground that the statute did not make it indispensable that the by-law should name the day on which the debentures or the interest should be payable.

(*d*) The approval of the Provincial Board of Health for Ontario as required by sub-section 2 of section 95 of *The Public Health Act,* if the by-law be for raising money for any of the purposes mentioned in sections 89 and 94 of that Act. 8 Geo. V. c. 32, s. 4.

288.—(2) The whole debt and the debentures to be issued therefor shall be made payable within the respective periods hereinafter mentioned at furthest from the time when the debentures are issued.

[By the original Act (14-15 Vict. c. 109, Sched. A. (24), all debts, no matter for what contracted, if not payable within the current year, were to be paid within, at the latest, twenty years from the time of the coming into force of the by-law creating them. In most provinces one period of time is yet fixed, which, at the latest, all debts must be paid. In Alberta, by the Towns Act, s. 177, this period is "not more than 40 years from the date of the issue of the debentures created under the by-law: the Villages Act specifies 20 and 30 years, s. 79 (4); the Rural Municipalities Act, the same as the Saskatchewan Villages Act; in British Columbia, by 6 Geo. V., c. 44, s. 20, amending the Act of 1914, [s. 97 (3)], "the whole of the debt and the obligation to be issued therefor shall be made payable on or before 50 years from the date when such by-law takes effect." In Manitoba a similar clause, 396 (b), provides for payment "in thirty years, at furthest, from the day on which such by-law takes effect: in Saskatchewan the Cities Act, s. 232 (3), fixes 40 years, as does, the Towns Act, s. 229 (3); the Villages Act, s. 192, limits the term to 15 years from the date of the first instalment of principal and interest, which may be made payable at any time, within 18 months from the date of the debenture. The Rural Municipalities Act, c. 87, s. 245, fixes a period of 20 years, unless extended under s. 246, and c. 89, s. 178, periods of 40 or 20 years. And in Quebec the annuities securing the debentures may cover a term not exceeding 50 years, s. 5785.

The various changes made in the Ontario Act will be referred to in the notes to s.-s. (a), (b) and (c) immediately below; the general period, however, is still 20 years in Ontario, s.-s. (d) below.

This section, formerly 384 (4), in R. S. O. 1897, c. 223, after being amended in 1903 and 1904, was completely redrafted in 1913, when it took its present shape.

The time limit was computed from the time of the coming into force of the by-law creating the debt, until the passing of 60 Vic., c. 45, when the time limit was computed from the time when the debentures were authorized, or required to be issued—*whether that be at a date or dates certain, specifically fixed, or at a date or dates depending upon, and determined by the happening of any event or events, or upon the fulfilment of any condition or conditions as set forth in the by-law.*"

Prior to the passing (in 1897), of the words in italics, a by-law, authorizing debentures, payable annually, and providing that the first payment should be made on a certain date in the year next succeeding the year in which the work to be done with the money raised, should have been completed was held to be illegal, the time fixed for payment being uncertain: Re Armstrong and Township of Toronto, 17 O. R. 766 (1889). R. S. O. 1897,

c. 223, s. 384 (6), also validated all by-laws passed before 1st July, 1897, in which the annual rate commenced at a time subsequent to the year in which the by-law took effect, or where the levy of such annual rate did not begin until the fulfilment of conditions contained in the by-law. Both of these sections have now been repealed. The time limit now runs from the time when the debentures are issued. This must be within 2 years after the passing of the by-law, or if issued in sets, the first set must be issued within such 2 years, and all the debentures within 5 years of such passing (s.-s. 7 below), unless the time is extended under s.-s. 9 below, and such extension may be granted, even if applied for, after the expiration of the two years, s.-s. 10.

Subject to the provisions as to extension, Re Armstrong, supra, would seem to be still applicable. Quære, whether by applications, under s.-s. 9, to extend the time of issue, such a by-law would be validated?]

288.—(2) (*a*) If the debt is a bonus in aid of a railway or for the promotion of iron works, rolling mills or works for refining or smelting ores, or is for railways, harbour works or improvements, sewers, gas or waterworks, the purchase or improvement of parks or the erection of high, continuation or public school houses, and the acquiring of land therefor, or for electric light, heat or power works or water privileges or land used in connection therewith, or for acquiring land for a drillshed or armoury, in thirty years. 3 Edw. VII. c. 19, s. 384 (4); 4 Edw. VII. c. 22, s. 9; *part redrafted.*

[See notes to s.-s. 2, immediately above.

The thirty-year limit was first extended to debts created to bonus railways, by 52 Vic., c. 36, s. 12; to debts incurred for gas and waterworks, by 22 Vic., c. 99; sewers (construction), parks (purchase or improvement), and public school houses, by 53 Vic., c. 50, s. 9; harbour works or improvements, by 54 Vic., c. 42, s. 10; the erection or purchase of electric light works, in towns having a population of 5,000 or under, by 60 Vic., c. 45, ss. 3 and 43 (2a). The other clauses were added by 3 Edw. VII., c. 19, and 4 Edw. VII., c. 22, s. 9, and the whole clause which appeared in R. S. O. 1897, c. 223, as 834 (4), was redrafted, in 1913, s. 394 (4), since 22 Vic., c. 99, contained a clause expressly excepting debts contracted for the purchase of public works. This clause is now dropped (see s.-s. (d), infra).

See notes to s. 2, *supra.*

"In thirty years," i.e., 30 years at furthest from the time when the debentures are issued, s.-s. (2), *supra.*]

288.—(2) (*b*) If the debt is for the establishment of a system of public scavenging or for the collection and disposal of ashes, refuse and garbage in ten years. 3 Edw. VII. c. 19, s. 559 (4*a*), *part.*

(*c*) If the debt is for the purchase of road-making machinery and appliances, in five years. 3 Edw. VII. c. 19, s. 640 (10*b*).

["In ten years"—"In five years," i.e., at furthest from the time when the debentures are issued, s.-s. (2), *supra.*]

288.—(2) (*d*) If the debt is for any other purpose, the whole debt, and the debentures to be issued therefor, shall be made payable in twenty years. 3 Edw. VII. c. 19, s. 384 (4); *part redrafted.*

["In twenty years," i.e., at furthest from the time *when the debentures are issued.* See s. (2), supra.

Twenty years, from the time of the coming into force of the by-law creating them, was the original period within which all debts were required to be repayable (14-15 Vic. c. 109, Sched. A (24)). See the notes to (2) above. This clause formerly appeared as part of s. 384 (4).]

The Obligations to be Issued shall be made Payable in Twenty Years at Furthest. In re Armstrong and Toronto, 1889, 17 O. R. 766, a by-law which did not comply with this requirement was quashed. And the same course was followed in Re Cooke and Norwich, 1889, 18 O. R. 72. And Re Hay and Listowel, 1897, 28 O. R. 332.

288.—(3) Where the principal of the debt is made payable at a fixed date with interest payable annually or semi-annually, the by-law shall provide for the raising in each year during the currency of the debentures, or of any set of them, of—

(*a*) A specific sum, sufficient to pay the interest on the debentures, or on [any set of them] when, and as it becomes due; and

(*b*) A specific sum, which, with the estimated interest, at a rate not exceeding 4 per cent. per annum, capitalized yearly, will be sufficient to pay the principal of the debentures, or of [any set of them], when, and as it becomes due. 3 Edw. VII. c. 19, s. 384 (5) and (8), *redrafted.*

[The words in brackets were substituted for the words "each instalment of the debentures."]

["Estimated Interest."—Section 384 (5) added the words "on the investments thereof."

"The by-law shall provide for the raising in each year . . . of." By s. 384 (5) the by-law was to "settle the specific sum to be raised annually . . . and the annual rate required for such purposes" was to begin from the date when the debentures were by by-law directed or authorized to be issued. This clause was added by 57 Vic. c. 50, s. 12, redrafted in 1897 (60 Vic. c. 45, s. 43 (3),) and dropped in 1913. See s. 300.

"A SPECIFIC SUM."—These words first appeared in 1879 (42 Vic. c. 31, s. 10 (2)). Previously (see R. S. O. 1877, c. 174, s. 330 (3)) the section required the imposition of *"an equal annual special rate."* The rate struck did not take into account the increase in assessed values—the result was that a rate which would produce the amount required on the basis of the assessed value at the time of striking often produced a much larger amount owing to the increase in such values. In Re Peck and Township of Ameliasburgh, 17 O. R. 54 (1889), Street, J., had to consider a by-law complying with all the requirements of the new section but directing the levy of a special rate of so much on the dollar in each year as was formerly required. He held the by-law invalid, saying at p. 57: "Under the law as amended the by-law is to provide only that a certain sum shall be raised in each year . . . leaving the . . . rate to be determined in each year by the amount of the assessment roll in that year."

The preamble of a debenture by-law recited that "it will require the sum of $400 to be raised annually for payment of interest and the further sum of $335.81 to be raised annually as a sinking fund . . . " and enacted that for paying the debentures and interest "the specific sum hereinbefore recited, *viz.*, the sum of $735.81 should be annually raised. . ."—Robertson, J., overruled an objection that the specific sums to be raised for interest and for sinking fund respectively should have been stated separately in the enacting clause, saying [Re Caldwell and Town of Galt, 30 O. R. 378 (1899), at p. 384]: "The recitals and the enacting clause together make it quite clear what is to be done . . . the preamble is undoubtedly part of the Act." Reference to Salkeld v. Johnston, 2 Ex. 256 (1848), at p. 283, per Pollock, C.B. . . . See notes to s. 288 (1), supra. See also the Interpretation Act, R. S. M. 1914, c. 1, s. 9.

The amount to be raised in any year towards the sinking fund is one of the "debts falling due within the year," referred to s. 297 q. v.

A mandamus will lie upon the application of a debenture holder, to compel the levy and collection of the amount for the current year, but not to compel the collection of arrears or the levy in a future year. See notes to s. 297 (1) and 302 (8), which declares the penalty for neglect to levy for the sinking fund.

The provisions of this section are imperative. Re Sills and Village of St. Thomas, 3 C. P. 286 (1853).

Debentures issued pursuant to the Public Schools Act, R. S. O. 1914, c. 266, s. 43 (4) and the High Schools Act, c. 268, s. 38, s.-s. 6, are subject to this section.

By The Alberta Towns Act, s. 183, the by-law may provide that the indebtedness shall be payable in any manner approved by the Minister, but if it is made payable as above, then the same practice is to be followed as set out in s.-s. (a) and (b).

THE BRITISH COLUMBIA ACT.—Section 97 (4) (a), as substituted by 6 Geo. V., c. 44, authorizes the issue of such debentures, and contains similar provisions.

In MANITOBA such by-laws are authorized by s. 396, s.-s. (c). The rate of interest is not to exceed 5 per cent., s. 396 (d). Section 435 permits the terms of the original by-law to be altered.

In NEW BRUNSWICK, s. 7 of 1 Geo. V., c. 6 (The Municipal Debentures Act), contains similar provisions, and s. 8 provides for the creation of a sinking fund, if none is heretofore created.

In NOVA SCOTIA.—Section 8 (1) of 4 Geo. V., c. 3, provides that when the Act requires a sinking fund to be created, there is to be included in the estimates from which the rate is made, a sufficient fund to provide payments to the sinking fund, and in both provinces (s. 6), unless otherwise provided in the Act authorizing the debentures, interest is to be payable half-yearly.

In SASKATCHEWAN.—The Cities Act, s. 292 (2) (a) and (b), and The Towns Act, s. 289 (2) (a) and (b), provide for a similar method of payment.

In QUEBEC.—The bonds, etc., shall be made payable at the periods fixed by the council, with interest payable on the first days of May and November in each year, Art. 5779, and see Arts. 5785, 5786 and 5787. Art. 5777 requires the council to provide, out of the revenues of the municipality, for the payment of the annual interest, and the establishment of a sinking fund, or at least 1 per cent. per annum for each loan. The annual interest in no case is to exceed the legal rate.]

Time of Repayment Uncertain.—In re Armstrong and Toronto, 1889, 17 O. R. 766, a by-law provided for a loan, and that the debentures should be made payable annually, and that the first payment was to be made on the 15th day of December in the year next succeeding the year in which the repairs for the purpose of making which the money was borrowed, should be completed. Falconbridge, J., quashed the by-law, saying:—

> " A by-law would be invalid which on its face made any part of the debt or the obligations to be issued therefor payable in more than twenty years. I think it must also be invalid when the time of re-payment is uncertain or contingent on the happening of a named event."

It is to be noted that the Act then contained a provision since eliminated, " no such by-law shall be valid which is not in accordance with the following restrictions and provisions."

In re Gilchrist and Sullivan, 1879, 44 U. C. Q. B. 855, the Court refused to quash a by-law objected to on the ground that the amount to be raised annually was one hundred and fifty dollars short of the amount called for by the debenture, and that the last debenture was payable ten days beyond the twenty years fixed by the statute.

Corporations May be Compelled by Mandamus to Raise Sinking Fund Levy in any Particular Year.—In Wilkie v. Clinton, 1871, 18 Gr. 557, it was held that the sinking fund was a debt within the meaning of the Act, and being a debt, it is the duty of the corporation to assess for it every year.

In Clarke v. Palmerston, 1883, 6 O. R. 616, Proudfoot, J., compelled the corporation by mandamus at the suit of a debenture holder to raise the sinking fund for the current year as provided for in the original by-law. He refused to order the levy of the arrears and did not think that any order should be made as to the levy of rates in future years, as it could not be assumed that the council would again neglect its duty.

[Provided that each instalment of principal may be for an even $100, $500, or $1,000, or multiple thereof, and notwithstanding anything herein contained, the annual instalments of principal and interest may differ in amount sufficiently to admit thereof: 7 Geo. V. c. 42, s. 3 (1).]

4a. Instead of the principal being made payable as hereinbefore in this section provided the by-law may provide that the principal may be repaid in equal annual instalments with interest annually or semi-annually upon the balance from time to time remaining unpaid: 7 Geo. V. c. 42, s. 3 (1).

The effect of s. 296 (7), is to make the requirements of s.-s. 326 imperative. In re Georgetown and Stimson, 1892, 23 O. R. 33, was decided before the Act contained provisions corresponding to 296 (7), and while it contained the provision that no money by-laws should be valid it was not in accordance with the restrictions and provisions contained in the Act (see s. 340 of R. S. O., c. 184, referred to *supra*, p.). In the last mentioned case a by-law in which there was a large variance in the amounts to be paid each year which had been duly registered with the notice as required, there being no application to quash within three months.

In Re Farlinger and Morrisburg, 1889, 16 O. R. 722, the course now authorized by s.-s. 4 was followed, and the by-law was upheld notwithstanding that it did not specifically state what amount of principal and what amount of interest was to be levied in each year for the repayment of the debentures authorized by the by-law. Street, J., referring to the provisions as to principal and interest, said:—

> "The object of the section is to prevent the burthen of the debt from being unequally distributed or unduly postponed to later years; this object is attained by the manner in which these debentures are to be drawn, as effectually as if the precise directions of the statute had been followed, and there is nothing which declares that a non-compliance with the precise terms of the section shall, under the by-law, be invalid, as there is in s. 340."

Registration Will Cure Latent Defects as Well as Those Apparent on the Face of the By-law.—See Bickford v. Chatham, 1887, 14 A. R. 32; 16 S. C. R. 235; Canada Atlantic v. Cambridge, 1886, 14 A. R. 299; Georgetown and Stimson, 1892, 23 O. R. 33, where a by-law providing for annual payment varying from six hundred dollars to three thousand nine hundred and seventy-five dollars in violation of then s. 342, now as redrafted, 288 (4).

Former s. 384 (5) was held to be alternative to former s. 386 (1), Forbes v. Grimsby, 1903, 7 O. L. R. 137.

288.—(4) [Instead of the principal being made payable at a fixed date, with interest, payable annually or semi-annually, the by-law may provide that the principal and the interest shall be combined, and be made payable in, as nearly as possible, equal annual instalments during the period for which the debentures are to run,] or that, without combining the principal and interest, the instalments of principal shall be of such amounts that, with the interest in respect of the debt, payable annually

or semi-annually, the aggregate amount payable for principal and interest in each year shall be as nearly as possible, the same.

Provided, that each instalment of principal may be for an even $100, $500, or $1,000, or multiple thereof, and notwithstanding anything herein contained, the annual instalments of principal and interest may differ in amount sufficiently to admit thereof.

(2) Section 288 of the Municipal Act is amended by inserting the following subsection after subsection 4:—

(4*a*) Instead of the principal being made payable as hereinbefore in this section provided the by-law may provide that the principal may be repaid in equal annual instalments with interest annually or semi-annually upon the balances from time to time remaining unpaid.

[See s.-s. 5 immediately following:—
Section 386 (1) and (3) redrafted. Sub-section (1) was amended by 61 Vic., c. 23, s. 15, and 2 Edw. VII., c. 29, s. 11. Sub-section (3) was first added by 3 Edw. VII., c. 18, s. 85.

The second part of this section is a redraft of s. 386 (1), which provided in part "that the aggregate amount payable for principal and interest in any year in respect of the debt . . . shall be equal, as nearly as may be, to what is payable for principal and interest during each of the other years of such period." The meaning does not seem to have been changed.

Effect of Registration.—A very large variance in the amounts payable in different years under a by-law which in this respect was contrary to statutory requirements, was held to have been cured by registration with the result that the by-law was valid and binding. Re Georgetown and Stimson, 1892, 23 O. R. 33.

ALBERTA.—The Towns Act, s. 183, as amended by 5 Geo. V., c. 15, s. 8, authorizes payment in any manner approved by the Minister. The Rural Municipalities Act, s. 241 (3), provides that the debentures may also provide for the payment of principal and interest in any manner approved by the Minister. Section 79 (2) of The Villages Act corresponds to s. 241 (3).

BRITISH COLUMBIA.—Section 97 (4) (c) of The British Columbia Act authorizes debentures, the interest on which is to be paid annually or semi-annually, and the principal of which is to be met by the payment of a certain specific sum in each year, in which case, the by-law is to settle a specific sum to be raised each year for interest, and a specific sum to be raised in each year for principal, as it becomes due, and s. 97 (4) (d) authorizes the council to issue any of such debentures it may be determined upon by by-law or resolution. Section 97 (4) (b) corresponds to the clause in brackets, and adds a clause similar to s.-s. 5 below.

MANITOBA.—Section 398 permits a by-law, such as the second above mentioned, in the discretion of the council.

QUEBEC.—Article 5786 provides that the annuities to be secured by the debentures shall include the interest and the portion of the capital which is to be annually paid to extinguish the debt at the time agreed upon, the debentures issued as security shall fall due every 6 months or every year, until the loan is paid in full. Art. 5787.

SASKATCHEWAN.—The Cities Act, s. 292 (b) and (c), and The Towns Act, s. 289 (b) and (c), authorize similar provisions as to repayment.

The above Saskatchewan Acts also contain provision for payment in such manner that the principal shall be repaid in equal annual instalments, with interest annually or semi-annually upon the balances from time to time remaining unpaid. Cities Act, s. 292 (d), and Towns Act, 289 (d), such by-laws are subject to a clause corresponding to s.-s. 5, following.]

288.—(5) In the cases provided for by sub-section 4, and sub-section 4*a*, the by-law shall provide for raising in each year in which an instalment becomes due, a specific sum sufficient to pay it when and as it becomes due. 7 Geo. V. c. 42, s. 3 (3).

[Section 386 (2), taken from 60 Vict. c. 45, s. 41 (2), appears in a redrafted form. The clause which in terms dispensed with any provision for a sinking fund has been dropped as unnecessary.

The provisions of this section are imperative. See notes to s.-s. 3 above.

ALBERTA.—See notes to s.-s. 4, above.

BRITISH COLUMBIA.—Section 97 (4) (b), and by s. 97 (5), "The by-law shall provide that such sums as are to be raised annually or in each year shall be raised, and levied in each year, by a rate sufficient therefor, on all the rateable land, or land and improvements within the municipality."

MANITOBA.—Section 398 contains similar provisions, and dispenses with any provision for a sinking fund.

SASKATCHEWAN.—Cities Act, s. 292 (3); Towns Act, s. 289 (3).

QUEBEC.—See notes to s.-s. 4].

288.—(6) In the case of a by-law heretofore or hereafter passed, the council may by by-law, without the assent of the electors, authorize a change in the mode of issue of the debentures, and may provide that the debentures be issued with coupons, instead of in amounts of combined principal and interest or *vice versa*; and [where any debentures issued under the by-law have been sold, pledged or hypothecated the council, upon again acquiring them, or at the request of any holder of them, may cancel them, and issue one or more debentures in substitution for them, and make such new debenture or debentures payable by the same or a different mode on the instalment plan, but no change shall be made in the amount payable in each year.]

[This section first appears in 7 Edw. VII. c. 40, s. 8, as 386 (4), and was redrafted in its present form in 1913. As to the mode of issue, see s.-s. 7, immediately below.

Coupons.—See s. 314 (2), and notes.

ALBERTA.—The Towns Act provides, s. 184 (2), for other forms approved by the Minister, or calling for payment of interest only, for the first 5 years succeeding its date, or that principal and interest may be payable in any way directed by the Minister, and s. 184 (3), authorizes the issue of a debenture for a full amount or for a less amount than mentioned in the by-law, or a series of debentures, aggregating such full amount or less amount, such series to be distinguished as provided for. Section 144A. (added by 6 Geo. V., c. 44, s. 29), permits the council, by resolution, to provide for the issue of debentures to repurchase debentures or stock issued, at a rate not exceeding 6 per cent., and to make agreements for such repurchase with the owners thereof.

BRITISH COLUMBIA.—Section 144 (as substituted by 5 Geo. V., c. 46, s. 22), permits the council to issue additional debentures, or with the consent of the Lieutenant-Governor in Council, additional treasury certificates, sufficient to make up the amount authorized for a specific purpose, where the selling value of the debentures or certificates already issued does not equal the sum authorized.

Section 144A. (added by 6 Geo. V., c. 44, s. 29), permits the council, by resolution, to provide for the issue of debentures to repurchase debentures, or stock issued, at a rate not exceeding 6 per cent. and to make agreements for such repurchase with the owners thereof.

MANITOBA.—In 1913, the clause in brackets was added (3 Geo. V., c. 37, s. 31), s. 434, and the section also provides, that the same powers may be exercised in respect of any debentures that have not been sold, etc., provided the term is not lengthened, the rate of interest is not increased, and the amount of the principal does not exceed the amount remaining owing upon the original debentures.

SASKATCHEWAN.—Cities Act, s. 294: Towns Act, s. 291.]

288.—(7) All the debentures shall be issued at one time and within two years after the passing of the by-law, unless because of the proposed expenditure for which the by-law intended to provide being estimated or intended to extend over a number of years, and it being undesirable to have large portions of the money in hand unused and uninvested, in the opinion of the council it would be of advantage to so issue them, and in that case the by-law may provide that the debentures may be issued in sets of such amounts and at such times, as the circumstances require, but so that the first of the sets shall be issued within two years, and all of them within five years, after the passing of the by-law 10 Edw. VII. c. 85, s. 5, *part*.

[This section appeared in the Act of 1897, as s. 384 (3), when, in place of the two-year periods mentioned above, one year only was given. This was changed by 10 Edw. VII., c. 85, s. 5, part.

As to debentures, see s. 314.

Extension of time of issue by Municipal Board. See s.-s. 9 below

ALBERTA.—The Towns Act, s. 187, corresponds to the first proviso. The issue may not be made after 4 years from the final passing of the by-law. The council may, otherwise, issue the debentures as expedient. The

Rural Municipalities Act, s. 241 (4), allows the issue of debentures for a full or less amount than mentioned by the by-law, or in a series aggregating the full amount, but if the series is issued at the same denomination, and at the same time, they must be so distinguished.

BRITISH COLUMBIA.—Section 99 permits debentures to be issued at once, or where for the same reasons as in this sub-section, it would be to the advantage of the municipality, in instalments of such amounts (not exceeding, in the aggregate, the total amount provided for in the by-law), and at such times as the exigency of the case demands. In such cases interest is to be calculated only from the date of the negotiation, or delivery of the debentures or instalments thereof. No by-law is needed, and no time limit is set, and s. 100 validates by-laws that have adopted the method set out in s. 99, and those by which the annual rate commences, at a time subsequent to the year in which the by-law took effect, or under which the levy of the annual rate did not begin until the fulfilment of the conditions contained in the by-law.

MANITOBA.—Section 399 provides that debentures may be issued to secure the repayment of debts incurred under by-laws passed under the provisions of s. 396.

SASKATCHEWAN.—Cities Act, s. 304; Towns Act, 301; contains provisions similar to those in the Alberta Towns Act.]

Rate Cannot be Levied for Unissued Debentures.—In Bogart v. King, 1901, 1 O. L. R. 496, reversing judgment of Meredith, J., 32 O. R. 135, an action was brought to restrain the corporation and their tax collector from collecting from the plaintiff a rate payable under the provisions of the by-law, which authorized the borrowing of a sum of money to be procured by a sale of debentures for the purpose of a bonus. The by-law provided that no part of the bonus should be paid until the company should have built six miles of railroad. This had not been done, and the debentures remained in the hands of the treasurer of the corporation and under his control. Osler, J.A., in giving reasons for awarding an injunction as prayed, said:—

> "In short, if no debentures have been issued, I fail to see that any authority exists to levy a rate under the by-law. I think that is the proper conclusion to be drawn from the provisions of the Municipal Act which I have referred to, for until the debentures have been issued it cannot be said that any debt has been contracted to provide for which a rate is required to be levied. . . .
>
> "They have not been sold or delivered to or placed in the hands of any one as trustee for the corporation and the company. No one other than the corporation has hitherto acquired any right to deal with them, and they might be destroyed by the corporation to-morrow without the right on the part of anyone to object to their doing so: Mowatt v. Castle Steel and Iron Works Co. (1886), 34 Ch. D. 58."

Debentures Cannot be Issued Lawfully After the Time Limit Fixed by the Section.—It was one of the grounds on which the corporation was restrained from levying a rate in Bogart v. King, *supra*, that the time limited by then s. 384 (3) had elapsed, and the debentures could not be lawfully issued.

288.—(8) All the debentures shall bear the same date, except where they are issued in sets, and in that case every debenture of the same set shall bear the same date.

[Section 8 was first passed in 1913.

"ISSUED IN SETS."—Under the provisions of s.-s. 7.

ALBERTA.—Section 187 of the Towns Act corresponds to the provisions of the Saskatchewan Towns and Cities Acts. The Rural Municipality Act, s. 244, contains provisions similar to those in the Saskatchewan Villages Act, see infra.

SASKATCHEWAN.—By the Cities Act 304 and the Towns Act 301, any debenture may, provided it be actually issued within 4 years, bear any date within that period; by the Village Act, s. 192, they may be dated at any time within 12 months from the date of the appearance of the notice of authorization in the Gazette; R. S. S., c. 87, s. 245, has a similar provision. For the provisions of ss. 179 and 193 of R. S. S. c. 89, see notes to s.-s. 11 below.]

288.—(9) The Municipal Board, on the application of the council or of any person entitled to any of the debentures, or of the proceeds of the sale thereof, may extend the time for issuing the debentures beyond the two years, or the time for the issue of any set beyond the time authorized by the by-law.

(10) The extension may be made, although the application is not made until after the expiration of the two years or of the time provided for the issue of the set.

[First passed in 1910 (10 Edw. VII. c. 85, s. 5 part), redrafted in 1913.

TIME OF ISSUE.—See s.-s. 7.

ALBERTA.—The Rural Municipalities Act, 1911-12, c. 3, s. 245, provides that in the event of the first instalment of principal and interest being made payable at any time after 1 year from date, as provided, such debentures may run for such longer term than 20 years, as may be necessary, to allow of repayment of the loan in 19 years from the date of payment of the first instalment.]

288.—(11) Unless the by-law names a later day when it is to take effect, it shall take effect on the day of its passing.

[Taken from 22 Vict. c. 99, s. 222 (1), as amended by R. S. O. (1887), c. 184, s. 340 (1), appearing in R. S. O. 1897, as s. 384 (2), redrafted in 1913.

Formerly had at A. the words "in the financial year in which the same was passed."

DAY OF ITS PASSING.—By s. 280 (1) it is the duty of the Council to pass the by-law within 6 weeks after the voting took place. In the computation of this period the time which intervenes between the making of any application for a scrutiny and the final disposition of it shall not be reckoned (280 (2)). The by-law shall not be passed until the expiration of 2 weeks after the result of the voting has been declared, or if within that period an order for a scrutiny has been made, until the result of the scrutiny has been certified by the Judge. Alta. 189.

Semble, the by-law may only name a "later day" than the day of its passing upon which it is to come into effect.

In re Michie and Toronto, 1862, 11 U. C. C. P. 379, Draper, C.J., refused to quash a by-law which was attacked on the ground that it did not state the day when it was to take place, although it was stated in the by-law that it was to come into operation on the day of its date, although he pointed out that the date on which a by-law is passed does not necessarily form a part of it, and it should not be necessary for the creditors or others to refer to anything extrinsic to the by-law to learn when it came into force.

ALBERTA.—Towns Act, s. 182, the by-law shall name a day when it is to take effect, which day shall be not more than three months after the day on which the voting is to take place, or else on the day of final passing.

BRITISH COLUMBIA.—By s. 97 (2), as amended by 6 Geo. V., c. 44, s. 20, the by-law shall take effect on registration or shall name a subsequent date on which it shall take effect.

MANITOBA.—Section 396 (a) requires the by-law to name a day "in the financial year," on which it shall take effect, otherwise it is to take effect on the day of its passing.

SASKATCHEWAN.—Cities Act, s. 291; Towns Act, s. 288; Rural Municipalities Act, c. 89, ss. 170 and 193 (2), have not last clause of 11, but require all obligations to be issued, to be dated of day on which the by-law takes effect. The by-law must name a day not more than 3 months from the day on which the voting is to take place when by-law shall take effect.

How many objects may be included in one money by-law?

In Alberta the point came up for consideration by Walsh, J., in the case of Taprell v. City of Calgary, 1913, 3 W. W. R. 987 (1913); 23 W. L. R. 498; 5 Alta. L. R. 377; 10 D. L. R. 656. An application was made to quash a by-law of the city entitled "A by-law . . . to raise the sum of $900,000 for the purpose of erecting and constructing bridges in the city of C. across the Bow and Elbow Rivers as follows." The first recital of the by-law read as follows: "Whereas the city is about to erect and construct bridges in the city of C., across the B. and E. rivers, as follows: Combined high and low level bridge across the B. river at Centre Street, across the E. river at 4th Street W., across the B. river at 9th Street W., re-erecting of bridge as at present at 9th Street W., at 14th Street W., and to provide for the purchase or otherwise of the necessary land for the approaches and abutments or otherwise, right-of-way thereto and the necessary engineering and incidental expenses in connection therewith."

The by-law was submitted to the electors and carried.

The city charter contained a clause (109, s.-s. 3 (a), practically identical with s. 288 (1) (a) above. Walsh, J., said (p. 988): ". . . It is contended that under this wording a by-law for borrowing money for more than one object is illegal, especially when contrasted with s. 141, which provides that 'the council may embody in one by-law one or more local improvements." . . . There is a singular dearth of authority upon this question. The corresponding section of the Ontario Municipal Act (then 384 (10)), is identical in wording with the above-quoted sub-section, but there is no reported decision under it. In re Croome v. Brantford (City of), 6 O. R. 188 (1884), the point was suggested, but Rose, J., evidently thought that the question did not arise in that case, for he dismissed the question with the remark that 'it can be discussed when the question arises.' And apparently, to this day, it has not arisen in Ontario. I have not been referred to, nor have I been able to find the report of any case bearing upon the question in which this point has even been suggested in any Canadian Court . . . I am of the opinion that a by-law which attempts to authorize the borrowing of one sum of money which is to be expended for more than one object is illegal."

The learned Judge then went on to say, at p. 989, "my difficulty, though, is to decide whether what is sought to be accomplished through

the medium of this particular by-law is one or more than one object. . . . I think it quite competent for a municipal council to formulate a comprehensive plan for the working out of its policy, along any given line of authorized civic enterprise, and to borrow under one by-law the money needed to finance it. For instance, I think that it may lay down its policy for street railway extensions, and have the money needed to carry that policy into effect, voted to it under one by-law. That would be but a single scheme although it would involve the council in the necessity of constructing branch lines in different parts of the municipality. If the by-law in question here had been put forward as an embodiment of the policy of the council on the question of linking by means of bridges, those portions of the city lying beyond the rivers with those portions of it lying within them, I do not see how objection could properly be taken to it simply because in the practical working out of this policy the throwing of bridges across the rivers at three different points, and the removal of an existing bridge to another point, are involved. The council might, with perfect propriety, say to the ratepayers, 'This is our bridge policy, take it or leave it as you see fit, but unless we can go ahead with the scheme as a whole we will not put it into effect at all.' Upon the facts as presented to me, however, I can not say that this by-law was placed before the electors in that way; on the contrary, it would appear that entirely different considerations lead to the bulking of this proposed expenditure in one by-law," . . . and at p. 991, "I am suspicious that these different works were all provided for by one by-law so that it might receive the support of those who favoured one or two of the bridges, even though they opposed both or either of the others. In the notes to ss. 213 and 891, of the 5th edition of Dillon on Municipal Corporations, are to be found many illustrations of what the American Courts have held to be more than one proposition. . . . Under the circumstances of this case I am of the opinion that the debt under this by-law is to be created for more than one object, and that it is, therefore, illegal. I do not think that this illegality appears upon the face of the by-law, for as I read it there is nothing in it to indicate that it is not submitted as the bridge policy of the council."

In Gerlach v. Spokane (City of), 124 Pac. Rep. 121; 68 Wash. 589 (1912), the Supreme Court of Washington said (per Chadwick, J., at p. 123): "Neither is the ordinance repugnant to article 4, s. 34, of the charter, providing that 'all legislative acts of the city council shall be by ordinance, the subject of which shall be clearly set out in the title; and no ordinance shall contain more than one subject. It is said that the ordinance under which the improvement was prosecuted contains four subjects: (1) Paving, curbing and sidewalking the streets and alleys in the assessment district; (2) the construction of a drainage system not authorized by s. 61 of the charter; (3) the creation of an assessment district, including more than one street: (4) the levying of a special assessment. Having passed the question of improving more than one street, under one contract (p. 123, ante), it will need no argument to sustain our conviction that all other matters suggested are germane and proper to be included in the ordinance, unless it be the provision for the construction of a drainage system . . . (at p. 124). We have no hesitation in holding that the provision for the drainage system is germane to the subject, 'The charter provision does not forbid the law-making body from passing an ordinance for a general object, and it may bring within its scope any number of sub-subjects germane to the general subject. Whatever is legitimately connected with a unified subject, may be embraced in a single title or act': Seattle v. Sylvester-Cowen Inv. Co., 55 Wash. 659, 104 Pac. 1121 (1909); In re South Shelshole Place, 61 Wash. 246, 112 Pac. 228 (1910).

In the Shelshole Place case (supra), an ordinance to condemn several strips of property lying from one-fourth to one-half mile apart, was held not objectionable, as embracing more than one subject, since all were involved in one general plan to create a continuous course between the termini: Weed v. Goodwin, 36 Wash. 31, 78 Pac. (1904), referred to and followed.

In the Seattle case (supra), Gose, J., said (p. 1123): "The provision invoked was adopted as a shield to prevent the union of diverse, incongruous and disconnected matters, but it cannot be used as a sword to strike down

useful legislation not within the mischief sought to be avoided:" Seattle v. Barto, 31 Wash. 141, 71 Pac. 735 (1903); Weed v. Goodwin, 36 Wash. 31, 78 Pac. 36 (1904).

Dillon, 5th ed., s. 891, p. 1381, says: "Even where there is no direction as to the form in which the question shall be submitted to the voters, it is essential that it be submitted in *such a manner as to enable the voters intelligently* to express their opinion upon it, and for that purpose the proposition should be submitted to them separate and distinct from any other proposal which is not germane to the question upon which a vote is desired." And see s. 213, p. 428" . . . *it is implied . . . that the voters shall be permitted to express their opinion on the question of creating the indebtedness per se, disconnected from any other distinct and different proposition*, which may be submitted for their consideration not related to the subject of incurring the debt."

See also the cases referred to, in Dillon, at the above pages, and in the above mentioned cases.

The illegality of a by-law upon this ground was proved by evidence *aliunde*: Taprell v. Calgary (supra).

The ALBERTA TOWNS ACT contains a section identical with the section in the Calgary charter considered above, so that a by-law under that Act would come within the rule laid down in the Taprell case. The Rrural Municipalities Act, s. 227, provides that if it sought to incur indebtedness for the purpose of effecting "*one or more*" of the many objects set out in that section it shall pass a by-law to that effect. This might authorize a by-law including more than one object. The form, however, must be prescribed by the Minister (s. 227). So long as it is such a form as he prescribes it would seem to be immaterial how many objects it included. The Village Act (s. 76), provides that the Minister may authorize the council to incur a debt on behalf of the village for "any or all of the following purposes"—and then enumerates the purposes set out at p. . The authorization of the borrowing of the sums mentioned in the by-law, or any less sum, is provided for in s. 78. The same considerations applying to by-laws under the Rural Municipalities Act would seem to apply to by-laws under the Villages Act.

In BRITISH COLUMBIA: Taprell v. Calgary (supra), would apply, the section in the Act (97), being the same, but there is also an express statutory provision, s. 165 (1), as amended by 5 Geo. V. c. 46, s. 25, provides that every by-law submitted shall be for a distinct purpose, and no such by-law shall group together two or more subjects of expenditure, and where two or more by-laws are so submitted, each by-law shall be voted upon separately; see the Ontarion section (263 (8)), and Gerlach v. Spokane (supra).

In MANITOBA, ss. 396 (f), (i) and 412 (a), are similar to the section considered in the Taprell case, which would apply.

In ONTARIO, also, Taprell v. Calgary would apply. See s. 288 (1), (a). Section 263 (8), permits more money by-laws than one to be placed upon the one ballot paper. Contrast the B. C. section.

In QUEBEC Art. 5599 provides that several subjects may be included in the same by-law. If the various subjects to which the same by-law applies, require the approval of the municipal electors, one approval shall be sufficient for the whole by-law.

In SASKATCHEWAN the by-laws passed under the provisions of the Towns and Cities Act and the Rural Municipalities Act, R. S. S. s. 89, are within the decision on the Taprell case, as each Act contains similar sections. See also s. 249 of the Cities Act, which provides that where more money by-laws than one are submitted, summaries of all or any number, may be included in the notices sent out. R. S. S. 87 requires the approval of the Minister to the by-law as in the Alberta Villages Act.]

Should the By-law Fix the Rate to be Levied.—There is no provision in the statute making it necessary for a money by-law to fix the rate which is to be levied. The rate will vary from year to year as the annual payments fixed under s. 288 (3) become payable, as the rateable property in the municipality varies from year to year. The necessary rate must be struck annually under the provisions of s. 298 (1).

In Canada Company v. Middlesex, 1852, 10 U. C. Q. B. 93, Robinson, C.J., quashed a by-law, saying:—

"We think it indispensable that the by-law should contain on the face of it the rate authorized to be levied for making up the sum granted; that it should be fixed by the council themselves in their by-law, and not left to be declared by the clerk. It may be said that if the clerk makes his calculation correctly it must come to the same thing; but he may not, and then questions might be raised whether the rate was legal."

Former Statutory Requirements as to Fixing a Special Rate by the By-law authorizing the debt.—Sub-sections 3 and 4 of s. 330 of the Municipal Act, R. S. O. 1877, c. 174, provided as follows:—

(3) The by-law shall settle an equal special rate per annum in addition to all other rates to be levied in each year for paying the debt and interest.

(4) Such special rates shall be sufficient according to the amount of rateable property appearing by the last assessment roll to discharge the debt and interest when respectively payable.

These sub-sections were repealed by c. 31, 42 Vict. s. 10, new provisions substituted which have ever since remained in force, and are now contained in s. 288 (3, 4 and 5). In re Peck and Ameliasburg, 1889, 17 O. R. 54, a by-law passed after the amendment provided for an annual rate as required by the former law. Street, J., considered this a substantial variation from the provisions of the statute, and as the then Act declared that no by-laws should be valid, which were not in accordance with the statutory provisions, he quashed it, saying:—

"The change made in the former law by these provisions seems to be this; under the law as it formerly existed the council were first to fix upon the sum which they deemed necessary for paying the interest in each year, and another sum as a sinking fund sufficient to extinguish the principal of the debenture at the expiration of the period for which they were to run. They were then to strike a special rate which upon the basis of the last revised assessment roll would produce in each year the required sum, and the rate so fixed was the invariable rate imposed during the currency of the debentures, irrespective of the fluctuations in the assessment roll during that period.

"Under the law as amended the by-law is provided only that a certain sum shall be raised in each year by a special rate upon all the rateable property in the municipality thus leaving the amount of the rate to be determined in each year by the amount of the assessment roll in that year."

289.—(1) Except where otherwise provided by this or any other Act, a corporation shall not incur any debt the payment of which is not provided for in the estimates for the current year, unless a by-law of the council authorizing it has been passed with the assent of the electors.

[This section formerly appeared as part of s. 389 (1), which was taken from 22 Vic., c. 99, s. 223 (1858).

It was redrafted in 1913. It previously provided that " . . . Every by-law for raising, upon the credit of the municipality, any money not required for its ordinary expenditure, and not payable within the same municipal year, shall, before the final passing thereof, receive the assent of the electors . . ."

" Except where otherwise provided by this or any other Act."

The exceptions are contained in s.-s. (2) immediately following (q.v.), and in s. 290, giving county councils special borrowing powers. Theee words were submitted for the first 6 lines of s. 389 (1) by 1 Geo. V., c. 57, s. 6.

"Debt."

"Includes liability and the borrowing of moneys," s. 287 (1).

"A corporation shall not incur any debt."

Debt, the Payment of Which is Not Provided for in the Estimates of the Current Year.—The Municipal Corporations Act, 1882, 45 and 46 Vict. c. 50 (Imp.), provides that all rents and profits belonging to a municipal corporation shall go to the borough fund (s. 139), and provides that certain enumerated classes of payments set forth in the fifth schedule of the Act may be made out of the borough fund, without the order of council, and that no other payments shall be made out of the fund except by the authority of Parliament or by the order of council or by the order of certain Courts (s. 140). If a borough fund is insufficient for the purposes to which it is applicable or otherwise by law the council is required from time to time to estimate as correctly as may be what amount in addition to the borough fund will be sufficient for these purposes, and to strike a rate to be known as "The Borough Rate" (144 (1) and (2). Section 143 then provides:—

> (3) A borough rate may be made restrospectively, in order to raise money for the payment of charges and expenses incurred, or which have come in course of payment, at any time within six months before the making of the rate.

It has occurred that there has not been sufficient money provided to pay amounts contracted for, and a question then arises somewhat similar to that which may arise in Ontario when a debt incurred which is not provided for in the estimates of the current year, and the English decisions in this connection may throw light upon the similar problem which may arise under the Ontario Act.

In R. v. Sheffield, 1871, L. R. 6 Q. B. 652; 40 L. J. Q. B. 247, there was no surplus in the borough fund, and an order was made for the payment out of it of certain expenses. The Court of Q. B. set aside the order. Mellor, J., said:—

> "I quite agree that where there is a surplus as there is in some boroughs it is to be appropriated under the direction of the council for the public benefit of the inhabitants and the improvement of the borough. In this case there is no surplus, and therefore, we are confined to the words of the section; and it appears to me that we are not waranted in saying that under the circumstances these expenses are properly chargeable to the borough rate."

In R. v. Liverpool, 1872, 41 L. J. Q. B. 175, a council agreed to pay certain expenses over a period of years out of the borough fund; ordinarily the surplus was greater than the amount, but in one year it was less. Blackburn, J., in upholding the arrangement, said:—

> "The question now raised is whether the town council has power to pay the sum. The general rule is that bodies corporate must fulfil their contract unless forbidden distinctly by some statute. Here this municipal corporation is subject to 4 & 5 Will. IV. c. 76, and the amount claimed cannot be paid out of the borough fund as an expense necessarily incurred in carrying into effect the provisions of that Act; but the 92nd section proceeds to provide for a surplus which is to be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough. It seems to me that the Sheffield case goes no further than this; if there is no surplus an expense which is not within the terms 'carrying into effect the provisions of the Act' cannot be paid by order of the council out of the borough funds. Here, however, there is annually a large surplus, and although in one particular year it might be insufficient for this claim there can be no doubt that the great borough of Liverpool can pay as much without a special borough rate."

NOTE.—R. v. Sheffield and R. v. Liverpool were decided under the Municipal Corporation Act, 5 & 6 Will. IV. c. 76, which was in effect the same as the Act of 1882 as to the matters in question.

Debt, the Payment of Which is Not Provided for in the Estimates for the Current Year.—Under the Towns Act, Alberta, c. 2 of 1911-12, ss. 177, 178 and 294, it is provided that debts which are not payable within the current year shall not be contracted without the assent of the ratepayers. In Manning v. Bergman, 1915, 32 W. L. R. 519, a resolution was moved and seconded at three separate council meetings, authorizing the purchase of certain lands at the price of six thousand dollars, the purchase price to be paid in future taxes which might be levied upon the property of a certain named firm. The Mayor on each occasion refused to put the resolution, on the ground that such an arrangement was illegal. The resolution was then modified so that it merely authorized the purchase of the lots for six thousand dollars, and in this form was submitted at two successive meetings, at both of which the Mayor refused to put it. Successive motions were submitted with the object of evading the provisions of the statute. An action was brought for a mandamus to compel the Mayor to put the resolutions, but this was refused by the Court.

In re Oliver and Ottawa, 1893, 20 A. R. 529, the Corporation of Ottawa by resolution authorized contracts involving a large expenditure, and provided that one-half was to be paid out of the ordinary rates of the current year, and the balance out of the next succeeding year. After the motion was launched the council passed another resolution enacting that "a sufficient sum of money out of the unexpended revenue of the current year be set aside for the payment of the contractor, and that all resolutions inconsistent therewith be repealed. Before the last resolution became effective the whole fund out of which alone the expenditure could have been made had disappeared because the residue of the funds had already been devoted to the ordinary expenditure provided for by the yearly estimates. The resolutions were quashed by the Court of Appeal, Osler, J.A., who delivered the judgment of the Court, saying:—

> "The expenditure, however, authorized in effect by the resolutions in question was, in my opinion, a special extraordinary and unusual expenditure and cannot properly be described as part of the ordinary expenditure of the city. Doubtless the whole of it might have been provided for in the yearly estimates, and raised by special rate or included in the general local rate, so long as the whole was kept within the one and a half cent limit. It was not in fact so provided for, but on the contrary a part of it was left to be raised by the council of a future year out of the rates of that year, a course which in my opinion rendered these resolutions illegal, as being directly opposed to the provisions of ss. 344, 357 and 359 of the Municipal Act, since the council were thereby entering into contracts and incurring an expenditure for which they had not made provision in the estimates for the year, and were casting it in large part upon the council of a future year without the authority of a by-law passed under s. 344. Thus the matter stood when the plaintiff commenced the present proceedings. I cannot see that the resolution of the 29th August mends the defendant's case. I assume that they are entitled to say that it was passed before those proceedings had become effective; but before that time the whole of the fund out of which alone the expenditure could be made had disappeared, the residue of the funds in their hands being already devoted to other purposes and to the ordinary expenditure provided for by the yearly estimates.
>
> "To hold that the council could remedy the defect in the way they have attempted to do would be merely to enable them to do indirectly what they have no power to do directly, viz., to throw the cost of carrying out the lawful purposes of the municipality for one year which have been provided for by the estimates of that year upon the council of a succeeding year. I am, therefore, of opinion that the order of my brother Rose so far as it directs the resolutions to be quashed, is right. The order, however, goes on to declare that the contracts entered into consequent thereon are not binding upon the corporation. This declaration must, I think, have been inserted *per incuriam* in drawing up the order, following up the terms of the

notice of motion, for I am sure my learned brother could hardly have intended to deal directly with the contracts in the absence of the other parties thereto. The order must therefore be varied and the appeal to this extent allowed. Under the circumstances it is evident that the more convenient and proper course to have taken would have been by an action in which the rights of all parties concerned might have been considered instead of by a summary application to quash the resolution, though no doubt the latter course is expressly authorized by the statute."

In Edinburgh Life v. St. Catharines, 1864, 10 Gr. p. 379, Spragge, V.C., said:—

"I incline to think Mr. Cameron's construction of s. 224 correct, and that any appropriation of money for other than ordinary purposes, whether payable within the year or not, and any appropriation for any purpose not payable within the year, requires the express sanction of the ratepayers."

In re Carpenter and Barton, 1887, 15 O. R. 55, a by-law authorized the expenditure of five thousand dollars towards the construction of roads to be spent on the happening of certain contingencies, one of which was the passing of a by-law by an adjoining municipality, and the expending of moneys thereunder. Rose, J., in quashing the by-law, said dealing with an objection that the money was appropriated for other than ordinary purposes, and that the express sanction of the ratepayers had not been given:—

"I put my finding as to this objection upon this ground, that the credit of the municipality has been pledged for the payment of $5,000, at a time not fixed, not stated to fall within the year, and which in fact will not fall within the year; and no provision has been made to pay the sum out of the income of the year.

"Then, what is to be the nature of the arrangement which will secure the proposed road as a free road for all time to come? Within what time is this arrangement to be entered into? The work may not be commenced, or may drag on for an indefinite time before all the conditions are fully performed. What year is to bear the burden? Clearly the liability is 'future, indefinite and contingent;' and as clearly it is not provided for out of the income of 1887, or indeed out of 1888.

"The following cases may be referred to in Re Nichol and Alnwick, 1877, 41 U. C. R. 577; McMaster v. Newmarket, 11 C. P. 398; Clapp v. Thurlow, 10 C. P. 533."

The general principle embodied in s. 289 (1), is that councils are only entitled to charge upon future ratepayers present expenditure in cases where they are specially authorized to do so. The effect of their borrowing powers is to enable them to charge instalments of present expenditure upon future ratepayers, and borrowing powers are granted upon the understanding that the capital expenditure benefits the future ratepayers. Subject, therefore, to their borrowing powers councils have no right to charge future ratepayers with present expenditures. (See remarks of Channell, J., in Smith v. South Hampton, 1885, 10 A. C. 354, and 54 L. J. Q. B. 577). In Woods v. Reed, 1877, 6 L. J. M. C. 105; 2 M. & W. 777, Lord Abinger, C.B., thus stated the English rule, which is in substance the same as the Ontario Statutory rule: "The general inconvenience of retrospective rates has been long known and recognized in the courts of law on the ground that succeeding inhabitants cannot legitimately be made to pay for services of which their predecessors have had the whole benefit. In Croydon Corporation v. Croydon, 1908, 2 Ch. 321; 77 L. J. Ch. 800, Buckley, L.J., said: "To say that a rate cannot lawfully be made retrospectively is to state the general principle that the ratepayers of each year ought to bear the expenses of the year; that the ratepayers of a subsequent year (who may be different persons) ought not to be made liable in respect of that which should have been done by their predecessors in liability. This is a first general principle which seems to run through all the cases." While the English rules above stated have been laid down in connection with statutory provisions which differ widely from those contained in the Ontario Municipal Act,

they indicate the source from which the provision found in 289 (1) has been drawn, and the reasons of policy which call for its enactment.

Section 299 (2) provides that a surplus in connection with the annual estimates shall be at the disposal of the council, and if there is such a surplus available from preceding years and unappropriated it might be used by the council to pay a debt incurred contrary to the provisions of s. 289 (1), or the council might adopt the course followed in Fitzgerald v. Molsons Bank, 1898, 29 O. R. 105. In this case the council borrowed six thousand dollars from the bank to meet current expenditure until the taxes could be collected. The taxes levied were greatly below the amount borrowed under the by-law, and the lenders, though they had no notice that the money borrowed was not required to meet current expenditure, they might by inquiry have ascertained that the sum borrowed was greater than the whole amount of taxes authorized to be levied. The lenders recovered a judgment against the corporation and this action was brought by ratepayers to restrain the collection and enforcement of the judgment. After the filing of the statement of claim the council submitted a by-law to the ratepayers authorizing a debenture issue to provide for the amount in question and further sums. Street, J., said:—

> "I think that a bank or individual lending is bound to inquire into the amount of the taxes authorized to be levied to meet the then current expenditure, and cannot lawfully lend more than that sum although not bound to inquire into the existence of an alleged necessity for borrowing that or any other amount.
>
> "Were the lender declared to be exempted from every inquiry nothing would be more easy than for a council to pledge the credit of the corporation for amounts much greater than the section was intended to authorize, and the provisions confining the expenditure of each council to the taxes levied during its year unless otherwise specially authorized by the ratepayers, would to a large extent cease to be a safeguard . . .
>
> "I can see nothing in the Municipal Act which prevents a council with the approval of the ratepayers from raising money for the repayment of such a debt as this. It is one thing to say that money borrowed by a council without the safeguards imposed by the statute may not be recoverable by the lender. It is quite another thing to say that a municipality having so borrowed money and expended it for the benefit of the ratepayers is to be restrained from being honest enough to pay it back. This is what the plaintiffs invite us to say in the present action, and I am clear we should refuse to say it."

Street, J., in the foregoing was delivering the judgment of the Divisional Court.

It is submitted that the proper rule to apply to debts incurred in violation of s. 289 is to be gathered from a consideration of Fitzgerald v. Molsons Bank, *supra*. The lender or contractor who is about to become a debtor of the municipality should inquire as to whether or not a proposed expenditure is provided in the estimates of the current year. It is a simple matter to examine the annual estimates which have to be prepared under s. 298, and if the expenditure is not contained therein, and the council has not an unappropriated surplus out of which to pay the debt under s. 299, the lender or creditor finds himself unable to recover the amount of his debt. The general rule which is as submitted applies to both municipal corporations and joint stock companies, is that laid down in Wenlock v. Dee.

A By-law Signed and Sealed Before submission to electors.— In re Pafford and Lincoln, 1864, 24 U. C. R. 16, a by-law was signed and sealed before it was submitted to the electors, and after the vote it was finally passed. It was held good notwithstanding an objection based on the premature signing and sealing to take effect from the final passing.

[The words "current expenditure," used also in s. 319, have been considered in the Courts in two cases.

The power conferred under s. 435 (now 319), of borrowing money to meet current expenditures is distinct from the power conferred by that section of borrowing money for school purposes, and the amount borrowed for the former purpose must not exceed 80 per cent. of the amount collected

in the preceding municipal year for the current expenditure of the municipality apart from the expenditure for school purposes: Holmes v. Goderich (supra).

In Rex ex rel. Moore v. Hamill, 7 O. L. R. 600 (1904), Cartwright, M.C., said, at p. 601: "This contention was, that sums expended for school purposes and debentures of various kinds and other special charges were not 'current expenditure.' To this, however, there are several answers. First the by-laws, with one exception, all recite that the loans which they authorized were to meet 'current expenditures.' Indeed, as is pointed out in Holmes v. Goderich (supra), all the matters on which these moneys were expended (except school moneys), come under the term 'current expenditure,' and there is no power to borrow for any other purpose. (The respondents were alleged to have violated the provisions of s. 435 in voting money to meet the current expenditure for 1903, in excess of the amount authorized by the statute). If there is any special expenditure, it must be provided for by a special by-law, and adopted by a vote of the duly qualified ratepayers. Secondly, these very sums were all part of the estimates for the year 1903, as they had been in the previous year, and were so made part of the current expenditure for 1903. Thirdly, these charges had all been part of the regular levy for 1902, and formed part of the sum on which the 80 per cent. was calculated. If they are taken into account for one purpose they must be so taken for the other."

[In Kerfoot v. Village of Watford, 24 O. R. 235 (1893), the facts were as follows:—

The construction of a drain being alleged to be necessary both for sanitary reasons and for the purpose of keeping in repair the highway under which a portion of it passed, the defendants resolved to construct it if necessary as part of the ordinary expenditure of the current year, but nevertheless submitted to the electors a by-law for the cost of its construction, which by-law was defeated. The council, however, proceeded with the construction of the drain; and again a second time in the same year submitted a by-law, which was carried. It appeared that the drain might have been paid for out of the ordinary expenditure of the year without exceeding the statutory limit of taxation.

Held, that the first by-law having been defeated did not prevent the submission of the second in the same year, nor did the fact of the work having been commenced as part of the ordinary expenditure for the year prevent the defendants (after the defeat of the first by-law) from submitting a second by-law for the construction of the drain.

Quære, as to whether the substitution of the word "expenditure" for the word "expenses" in s. 297 (2) alters its meaning? See s. 297 (2) (note). The change was made in 1913.

"Unless a by-law of the council authorizing it has been passed with the assent of the electors."

The assent of the electors to the proposed by-law (see s. 260 (a) and (d)), must still be attained before the final passing (s. 280 (3)), in the manner prescribed by Part X. See s.-s. 263, as to mode of obtaining such consent, and s. 265 as to the persons qualified to vote.

Section 276 provides a simple majority shall be sufficient except in the cases provided for in s. 278.]

[ALBERTA.—The Towns Act, s. 179, and the Rural Municipalities Act, s. 231 (similar to 179), require the consent of two-thirds of the electors voting thereon. The Village Act, s. 76, requires a petition to be submitted by a majority of the electors.

BRITISH COLUMBIA.—Section 165 (1)—a simple majority seems to be sufficient—s. 167. Section 96 (1) prohibits the incurring any liability beyond the municipal revenue, except as authorized by s. 97, i.e., by by-law.

MANITOBA.—Sections 391 and 395 require the assent of three-fifths of the qualified electors actually voting in the cases of cities, towns and rural municipalities. Section 393 applies the same rule to villages.

QUEBEC.—Art. 5782 requires the approval of a majority in number and real value of the proprietors who are municipal electors, and who have voted. Art. 5783, dealing with cases where the total debt of the municipality amounts to 20 per cent. of the valuation of the taxable immoveable pro-

perty, requires the assent of three-quarters in number of such voting proprietors, and of the Lieutenant-Governor-in-Council. The by-law must be submitted within 30 days of passing, Art. 5788.

Anglin, J. (dissenting), in Shawinigan Hydro-Electric Co. v. Shawinigan Water & Power Co., 45 S. C. R. 585 (1912), says at p. 613. "The Cities and Towns Act (R. S. Q. 1909, Arts. 5256, et seq.), contemplates indebtedness being incurred otherwise than by loan (Art. 5783), but it contains no provision, such as is frequently found in municipal legislation (vide "Ont. Mun. Act," 1903, s. 389, now 289 (1)), prohibiting the raising on the credit of the municipality of any money not required for ordinary expenditure and not payable within the municipal year otherwise than under a by-law submitted to the ratepayers. The burden of the special tax for payment of the expenditure being imposed upon the 'owners or occupants of houses, shops or other buildings' (Art. 5668), and the total debt of the town not amounting to 20 per cent. of the value of the taxable immoveable property (Art. 5783), no reason exists for requiring the approval of other ratepayers or proprietors."

Idington, J. (ibid., p. 603), says: "It is not merely the form of a loan that is in question, but the absence of any distinct power in the council enabling the creation of an indebtedness, which has to be provided for over a term of years in the future. In the absence of any such power to create indebtedness the municipal council has no implied power. Borrowing to pay any debt extending over a period of years is what the general power contemplates. Certainly the council cannot do that indirectly, which the law does not permit to be done directly." See the note of this case at p. 444.

SASKATCHEWAN.—The Cities Act, s. 232, and the Towns Act, s. 329, correspond to the Alberta Towns Act, s. 179, the Village Act (if a poll is demanded, see ss. 177 and 179), s. 185 requires a simple majority. The Rural Municipality Act, c. 89, s. 192, requires the consent of two-thirds of the qualified ratepayers voting.

The Revised Act (c. 87)—ss. 232 and 238—contains provisions similar to those in the Village Act.

In Taprell v. Calgary (City), 3 W. W. R. 987 (10 D. L. R. 656, 23 W. L. R. 498, 5 Alta. L. R. 377 (1913)), Walsh, J., said, at p. 989: "It is the duty of a municipal council to submit its by-laws which require the assent of the ratepayers, in such form, that they may receive the intelligent approval or disapproval of those to whom they are submitted. But two classes of ratepayers could vote intelligently on such a by-law (one authorizing the borrowing of one sum of money to be expended for more than one object), namely, those who favoured and those who opposed both projects. The ratepayer who approved of one, but disapproved of the other, must either not vote upon it at all, or stultify himself by voting for the project of which he disapproved, or against the scheme which appealed to him. . . . So manifestly unfair a way of submitting to the ratepayers the question as to whether or not they are willing to assume the statutory debt which would be placed upon them by the passing of the by-law would at once brand it with illegality." And see the notes to s. 288 (1).

In Shawinigan Hydro-Electric Co. v. Shawinigan Water and Power Co., 45 S. C. R. 585 (1912), the Water and Power Co. brought an action against a municipal corporation, and the Hydro-Electric Co., to have quashed a by-law of the municipality authorizing the purchase of the electric light and power plant of the Hydro Co. The by-law was quashed and the municipality submitted to the judgment of the trial Court, and the Hydro Co. carried on the proceedings. The Superior Court allowed the appeal; the Court of King's Bench, Appeal Side, reversed the Superior Court, and the matter came on before the Supreme Court of Canada.

"The town proposed, in its by-law, to give its promissory notes in part payment of the purchase money and to assume an existing mortgage on the property for the balance," per Davies, J., at p. 587.

It was attacked on, amongst others, the ground that the by-law involved the making of a loan by the corporation without the assent of the ratepayers required by law. Davies and Anglin, JJ., held that the by-law could not be supported as being one passed under the powers contained in Arts. 5776, et seq.; Idington, J., held, that it came within the provisions of such article, and was invalid because the assent of the ratepayers had not been obtained as required by Art. 5782. Anglin, J., held, that if the

corporation had proceeded under Art. 5776, the assent of the electors would be "requisite," under Art. 5782.

See also Hanson v. Grand Mere (1904), A. C. 789, where it was held that a by-law guaranteeing debentures to be issued by a company with which the corporation had contracted for the execution of a public work within the municipality, not having been submitted to the electors, was invalid.

Limitations upon the power of borrowing by money by-law having regard to,

I. The purpose for which money may be borrowed.

ALBERTA.—The Rural Municipalities Act, s. 227, confines the purposes to the purchasing or constructing of roads, highways, bridges, ferry or other municipal public works, or for the purposes of purchasing or otherwise acquiring any land, gravel pit, right-of-way, easement or other interest in any land for the use of the municipality or for the purpose of draining any portion thereof or for the purpose of providing a water supply for any portion thereof or for purchasing any machinery, tools or implements for the use of the municipality, or of assisting in the erection or enlargement of a hospital *either within or without the limits of the municipality*, or for the purpose of purchasing, erecting, improving, altering, adding to or furnishing any building for the use of the municipality, or for all or any of said purposes. Section 196 contains the general purposes for which the council may buy any of the above.

The Village Act (s. 76), permits the incurring of debts for any or all the following purposes:—

(a) The construction of roads, bridges, ferries or sidewalks;

(b) The purchase or other acquisition of any land, right-of-way, easement or other interest in any land for the use of the village for any purpose authorized by this Act;

(c) The purchase of fire engines, fire halls and equipment;

(d) The construction, alteration, operation or extension of any system of waterworks or system of water purification or any common sewer, or of any system of sewerage or sewerage disposal or purification, subject to the provisions of the Public Health Act;

(e) The purchase, erection, improvement, alteration, extension or furnishing for the use of the village of any building which the council is authorized by this Act to purchase, erect, improve, alter, extend or furnish;

(f) For any purpose necessary and incidental to the proper accomplishment of the foregoing objects.

The Towns Act, s. 178, gives a general power to borrow for any purpose within the jurisdiction of the town, or for roads, bridges, waterworks or drainage works outside the limits of the town. Section 162 confines the jurisdiction to the limits of the town, except where authority beyond the same is expressly given by the Act. Section 163 includes 99 sub-sections, containing powers similar to those in 398 et seq. infra, q.v.

By the Towns Act, s. 164; the Rural Municipalities Act, s. 197, and the Villages Act, s. 64, the power to bonus railways, whether within or without the municipality, or any manufactory, mill or railway, or to exempt the same from taxation, or to subscribe for stock in or guarantee the bonds, debentures or other securities thereof, is expressly withheld.

BRITISH COLUMBIA.—Section 97 permits borrowing for any purpose within the jurisdiction of the council, including school purposes, and for levying rates for payment of such debts on the rateable lands or improvements, either or both, or the rateable real property within the municipality. Section 7 confines the jurisdiction of every council to the municipality the council represents, except where authority beyond the same is expressly conferred by Statute.

Every council of a municipality, wherein sewer rentals or rates, or charges, and water, or gas, or electric light, or power rates, or charges, are enforceable under the provisions of this Act, may borrow money upon the security of the same, or either, or any, or all, and pledge the credit of the municipality at large therefor (s. 102). The council also has power to borrow money to carry out certain works of draining, dyking, etc.; such

powers are limited to incurring a liability not over 5 per cent. of the total assessed value of the land in the municipality, unless authorized by the ratepayers in the same way as ordinary money by-laws.

MANITOBA.—Section 389 (and see 391), limits the purposes as follows: To construct, repair, pave, macadamize or otherwise improve (and in cities to purchase), or assist in constructing, etc. (and in cities, purchasing), any bridge, drain, causeway, pier, wharf (and in cities, waterworks system), public road or street or other public work, situate in whole or in part within the municipality, or in its vicinity, whether the same is to be undertaken and built by the municipality or otherwise; and (b) for acquiring, by purchase or otherwise, lands situate within the limits of the municipality, in the case of a rural municipality, and within or outside the limits of the municipality, in the case of a city or town, to be used as a nuisance ground, and for erecting thereon any building or buildings required for the purposes thereof.

By s. 390 "public works" in 389, include every public work within the jurisdiction of the council to perform, including all the above and "town halls, market places, fire halls, crematory and other buildings required for the purposes of the council of a city, town or rural municipality, and the sites for all such halls and buildings.

The powers of villages are limited by ss. 392 and 393 (see p. 416) infra).

ONTARIO.—See s. 257 and notes to s. 287.

QUEBEC.—Art. 5776 authorizes borrowing for improvements in the municipality and generally for all objects within its jurisdiction. Art. 5281 gives the corporation, and Art. 5588 gives the council, jurisdiction over its whole territory. See Shawinigan Hydro, etc., Co. v. Shawinigan Water Power Co., 45 S. C. R. 585 (p. 441, supra).

In Menard v. Bondeaux, 34 Que. S. C. 335 (1908), it was laid down that a town corporation may not borrow money nor issue debentures in payment except for purposes *fixed* by statute. A resolution recited repairs to be made without specifying cost and that there was an opportunity to obtain and instal a certain machine at a price of $10,000 and then authorized the borrowing of $50,000, "to cover these expenses, and if there is ground for every purpose of public interest provided by statute." Held not to sufficiently determine the object and the use to be made of the money and therefore void.

SASKATCHEWAN.—The provisions of the Cities Act, ss. 282, 202, et seq., and 204, correspond to a large degree with the sections of the Alberta Towns Act given above. Sections 194 and 192 correspond to ss. 162 and 163, respectively, of the Alberta Towns Act (supra). The Village Act, s. 175, corresponds generally to s. 227 of the Alberta Rural Municipalities Act (supra). The provisions of R. S. S. c. 87 (s. 228), also correspond to those in the Villages Act (175), and see s. 198. R. S. S. c. 89, s. 59, contains the general powers of the council. The borrowing powers are set out in ss. 175 and 176. Certain bonusing powers exercisable upon petition are given by s. 177, and see s. 178.

The Cities Act, s. 234, withholds power to bonus except as to any incorporated street railway company operating within or near the city. Section 231 of the Towns Act withholds all power to bonus.

II. *The amount which may be borrowed:—*

The amount which the council may borrow is limited by the following Acts in the different provinces:—

In ALBERTA the Towns Act, s. 178, limits the amount to 20 per cent. in the same terms as the Saskatchewan Cities Act. By the Rural Municipalities Act, s. 242, the total face value of all debentures is not to exceed 5 per centum of the assessed value of the lands. The Villages Act, s. 76, limits the borrowing power to an amount not exceeding 10 per cent. of the value of the assessed land in the village as shewn by the last revised assessment roll.

The British Columbia Act, s. 97, limits the aggregate of such debts, except for local improvement and school purposes, to 20 per cent. of the

assessed value of the land and improvements according to the last revised assessment roll.

Under the Manitoba Act, by s. 393, borrowing by villages is limited to $6,000 for providing fire apparatus, and a similar amount for establishing a waterworks system, and see ss. 530 to 573, as to local improvements and special assessments. Section 401 limits the debt which a rural municipality may incur.

Other than as provided in s. 393 no village may borrow or issue debentures for any purposes whatsoever, or incur indebtedness, except such as it has funds in hand to pay after paying all other indebtedness previously incurred, or except such as two-thirds of the levy for the year in which such indebtedness is incurred, will meet after all other indebtedness has been provided for.

By s. 401 the limit of debt to be incurred is 10 cents an acre of the lands alienated from the Crown or entered for, either as homestead or preemption. In certain cases the Lieutenant-Governor in Council may authorize the raising of the limit to 25 cents per acre (ibid.) The annual rate must not exceed 2 per cent. upon all taxable property (403).

By s. 422 the rate to be levied in any year, in addition to what is required for payment of interest on outstanding debentures and the amount required for a sinking fund therefor, and for school purposes, and for the maintenance of the police force, shall not exceed the sum of one cent on the dollar.

In Ontario by s. 297, the total rate to pay all debts payable within the year, whether of principal or interest, shall not exceed 2 cents in the dollar on the assessed value, and if it does, borrowing must cease until it is reduced to that rate.

In Quebec, Art. 5783 limits the amount to 20 per cent. of the valuation of taxable immovables unless a by-law to borrow beyond that amount is approved by three-quarters of the voting proprietors and the Lieutenant-Governor.

In Saskatchewan.—The Cities Act, s. 286, provides that the debenture debt is not to exceed 20 per cent. of the total amount of the assessment in respect of lands, businesses, incomes and special franchises. Funds to the credit of the Sinking Fund are to be omitted from such calculations. By the Towns Act, s. 285, the amount of the debenture debt of a town shall not at any time exceed 15 per cent. of the total amount of the assessment in respect of land, business income and special franchises exclusive of debentures under the Municipal Public Works Act, the Secondary Education Act, and debts for local improvements to the extent to which the amounts are secured by special assessment.

By the Villages Act, s. 190, the limitation is 10 per cent. of the total value of the assessable real property except in cases under s. 199, where the tax is upon land values when the limitation is 15 per cent. of such total value. R. S. S. c. 89, ss. 175 and 191, limits the amount to 10 per cent. R. S. S. c. 87, s. 243, to 13 cents per acre.

III. *The place where the money is to be spent, i.e., within or without the limits of the Municipality:—*

The question may arise as to whether the municipality can exercise its powers outside of its territorial limits. The Supreme Court of Canada discussed the question in Shawinigan Hydro-Electric Co. v. Shawinigan Water & Power Co., 45 S. C. R. 585 (1912). Davies, J., said at p. 599: "I agree . . . that the question we have to decide is not one upon which the authorities will help us very much. It is one of the fair and reasonable constructions of the powers conferred on the councils of cities and towns by a general Act of the legislature of Quebec. I do not understand Mr. Geoffrion to controvert or question the general rule, that a municipal corporation can exercise its corporate powers only within its territorial limits." Idington, J., at p. 604, after considering Mayor of Detroit v. The Park Commissioners, 44 Mich. 602 (1884), and referring to the American cases suggesting such a power might exist by implication, held it did not. Duff, J., p. 607, said: "Such an implication is not permissible."

Anglin, J. (dissenting), held, upon a consideration of the facts and statutes that such a power might be inferred, p. 611.

Davies, J., at p. 596, also said: "Reading the Act as a whole, I am drawn to the conclusion that general words conferring powers upon a municipality, brought within its operation, must be given a territorial limitation, unless from the very nature of the power it must be held that it was to be exercised extra-territorially, and that where it is intended that general powers, not absolutely necessary to be exercised territorially, should, nevertheless, be so exercised, apt language must be shewn to evidence such a legislative intention.'

Examples of the statutory provisions in the various provinces follow:

ALBERTA.—Authority to exercise its powers beyond the jurisdiction must be expressly given by the Act (Towns Act, s. 162). No such expressed limitation appears in the Rural Municipalities Act or the Villages Act. The following things may be acquired, constructed, established or done within or without the municipality. Under the Towns Act, by sections:—

163 (21) Parks and rinks.
(22) Ferries.
(28) Sewers, drains and ditches.
(33) Quarries.
(37) Electric light or gas works.
(39) (40) Nuisance grounds.
(73) Parks, exhibition grounds or sites for industrial or manufacturing purposes.
(78) Cemeteries.
204 (69) Improvement of any road beyond the municipality.
214 Such land within or without the city for any public civic purpose whatever as the council shall deem expedient.

Under the Villages Act, by sections:—

63 (43) Parks and exhibition grounds.
(46) Cemeteries (outside the village).
(50) Parks (Limit $300 in one year).
(54) Skating and curling rinks.
(57) A ferry (wheresoever situated).

Under the Rural Municipalities Act, by sections:—

196 (1) Exhibition sites (Limit $500 in one year, unless by-law approved by two-thirds vote of electors voting).
(2) Weigh-scales (within the municipality or any village or town).
196 (6) A ferry.
(7) Machinery to be used in the making of roads, bridges or other public works within the municipalities, or if jointly with any other municipality, then in both.
(9) To unite with the councils of other municipalities for the construction or maintenance of any public work deemed by all to be for the advantage of all.
191 (3) Cemetery.
(4) Granting aid for erection of hospitals.

BRITISH COLUMBIA.—A section numbered 157 (repealed by 1915 c. 46, s. 24), provided that it shall be lawful for the council of any municipality by resolution or by-law to accept or purchase, hold and use, any real property within or without the municipal limits for the purposes of the corporation.

This case is partially covered by s. 54 (25), which gives the council power to acquire real property within or without the jurisdiction, for the purpose of holding agricultural or industrial exhibitions. Section 156 permits the acquisition of a hospital or quarantine station, within or without the territorial limits.

MANITOBA.—The jurisdiction of the council is confined to the municipality it represents, except where authority beyond the same is expressly given (s. 327). Powers exercisable "*within or without*" the jurisdiction are contained in ss. 389 and 390, set out at p. 442, supra.

ONTARIO.—See ss. 249; 373 (1); 379 (4); 383; 386 (2); 398 (2), (7), (11), (12), (14), (16), (17), (19), (32), (33); 399 (20), (56); 400 (10); 403 (1 to 6); 404 and 411 (6) and notes.

In Verner v. Toronto (City of), 3 O. W. N. 586 (1912), Middleton, J., said: "I am content to accept the statement in Dillon, 5th ed., para. 990: 'Whether a municipal corporation, with power to purchase and hold real estate for certain purposes, has acquired and is holding such property for other purposes, is a question which can only be determined in a proceeding at the instance of the state.'

The municipality has the power to purchase and hold lands for the use of the corporation . . . and has, for certain purpose, the further right to expropriate lands both within and outside the municipal limits. Under s. 104 of the Public Health Act, this hospital cannot be established without the consent of the township. This consent was not asked at the date of the purchase (of the lands) and, when asked . . . was not given . . . The city council fearing that the disclosure of their plans before the site had been secured might make it impossible to purchase at all, or at a reasonable price, bought before any application was made to the township. This course was prudent, but whether prudent or not, I have no right to criticize, if it was within the power of the council, as I think it was . . . The Municipality took the chance of obtaining the consent . . . and . . . the chance, if the consent is finally refused, of selling without loss. I cannot find any jurisdiction in the Court to interfere with this, nor should I do so unless I find some express prohibition. . . . I can find no trace of any right in the Court to rescind a sale actually carried out, at the instance of a ratepayer. A ratepayer has the right to prevent the expenditure of municipal funds for purposes *ultra vires* the corporation, and, when a loss occurs by reason of the *ultra vires* transaction, he may hold the individual councillors responsible for the loss; but this does not justify an action to rescind and to compel the vendor to repay the price he has received. The land has been purchased: the title has passed: as between the vendor and purchaser, the transaction is completed. If the land was not purchased "for the use of the corporation" or the public use of the municipality, "then the Crown alone can object. It is clear that the land was purchased for the use of the municipality—the purpose . . . was plain from the proceedings of the council—the establishment of an hospital for contagious diseases. . . . I find there is no evidence brought home to the vendor of knowledge of the purpose of the purchase before the completion of the sale."

In Town of Berlin and Township of Waterloo, 3 O. W. R. 903 (C.A.) (1904), Maclennan, J.A., said, p. 906: "Independent of the statute, the town had no power to extend its sewage works beyond its own municipal limits or into an adjacent township."

QUEBEC.—By Art. 5281, the corporation is expressed to have jurisdiction beyond its territorial limits *"in special cases where more ample authority is conferred upon it,"* and by Art. 5588 the same powers are given to the council.

Davies, J., said in the Shawinigan case (supra, p. 441): "That declaration (the words in italics above) seems to me to impose upon a corporation, acting under the powers given in that Act, the duty of shewing either that the powers, the exercise of which were challenged as illegal, were exercised within territorial limits, or, if beyond those limits, were only carried beyond to an extent *necessary* for their exercise, and so fairly to be implied from the language conferring the power, or *that express power to exercise the challenged powers beyond territorial limits was given.* Then Article 5588 . . . repeats over again the statutory limitation as to territory. . . . Now it is generally the case that special powers to act or carry on works extra-territorially are found in special charters given to municipalities, and the general Act in several analogous instances to the immediate one before us has conferred 'ample authority,' required by Art. 5281, for special cases of extra-territorial work."

[Reference to:—

Art. 5646, the construction of water works in and beyond its limits for 20 miles.

Art. 5679, the establishment, etc., of abbatoirs within or without the municipality.

And see also:—

Art. 5638 (22), extension of main sewers or tunnels in any adjoining municipality.

(23), opening and maintaining ditches in the municipality or beyond the limits thereof.

Art. 5647. To acquire land for the purposes in Art. 5646.

Art. 5685. To aid in the construction, etc., of public works, etc., foreign to the municipality.

Art. 5688. To aid in establishing libraries in an adjoining municipality.]

The learned Judge and Idington and Duff, JJ., held that in the absence of an express power Arts. 5667 and 5668 did not give an implied power to establish the work referred to outside of the municipal boundaries. Anglin, J., dissented.

Where an Act gives a municipality the right to extend its main sewers or tunnels into any adjoining municipality, it does not give it any right to extend such sewers into a municipality that is not adjoining or without, in any event, having obtained a right of way in such municipality. Per Dunlop, J., in Village of Ahuntsic v. City of Montreal, 26 Que. S. C. 291 (1904).

Where territory intervenes between two municipalities they cannot be held to be adjoining municipalities. Ahuntsic v. Montreal (supra), Village of South Orange v. William Wittingham, 58 New Jersey R. 655 (1897).

SASKATCHEWAN.—The general powers in the Saskatchewan Acts are given at p. 416, supra.

The special provisions are very much similar to those in the Alberta Acts. The Cities Act gives the following extra-territorial powers: Section 204 (20) ferries; (26) sewers; (34) quarries; 49 (c) slaughter houses and dairies; (69) road improvements; (80) parks; (81) parks; (82) bands of music; (83) cemeteries; s. 214, purchase of land. Section 233 gives special jurisdiction beyond the limits of the city in cases set out in 232 (a), which correspond largely to the specific cases already set out. The Towns Act contains similar provisions in s. 194, s.-s. (22), (28), (34), 47 (c), (66), (77, (80), (81), (82), and (75) hospitals. Section 230 of the Towns Act corresponds to s. 233 of the Cities Act, and gives jurisdiction in cases set out in 229 (a) of the Act, "notwithstanding that the same are wholly or partially beyond the limits of the town." The Villages Act contains restrictions similar to those in the Alberta Rural Municipalities Act (supra, p. 445); see s. 141 (28) slaughter houses and dairies; (34) land for electric light plant; s. 163 (1) acquisition of land for parks, cemeteries, etc. (expenditure limited to $300 in one year, unless approved by vote of two-thirds of electors voting). 163 (6) drains, 163 (7) ferries. R. S. S. c. 87 contains similar sections. See s. 198 (1) to acquire land for exhibition or nuisance grounds or a cemetery (limit $500 in one year, unless two-thirds vote), (2) weigh scales, (4) drains, (8) ferries, (9) road machinery, (11) construction of public works jointly with other municipalities. R. S. S. c. 89 has similar provisions. Section 59 (50) nuisance grounds outside the limits, (66) drainage.]

289.—(2) Sub-section 1 shall not apply to a by-law passed

(a) Under s. 290; or

[This sub-section applies to the special powers of county councils to borrow. See s. 290, *infra*.

289.—(2) (*b*) Under *The Local Improvement Act;* or

[The Local Improvement Act, R. S. O. 1914, c. 193, was first passed in 1911, when certain sections of the Municipal Act were given the title of "The Local Improvement Sections of the Municipal Act." (See 1 Geo. V., c. 58, s. 1), and see 2 Geo. V., c. 44, s. 1, giving the present title.

Section 40 provides as follows:—

(1) The council may agree with any bank or person for temporary advances to meet the cost of the work pending the completing of it.

(2) The council may, when the work undertaken is completed, borrow on the credit of the corporation at large, such sums as may be necessary to defray the cost of the work undertaken, including the corporation's portion of the cost, and may issue debentures for the sums so borrowed.

(3) The provisions of the Municipal Act as to by-laws for creating debts shall apply to by-laws passed under the authority of s.-s. 2, except that it shall not be necessary

(a) That the by-law be submitted to or receive the assent of the electors.

(b) That any rate be imposed for the payment of the principal of so much of the moneys borrowed as represents the owners' portion of the cost or of the interest thereon, other than the special rate per foot frontage imposed to meet it.

(c) To comply with the provisions of s.-ss. 5 and 7 of s. 263 of the Municipal Act.

And except that the debentures, save as provided by s. 42, shall be payable within the lifetime of the work.

A special assessment for local improvements is a local assessment imposed occasionally, as required, upon a limited class of persons interested in a local improvement, who are assumed to be benefited by the improvement to the extent of the assessment; and it is imposed and collected as an equivalent for that benefit, and to pay for the improvement, per Butler, J., in Bridgeport v. New York & N. H. R. Co., 36 Conn. 255, 262, and see Dillon, Municipal Corporations, s. 1430 (5th ed.).]

289.—(2) (*c*) By the Council of a county or of a city which* forms part of a county for judicial purposes, for raising money for erecting, rebuilding, enlarging, furnishing *and equipping* the court house and offices to be used in connection therewith, a gaol, *a gaoler's residence* and [a registry office], and for acquiring such land *and buildings* as may be necessary or convenient for such purposes. *This clause shall be deemed to have been in force from the first day of July, 1913.*

[Amended in 1915 by adding the words in brackets (c. 34, s. 18). Amended in 1916 (c. 39, s. 4) by adding the words italicized. The section to * formerly commenced. "By the council of a city or county where the city.*" This was changed in 1916.

This section formerly appeared as s. 389 (2), and applied only to court houses and offices. The exception was originally created by 44 V. c. 23, s. 6 (1881). The provision as to gaols first appeared in 1913.

"Shall be deemed to have been."

As to the effect of this clause see per Cane, J. who, in Reg. v. Norfolk County Council, 60 L. T. Q. B. 379 (1891), in discussing a clause in a statute which reads, "The following areas shall be deemed to be highway areas for the purposes of this Act," says, "Generally speaking, when you talk of a thing being deemed to be something, you do not mean that it is that which it is deemed to be. It is rather an admission that it is not what it is deemed to be, and that, notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is to be deemed to be that thing." Quoted by Richards, J.A., with approval in Mutchenbacker v. Dominion Bank, 21 M. R. 327 (1911).]

289.—(2) (*d*) By the Council of a city or a separated town for raising such sum as is required to pay its share of the debt of the county as agreed upon or determined by arbitration.

[(a) This section first appeared in 49 Vict. c. 37, s. 7, in 1886; it was later s. 389 (3). It took its present form in 1913.
"A separated town" is one separated for municipal purposes from the county in which it is situate, s. 2 (q).]

289.—(2) (*e*) By the council of a city with the approval of the Municipal Board for raising such sum as may be required to pay its share of the cost of constructing or reconstructing a bridge over any stream which constitutes a dividing line between the city and any other municipality or of reconstructing any existing bridge within the municipality; but the aggregate amount to be raised for all of such purposes in any one year shall not be more than $10,000 where the city has a population of not more than 20,000; or $15,000 where the city has a population of more than 20,000 and not more than 100,000; or $20,000 where the city has a population of more than 100,000; or

[This section first appeared in 62 V. (2), c. 26, s. 23, when it was added to the Act as 388 (a); it was amended in 1913, when it took its present form.]

289.—(2) (*f*) By the council of any municipality, with the approval of the Municipal Board, for raising such sum as is required to pay the share ordered to be paid by the corporation of the cost of any work constructed under the order of the Board of Railway Commissioners of Canada or of the Municipal Board or of any work or improvement which, in the opinion of the Municipal Board, has been rendered necessary or expedient, owing to the construction of any work ordered by either of the boards.

[This section was added in 1909 as 388 (b) by 9 Edw. VII. c. 73, s. 12, and amended by 10 Edw. VII. c. 85, s. 6, when changed to 388 (c). It was redrafted in 1913.]

289.—(2) (*g*) By the council of an urban municipality for raising such sum as may be required for the

purchase of a site in the municipality for an armoury or drill-shed for any militia or volunteer corps having its headquarters in the municipality, if the by-law is passed by a vote of two-thirds of all the members of the council; or

[This section first appeared in 1902. See Edw. VII. c. 29, s. 13.]

289.—(2) (*h*) By the council of a county for guaranteeing debentures of a local municipality; or

[This section was new in 1913, 3-4 Geo. V. c. 43, s. 289 (h).
By s. 408 (3), q. v., by-laws may be passed by the councils of counties for guaranteeing debentures of any local municipality in the county.]

Guaranteeing Debentures.—In Re Kerr and Lambton, 1896, 27 O. R. 334, a county by-law authorizing the county to guarantee certain township debentures was passed before the township by-law authorizing the debentures had been finally passed. The then Act did not expressly exempt a county from the necessity of submitting such a by-law to vote. Meredith, C.J., refused to quash the by-law, holding that it had not been prematurely passed, and that it was not necessary to obtain the assent of the electors under the provisions of then s. 344, now 289 (2*h*), saying:—

> "These requirements have plainly, I think, no application to such a by-law as that in question, and would involve the necessity of the raising by Petrolia of enough in each year to provide for the payment of its debentures and the county council levying a like rate for the payment of the debt and interest—a proceeding which, it appears to me, would be wholly unnecessary and not to have been contemplated by the Legislature.
>
> "Nor is the liability created by the by-law within the provisions of s. 344, which by its terms is made applicable to by-laws for raising upon the credit of the municipality any money not required for its ordinary expenditure and not payable within the same municipal year—words applicable, I think, to the raising by the municipality for its own purposes, and those only, of moneys required by it for such purposes."

289.—(2) (*i*) By the council of a town or village for purchasing fire engines, appliances, apparatus and appurtenances as provided by paragraph 1 of s. 407; or

[Sec. 407 (1) limits the cost to $5,000; the debentures must be payable in equal annual instalments of principal and interest during a period not exceeding 10 years. The by-law must be passed by a two-thirds vote of all the members of the council, s. 407 (1) (a). The above clause first appeared as part of 407 (1) when it was originally passed in 1906 (see 6 Edw. VII. c. 34, s. 18).]

289.—(2) (*j*) For borrowing money for any of the purposes mentioned in ss. 43 or 44 of *The Public Schools Act*, or s. 38 of *The High Schools Act*, or subs. 3 of s. 4(*a*) of *The Continuation Schools Act;* or

[This section was new in 1913. Formerly Division XX, covered the same ground. See ss. 587 (1) to (11)].

The provisions of the former section, which were carried into the above mentioned School Acts, are discussed below. S. 309 (1) provides for the setting apart of certain moneys for educational purposes, the investment of the same, the lending of the same to any board in the municipality or applying the same in aid of poor school sections in the municipality.

The Public Schools Act, R. S. O. 1914, c. 266, contains the following:—

BORROWING POWERS.

In Urban Municipalities.—43. (1) The council of an urban municipality, on the application of the board, may pass a by-law for borrowing money by the issue and sale of debentures for any one or more of the following purposes:—

(*a*) The purchase or enlargement of a school site;
(*b*) Obtaining and conveying, from beyond the school premises if necessary, a supply of water;
(*c*) The erection of a school-house, drill hall, gymnasium or teacher's residence, or any addition to the same or any of them;
(*d*) Repairs or improvements of the school property;
(*e*) The purchase of furniture, furnishings, school apparatus, a school library and other equipment; and it shall not be necessary that the by-law shall be submitted to the electors for their consent.

(2) The debentures and the money to be raised annually for payment thereof shall be chargeable only upon the property of ratepayers who are supporters of public schools.

(3) Where the council refuses to pass such a by-law the question shall be submitted by the council, if requested by the board, to the vote of the electors qualified to vote under the Municipal Act on money by-laws and who are supporters of public schools, in the manner therein provided, and on the assent of such electors being obtained the council shall pass the by-law and issue such debentures; and it shall not be necessary that the by-law shall be submitted to the electors for their consent.

(4) The debentures may be for such amount and for such term of years, not exceeding thirty, as the council sees fit, or the council may make the principal and interest payable by annual or other instalments, in the manner provided in the Municipal Act.

(5) The application for the issue of debentures by the board of an urban municipality to which part of an adjoining township is attached shall be subject to the provisions of this section.

(6) Where the amount provided by a by-law passed under the authority of this section proves insufficient for the purposes for which the by-law was passed the council may pass another by-law for borrowing the remainder of the money required for such purposes; and all the provisions of this section shall apply to such by-law.

In Rural Sections.—44 (1) On the application of a rural school board for the issue of debentures for any of the purposes mentioned in the next preceding section the council of the township shall pass a by-law therefor, and shall forthwith issue debentures to be payable out of the taxable property of the public school supporters of the section in such annual amounts as they may deem expedient, provided always that the proposal for the loan has been submitted to and sanctioned at a special meeting of the ratepayers called for the purpose.

(2) The application for a loan for any of such purposes shall be made by the board of a union school section to the council of the municipality within which the school house or school site of such section is situate, and all debentures for the payment of the loan shall be issued by the corporation of said municipality.

(3) The application must be sanctioned by the ratepayers of the school section in the manner set forth in s.-s. 1.

(4) The corporation or corporations of any other municipality or municipalities forming, or any part of which forms, part of the union section shall, on the requisition of the clerk of the municipality by which the debentures were issued, pay its or their share of the loan, including interest, as it comes due, according to its or their liability as determined by s. 29.

(5) The proportion of the moneys payable by the corporation of each of the municipalities shall be payable out of the taxable property of the public school supporters, therein lying within the section.

(6) The expenses of preparing and publishing any by-laws or debentures, and all other expenses incident thereto, shall be paid by the section on whose behalf such debentures were issued, and the amount of such expenses may be deducted from any school rates collected by the municipal council for such section.

(7) Notwithstanding any alteration which may be made in the boundaries of a section the taxable property of the public school supporters situate therein at the time when such loan was effected shall continue to be liable for the rate which may be levied for the repayment of the loan.

The High School Act, R. S. O. 1914, c. 268, defines as permanent improvements most of the objects set out in s. 43, *supra*, [see s. 2 (*k*)]. If the cost of these exceeds $500 the amount to be raised may be borrowed by the council on the application of the board and secured by debentures [see s. 38 (*i*)].

The application is to be made to the council having jurisdiction over the high school district (s. 38, s.-s. *z*) and the council is to deal with the application and approve or disapprove of it [38 (3)]; and if it approves, issue debentures, [38 (4)]. The following provisions are also found.

Grants for Permanent Improvements.—S. 38. (4) If the council or a majority of the councils, where there are more than one, approve of the application, the council of the municipality within which the high school is situate shall raise the sum required by the issue of debentures in the manner provided by the Municipal Act.

(5) If the council, or half the number of councils, where there are more than one, disapprove of the application, such council, or each of such councils, where there are more than one, on the request of the board, shall submit the application to a vote of the electors of its municipality or of the part thereof comprised in the high school district in the manner provided by the Municipal Act, in the case of a money by-law.

(6) If a majority of the votes cast throughout the high school district are in favour of the application the council of the municipality in which the high school is situate shall in the manner provided by the Municipal Act, but without submitting any by-law to the electors, raise the required sum by the issue of debentures.

(8) Where a high school district comprises more than one municipality or parts of more than one municipality each municipality shall be liable for such proportion of the principal and interest payable under and of the expenses connected with the debentures as the equalized assessment of that part of the high school district which is within such municipality bears to the equalized assessment of the whole district, and the council of each of the other municipalities shall pay its proportion to the council of the municipality which has issued the debentures.

(9) A debenture may be for such terms of years, not exceeding thirty, and not less than that mentioned in the application of the board, as the municipal council or councils concerned or a majority of them may think proper, or the council or councils or a majority of them shall, if the board has so requested, and may whether such request has been made or not, make the debenture debt payable by annual or other instalments in the manner provided by the Municipal Act.

(*a*) The council or councils of a municipality or municipalities liable for more than one-half of such debt shall for the purposes of this sub-section be deemed a majority.

(10) Nothing in this section shall prevent the municipality in which the high school is situate from assuming the full cost of permanent improvements or from undertaking to pay any debentures that may be issued therefor notwithstanding that such municipality forms only a part of the high school district.

Upon the Application of the Board: (Secs. 43 and 44).

In McGloghlon and Town of Dresden (1909), 1 O. W. N. 74, Meredith, C.J., said, (p. 75: "The by-law is . . . I think, open to the further objection that the foundation for it should have been an application to the

council by the school board to pass a by-law for borrowing money by the issue and sale of debentures for the purpose of erecting the school house, and no such application was made. The only application to the council is a resolution passed by the school board 'that an application be and is hereby made to the Municipal Council of the Town of Dresden for a grant of the sum of $20,000 for the erection of a school house in the said town of D.,' which was communicated to the council; and this was not such an application as the statute requires:" 9 Edw. VII. c. 89, s. 43 (now R. S. O. 1914, c. 266, s. 43), referred to."

It is unnecessary that the notice calling any meeting of any school board or municipal corporation should specify the business to be transacted and the Court refused to declare a by-law invalid on the ground that no notice was given of the *object* of the meeting at which the resolution asking the council to raise certain sums was passed. Forbes v. Grimsby P. S. Board (1903), 7 O. L. R. 137. [Marsh v. Huron College (1880), 27 Gr. 605, and Cannon v. Toronto Corn Exchange (1880), 5 A. R. 268, distinguished: The King v. Pulsford (1828), 2 B. & C. 350, and La Compagnie de Mayville v. Whitely, [1896] 1 Ch. 788, referred to]. See Smyth v. Darley and other cases (infra).

Any business which might have been transacted at an original meeting may be transacted at an adjourned meeting (ibid).

Where a by-law under this section was only passed to overcome certain defects in the earlier one, it was held it might well have been passed without any new requisition from the school board (ibid).

In Smyth v. Darley, 2 H. L. C. 789 (1849); Cannon v. Toronto Corn Exchange, 27 Gr. 23 (1880), and Marsh v. Huron College, supra, referred to above, and in Biggar, p. 276, and cited on the argument of Forbes v. Grimsby, it was laid down that all the members entitled to be present at a special meeting should be notified to attend, and if practicable notified also of the purpose for which the meeting was called. In Smyth v. Darley the omission to notify a member was held to invalidate all proceedings at such meeting. There is authority to say that where a purpose is specified in the notice there is no power to transact other business. Rex v. Liverpool, 2 Burr. 723 (1759); Rex v. Carlisle, 1 Str. 385 (1719); Machell v. Nevison, 2 Ld. Rayd. 1355 (1724). In re Rural Municipality of MacDonald, 10 Man. L. R. 294, 382 (1894-5), a resolution of a municipal council which was accustomed "to adjourn to the call of the reeve," who did not specify the purposes of the meetings he called, was quashed, it being held that these were special meetings and the object of the meeting should have been specified. Most of these cases were cited on the argument in Forbes v. Grimsby, 7 O. L. R. supra.

See also, s. 290 (2), (3), and notes.]

Duties and Powers of the Board—Estimates.

The duties of the School Board are set out in s. 73 of c. 266 (see particularly s.-s. (*o*), formerly 1 Edw. VII. c. 39, s. 65 (9), requiring the trustees to submit to the council on or before the first day of August or at such time as may be required by the council, an estimate for the current year of the expenses of the schools under their charge.

In Toronto Public School Board v. The Corporation of the City of Toronto, 2 O. L. R. 727 (1901), 4 O. L. R. 468 (1902 C. A.), it was held that it is "only when it is made to appear that the expenditure would be clearly an illegal one, or one *ultra vires* the school board, that the council would be justified in refusing to raise the sum required by the board. The school board in preparing their estimates may include everything that in their judgment may be needed to meet legitimate expenditure that is . . . within their lawful authority; and they are bound to prepare them in such a manner as to shew generally the several objects of such expenditure and what is required in respect of each. The duty of the municipal council is to examine the estimates so far as to ascertain that they are for purposes clearly *intra vires* the school board. If an item or class of items is clearly for an unauthorized purpose, it is the duty of the council to reject it. But beyond this the council cannot go. If *intra vires* they cannot moderate or reduce it. The council have no voice in the control of the affairs which

are committed by law to the school board; their duty is to levy and collect and pay out from time to time as required, the moneys shewn by the estimates to be necessary for lawful school purposes."

The collection of authorities in the arguments in this case as reported is very valuable.

The annual estimate is discussed in Board of Education of the City of London v. The Corporation of the City of London, 1 O. L. R. 284 (1901), and it is laid down that the estimate "should be of the same character as the estimates of municipal councils for the purpose of striking the municipal yearly rate, and contain the like details as those upon which the board of trustees have based their own calculations and not merely state a certain sum as required." Meredith, J., said at p. 289": The . . . council has the right—indeed, that is its duty—to take some care that it is not made the instrument by which any intentional, or unintentional, excess of the powers of the school board are given effect to by levying for them any sum of money which the law does not authorize them to exact." See also the cases referred to in the same judgment.

In Re McGloghlan and Town of Dresden (1909), 1 O. W. N. 74, it was held that a by-law which was intituled "A by-law for the purpose of raising by way of loan the sum of $20,000 for the erection of a public school building in the town of Dresden," providing "that a certain site shall be the site upon which a proposed school house be erected" should be quashed upon the ground that it assumed to fetter the school board of the municipality in the selection of a site.

Similar decisions as to the powers of school boards over the estimates are found in C. P. R. v. The City of Winnipeg, 30 S. C. R. 562 (1900), and see Winnipeg School Trustees v. C. P. R., 2 Man. L. R. 163 (1885).

These Borrowing Powers are not Exclusive.

Public school trustees are not restricted to the debentures voted by the council under this section, but may also use other monies they have under control in the shape of proceeds of the old school house, although under Smith v. Fort William Public School Board (1893), 24 O. R. 366, they should not undertake for building purposes an outlay in excess of the funds provided by council. Forbes v. Grimsby Public School Board et al. (1903), 7 O. L. R. 137.

Review of Exercise of Powers by the Courts.

The Court should not lightly obstruct the united action of the council and the school board in proceeding to establish a new school suitable for the needs of the municipality. Forbes v. Grimsby (1903), 7 O. L. R. 137.

Form of By-law.

Held also that the by-law sufficiently recited the amount of the debt to be created, as it recited that application had been made by the school board to the council to raise the sum of $12,500 by the issue of debentures, and it authorized the issue of debentures to that amount. Forbes v. Grimsby (1903), 7 O. L. R. 137.

School Taxes—Exemptions.

As to the power of municipal councils to exempt from taxation for school purposes. See ss. 395 et seq. infra, and Canadian Pacific Railway Co. v. City of Winnipeg (1900), 30 S. C. R. 558; Pringle v. Stratford (1910), 20 O. L. R. 246, C. A.; Re Canadian N. P. Co. v. Stamford (Township (1914), 30 O. L. R. 384 (1915); 50 S. C. R. 168; Re Electrical Development Co. & Stamford (1914), 30 O. L. R. 391 (1915), 50 S. C. R. 168.

Alberta.—The School Ordinance, c. 75, ss. 107 et seq., permits the board to borrow on the security of the district for purposes similar to those in s. 43—a by-law in a form prescribed by the minister must be passed, and within 5 days the board must give notice of its intention to apply to the

minister for authority to borrow the amount specified in the by-law (s. 108); a poll may be demanded within 15 days (s. 109); otherwise the authorization of the minister must be given (s. 110); debentures may then be issued the total face value of which in a rural district is not to exceed 25 cents for each acre assessed and in other districts 15 per cent. of the total assessed value of the real property and shall not run for a longer period than 20 years or 10 years if the buildings to be erected are to be frame or log (s. 128), and see particularly the further provisions of the Act.

British Columbia.—The Public Schools Act, R. S. B. C., c. 170, s. 37, applying to city school districts, requires the Board to annually supply council with an estimate of the sums required for the current year's expenses and special or extraordinary expenses legally incurrable which council shall consider, alter and finally approve or reject. If council rejects the estimates, upon the written request of the board and within 30 days thereafter, it shall submit a by-law for the assent of the electors in the manner prescribed by s. 68 of the Municipal Act.

Manitoba.—R. S. M. 1913, c. 165 (The Public Schools Act), ss. 203 et seq., provides that the ratepayers of any rural school district may at a public meeting duly called require the trustees to borrow any sum of money not exceeding $2,000, or in case the school district is already in debt such a sum as will not increase the debt beyond $2,000 for purposes very much similar to those in s. 43. (See Geo. V. c. 87, s. 25). A majority of the ratepayers present may authorize the loan (s. 205); in cities, towns and villages and rural school districts where the amount exceeds $2,000 the trustees must pass a by-law and submit it for the assent of the ratepayers in the manner provided in the Municipal Act with regard to by-laws authorizing debts (s. 206). The vote in rural school districts must shew a majority and in other districts a three-fifths majority of those voting. No loan under $2,000 shall be made for a period exceeding fifteen years and nine months and any other loan twenty years and nine months, except in cities where the debentures may run 50 years (s. 213 and see 4 Geo. V. c. 86, s. 35, 5 Geo. V. c. 57, s. 21). A sinking fund must be raised (s. 215), and debentures may be issued by the school district (s. 216). The loans must be repayable as set out in ss. 215 and 217. All school loans require the assent of the Department, s. 219, and see s. 224, giving powers to borrow to renew debenture loans without the assent of the ratepayers.

New Brunswick.—C. S. N. B. 1903, c. 50 (The Schools Act), s. 72 (3), gives the board of trustees powers to borrow, when authorized by the school meeting, money for the purposes of improving grounds for school purposes or purchasing or building school houses or furnishing the same. The amount is to be raised by equal yearly instalments not exceeding 7 or such greater number as the Board of Education shall by special order allow, with any interest accruing to be assessed on the district. The money so borrowed shall be a charge upon the district and for money so borrowed the board shall have power to give certificates of indebtedness. The cities of St. John and Fredericton are by s. 105 (7, 8), given special borrowing powers and power to issue 25 year 6 per cent. debentures up to $160,000 and $60,000 respectively, with a proviso as to further issue if authorized by the Lieutenant-Governor-in-Council.

Nova Scotia.—R. S. N. S. 1909, c. 52, s. 63, gives the trustees powers to borrow for purposes similar to those in the new Brunswick Act. The number of yearly instalments is not to exceed 12 and s. 64 permits the issue of debentures to be signed by the trustees or any two of them and countersigned by the secretary. The interest, etc., is to be rated for (s. 65). The money borrowed is to be a charge upon the ratable property in the school section (s. 63), and any other form of security, approved by the inspector, may be given (s. 66).

Saskatchewan.—The Schools Act R. S. S. 1909, c. 100, ss. 106 et seq. and especially ss. 107, 108 (a poll is not required if the amount is under $800) and is for the purposes specified in the section); 109 and 127 (value confined to 30 cents per acre or one-tenth of the total assessed value); contains provisions similar to the Alberta Act.]

289.—(2) (*k*) For borrowing a sum not exceeding $5,000 for the purpose of making a grant to the University of Toronto.

[By 3 Edw. VII. c. 19, s. 587 (9) councils of cities having 100,000 inhabitants or more were given powers for granting aid to the University and for creating a debt therefor and for the issue of debentures for the amount of such debt; and no such by-law required the assent of the ratepayers unless the amount exceeded $500. See ss. 403 and 404 infra.

Biggar points out (p. 786), that this section (originally 53 Vict. c. 50, s. 41), was added after the greater part of the University buildings was destroyed by fire February 14th, 1890.]

289.—(2) (*l*) Under paragraph 11 of s. 483.

[S. 483 (11) provides for purchasing or renting road-making machinery, The debentures issued under s. 483 (11) are to be on the instalment plan. The limit is 5 years. This section first appeared as 2 Edw. VII. c. 29, s. 31, adding it to s. 640 as 10 (b).

289.—(2) (*m*) For borrowing any sum or incurring any debt, which under the provisions of *The Public Health Act* may be borrowed or incurred without the assent of the electors.

[The Public Health Act, which was consolidated in 1912 (2 Geo. V. c. 58), now appears as R. S. O. 1914, c. 218. The powers referred to are found in s. 96. The assent of electors to any by-law incurring a debt for the following purposes, is not required where the Provincial Board reports in writing that it is necessary in the interest of the public health that a waterworks system or an adequate water purification plant, or a sewer or a sewerage system, on an adequate sewerage treatment plant, should be established or continued, or that any existing waterworks system, etc., should be improved, extended, enlarged, altered, renewed or replaced.]

289.—(3) A municipal corporation may enter into any contract for the supply of a public utility as defined by *The Public Utilities Act*, to the corporation or to the inhabitants thereof for any period not exceeding 10 years in the first instance and for renewing such contract from time to time for further periods not exceeding 10 years at any one time if a by-law setting forth the terms and conditions of such contract has been first submitted to and has received the assent of the municipal electors in the manner provided by *The Municipal Act*.

[The Public Utilities Act is R. S. O. 1914, c. 204. By s. 2 Public Utility is newly defined as water, artificial or natural gas, electrical power or energy, steam and hot water. This applies to Parts 3, 4, 5 and 6.

Part I. applies to Municipal Waterworks, II. to those municipal public utilities other than waterworks and a new definition is given by s. 17, namely, artificial and natural gas, electrical power or energy, steam and hot water. Part III. applies to all municipal corporations owning or operating

public works. Part VI. to all municipal and company Public Utilities. Part V. to all company Public Utilities, and Part VI. to works acquired from companies.

The Public Utilities Act of Alberta is (1915), c. 6, s. 89, applies to cities or towns, s. 90 to Villages and Rural Municipalities. The Saskatchewan Act, R. S. S. c. 91, is made applicable to cities by the Cities Act, s. 220 and to Towns by the Towns Act. Sections 209, 210.]

289.—(4) Sub-section 3 shall come into force and take effect as from the 15th day of April, 1913.

290.—(1) A county council may in any year borrow any sum or sums not exceeding in the whole $20,000 over and above what is required for its ordinary expenditure and [over and above any sum which the council is by this Act or any other Act expressly authorized to borrow] without the assent of the electors.

[Taken originally from 22 Vict. c. 99, s. 223 (1858), which permitted the whole $20,000 to be borrowed within one year. Upon the extension of the term of office of a county councillor to 2 years in 1896 (The County Councils Act), the words "during any one term" were by 60 Vict. c. 15, Sched. C. (125), read into the section in the place of the words "in any year." These words were restored by 6 Edw. VII. c. 35, s. 31 (The County Councils Act). Lately, s. 388.

By 6 Edw. VII. c. 19, s. 30, in place of the words in brackets—which were substituted by 2 Geo. V. c. 40, s. 5—these words appeared "over and above any sum raised for the purchase of a site or erection of buildings for a House of Refuge." By s. 10 of the House of Refuge Act, R. S. O. 1914, c. 290, no assent is required.

It is to be observed that this is a special borrowing power and one within the exception contained in s. 289 (1).]

"Ordinary Expenditure."—See notes to s. 289 (2) (c) p. 448. supra.

290. — (2) Subject to subs. 3 the by-law shall be passed at a meeting specially called for the purpose of considering it, and held not less than six weeks after the first publication of a notice of the day appointed for the meeting which shall be published once a week for four successive weeks, and shall state the amount to be borrowed, and the purpose for which it is to be borrowed.

[This section originally applying to all Municipal Councils (see 14-15 Vict. c. 109, s. 16) was by 22 Vict. c. 99, s. 224, confined to county councils. It appeared prior to 1913 as s. 390, and was made subject to s. 389 (2) now 289 (c). It formerly read: "No by-law shall be valid unless . . ."—(See the notes to s. 288 (1) (*a*), supra p. 417.

"A Meeting Specially called for the Purpose of Considering it."—See the notes to s. 289 (2) (j), p. 453, supra.

Quære, whether the notice of calling the meeting must specify the purpose since the decision in Forbes v. Grimsby, supra, p. 453.

Adjournment.—See s.-s. 3, following.

"Publication."—Publication once a week for four weeks was first required by 8 Edw. VII. c. 48, s. 5—formerly only one publication was specified. S. 390 required publication of a copy of the by-law as ultimately passed.

The section formerly prescribed the publication of a notice of the time and place of the meeting.

"Six Weeks."—Formerly 3 months—and if the by-law as passed differed materially from the by-law as published it was held invalid. See Re Bryant and Township of Pittsburg, 13 U. C. R. 347 (1855), changed in 1913.]

290.—(3) The by-law may be passed at any regular or special meeting to which the consideration of it may be adjourned.

[8 Edw. VII. c. 48, s. 5, amending s. 390, provided that the by-law might be passed either on the day mentioned in the notice referred to in (2) immediately above, or at a subsequent regular or special meeting of the council as may be determined upon by resolution of the council. The above clause appeared for the first time in 1913.

Adjourned Meeting.—See Forbes v. Grimsby (1903), 7 O. L. R. 137, and other cases in notes to s. 289 (2) (j), *supra*.]

291. Where, owing to an advance in the rate of interest between the passing of a money by-law heretofore or hereafter passed, and the sale or other disposal of the debentures. they or any of them cannot be sold or disposed of, except at a discount involving a substantial reduction in the amount required to be provided, the council may, with the approval of the Municipal Board, and without submitting the same for the assent of the electors, pass a by-law to amend the first-mentioned by-law, by providing for an increased rate of interest, and for a corresponding increase in the amount to be raised annually.

[This section was added as 388 (b) by 4 Edw. VII. c. 22, s. 11. The Lieutenant-Governor in Council approved the by-law until the formation of the Board. This section took its present form in 1913.

SIMILAR LEGISLATION.

This provision has been copied into the Saskatchewan Cities Act as s. 295 and the Towns Act as s. 292. The approval of the Local Government Board is required.

292.—(1) Where part only of a sum of money provided for by a by-law has been raised, the council may

repeal the by-law as to any part of the residue, and as to a proportionate part of the amounts to be raised annually.

[Originally 22 Vict. c. 99, s. 230, lately s. 391. In Re Hill and Township of Walsingham, 9 U. C. R. 310 (1852), it was laid down that it is an erroneous impression that when once a municipal council has determined to contract a loan, in order for example, to aid in advancing a public work, the whole matter of the by-law passed for that object is entirely out of their control, and not merely such parts of it as are necessary for securing those who have advanced money under its provisions.]

292.—(2) The repealing by-law shall recite the facts on which it is founded, shall be appointed to take effect on the 31st day of December in the year of its passing, shall not affect any rates due, or penalties incurred before that day, and shall not take effect until approved by the Municipal Board.

[See the notes to 292 (1) *supra*. This section lately appeared as part of 391.

"**Municipal Board.**"—Formerly the Lieutenant-Governor.]

293. Subject to the next preceding section, after a debt has been contracted under a by-law, the council shall not, until the debt and interest have been paid, repeal the by-law or [any by-law appropriating for the payment of the debt or the interest, the surplus income from any work or any interest therein, or money from any other source]; and shall not alter any such by-law, so as to diminish the amount to be raised annually, and shall not apply to any other purpose any money of the corporation which has been directed to be applied to such payment.

[This section, originally 22 Vict. c. 99, s. 231, and lately 392, was redrafted in 1913. Formerly by s. 326 a council was permitted to amend or repeal its by-laws. This power was omitted from the section in 1913 (see s. 250).

The by-laws referred to in the clause in brackets were authorized by ss. 421 and 422. The sections are now replaced by the provisions of s. 305, which provides for a different disposition of the fund.

In Smith v. Township of Oakland (1874), 24 C. P. 295, it was held that where a by-law had been passed by a municipal corporation, creating a debt, and before the debt had been paid, it was by a subsequent by-law repealed; the repealing by-law was invalid and must be quashed.

By the Municipal Debentures Act (Sask.), (1915), c. 20, s. 11), any by-law passed under its provisions unless otherwise provided shall not be repealed until the debt created under the by-law is fully paid and satisfied.]

Money By-law Repealed in Part. Creditor's Rights not Affected.—In re Hill and Walsingham, 1852, U. C. R. 310, the council passed a by-law repealing certain portions of a money by-law, under which

debentures had been issued. A motion to quash the repealing by-law on the ground that it was contrary to secs. 177 and 178 of 12 Vict. c. 81 (an Act to provide by one general law for the erection of municipal corporations and the establishment of regulations of police in and for the several counties, cities, towns, townships and villages in upper Canada) was refused. Section 177 provided in effect that it should not be lawful to repeal a by-law authorizing a debt, or to discontinue any rate imposed thereby until the debt and interest should be fully discharged, and sec. 178 further provided that any by-law by which it was attempted to repeal any by-law so as to diminish the amount to be levied thereunder until the debt and interest was fully paid should be null and void. Robinson, C.J., said:

> "The Council have been careful to do nothing that could impair the security of any person who had purchased debentures issued under the former by-law; they sustain these fully; and we cannot doubt that they have power to modify the measure which they had passed in regard to the method of issuing and disposing of debentures to be thereafter issued and accounting for the procedure.
>
> "The motion seems to have been made under an erroneous impression in the applicant that when once the council had determined to contract a loan in order to aid in advancing a public work for any purpose, the whole matter of the by-law passed for that object must be entirely out of their control, and not merely such parts of it as are necessary for securing those who may have advanced money under its provisions."

294. Any officer of a corporation, whose duty it is to carry into effect any of the provisions of a money by-law who neglects or refuses to do so, under colour of a by-law illegally attempting to repeal or amend it, so as to diminish the amount to be raised annually under it, shall incur a penalty not exceeding $100.

[Originally 22 Vict. c. 99, s. 203, lately s. 393. The penalty was first provided in 1913 when the section was redrafted. Disobedience of a provincial statute is an indictable offence punishable with one year's imprisonment under s. 164 of the Criminal Code. The original s. (203), declared disobedience to be a misdemeanour and punished it by fine or imprisonment. The penalty is recoverable under the provisions of R. S. O. 1914, c. 90 (the Summary Convictions Act).]

[NOTE.—*Old ss. 394 and 395, allowing municipalities to purchase public works from and to contract debts with Crown for them and providing for imposing special rates to meet such debts, struck out as unnecessary.*]

295.—(1) The council of a municipality which has heretofore passed or shall hereafter pass a money by-law, or a by-law imposing a special assessment or a special rate under this or any other Act, or the holder of any debenture issued under any such by-law [or any person entitled to receive any of such debentures or of the proceeds of the sale thereof] may apply to the Municipal Board for a certificate approving the by-law.

[This section was first enacted in 1908 as part of the Ontario Municipal Securities Act (8 Edw. VII. c. 51), following the creation of the Municipal Board in 1906 (c. 31). It was amended in 1909. See notes to s.-s. 3, and repealed in 1913 (3-4 Geo. V. c. 537), when it was re-enacted in the present form as part of this Act.

The words in brackets were added by 10 Edw. VII. c. 86, s. 1, which also added "or to payment of the liabilities or any of them intended to be created by such by-law." These last words were dropped in 1913.

Alberta.—The Towns Act, s. 190, provides for approval in the same manner by the *Minister of Municipal Affairs*. The Towns Act also provides (s. 190 (4) passed in 1913, 1 Sess. c. 8, s. 11, 1913, 2 Sess. c. 22, s. 9), that if the town intended to apply for such approval it must forward a copy of the by-law to the minister before the vote is taken. Debentures issued under the Villages Act are countersigned by the minister, s. 80, who also must authorize the by-laws issued under the Rural Municipalities Act, s. 239, and countersign the debentures.

Manitoba.—S. 400 provides for approval upon the application of any municipality (only) by the Municipal Commissioner. This provision also applies to money by-laws in all cities having special charters, s. 14.

New Brunswick and Nova Scotia.—By the respective Municipal Debentures Acts (1 Geo. V. c. 6, s. 14 and 4 Geo. V. c. 3, s. 17), a certificate by the Auditor-General or the Commissioner may be printed or lithographed on each *debenture*. These officers have power to examine books and take evidence to enable them to give such certificates (see ss. 17 and 20); s. 18 (N.B.) describes the Auditor-General and s. 19 provides for an allowance for his services. By s. 21 of the Nova Scotia Act the Commissioner may make regulations as to the granting of such certificates.

Quebec.—By art. 5635 a copy of each by-law is to be sent to the Lieutenant-Governor in Council without delay. He may disallow it within 3 months. Notice of such disallowance is to be published in the Quebec Gazette and from the day of such publication the by-law "shall be null and void."

Saskatchewan.—The Cities Act, s. 297 (2); the Towns Act, 294 (2). provide for approval by the Minister of Municipal Affairs. By the Village Act, s. 187, the Local Government Board is authorized to sanction the by-law and the loan. The Rural Municipalities Act, R. S. S. c. 87, s. 231, contains provisions for obtaining the sanction by the Minister of the loan and validation of by-law.

For the effect of Registration, see ss. 296 and notes. See also Canadian Agency Ltd. v. Tanner, p. 467, and Molison v. Woodlands, p. 465, *infra*.]

In Re Harper and Township of East Flamborough, 32 O. L. R. 490 (1914), a motion was made to quash a debenture by-law. A preliminary objection was taken that the by-law had been approved by the Ontario Railway Board under this section. The motion was enlarged to permit of an application to set aside the certificate of approval, which was done with effect. The motion was renewed and the further objection was taken upon the ground that at the time of service of the notice of motion the by-law was in-expungable by reason of the provisions of s.-s. 4. Riddell, J., at pp. 491-492, said: "Speaking generally . . . the rights of an applicant on such a motion as the present must be determined as of the day of the service of the notice of motion, the beginning of the proceeding: Re Shaw and City of St. Thomas (1899), 18 P. R. 454: . . . but I do not think such a principle is conclu-

sive here. Full effect can be given to the section by interpreting it as meaning that the court cannot question the validity of a by-law which has been approved by the board if such approval is in existence when the court is called upon to decide. And this works both ways: if the approval of the Board were obtained after notice served and before the return thereof, I have no doubt the court could not declare the by-law invalid." "Were this a case of estoppel, difficult questions might arise; but, even then, there is respectable authority for the proposition that an action begun which can be met by a plea of estoppel will lie if the estoppel be removed before the matter comes to adjudication." Riddell, J., further discussed the difference between estoppel and merger and overruled the objection.

295.—(2) A certificate shall not be granted while any action or proceeding in which the validity of the by-law is called in question, or by which it is sought to quash it, is pending, or until thirty days after the final passing of the by-law, unless notice of the application shall be given in such manner and to such persons, if any, as the Board may direct.

[Originally 8 Edw. VII. c. 51, s. 3, see the notes to 295 (1).

Alberta.—The Towns Act, s. 190 (2): the period is 2 months.

Saskatchewan.—The Cities Act s. 297 (2); the Towns Act 294 (2).]

295.—(3) *The Board may grant the certificate notwithstanding any irregularity in the proceedings prior to the final passing of the by-law or in the by-law itself.* [or where the by-law has been amended by the council to conform with the provisions of the Act under the authority of which it was passed, and] except in the case provided for by s. 291, [the burden on the ratepayers is not increased by the amending by-law] *if in the opinion of the Board the provisions of the Act under the authority of which the by-law was assumed to be passed have been substantially complied with.*

[Originally 8 Edw. VII. c. 51, s. 4.

The words in brackets were first added in 1909 (9 Edw. VII. c. 76, s. 1), and redrafted in 1913. See notes to s.-s. 1.

Alberta.—The Towns Act, 191, corresponds to the part in italics.

Manitoba.—The certificate may issue when the Commissioner is "satisfied that all the provisions of the Act and any amendments thereof, relating to the passage of money by-laws, have been substantially complied with.

Saskatchewan.—The Cities Act, s. 298; the Towns Act, s. 295.

New Brunswick and Nova Scotia.—S. 16 (N.B.), and 19 (N.S.) are to the same effect.

"Notwithstanding [any defect] or irregularity."

The words in brackets appear in the Saskatchewan City Act.

Haultain, C.J., held, in Canadian Agency Limited v. Tanner, 24 W. L. R. 71 (1913), that neglect to submit to the burgesses was a defect "in substance in the proceedings prior to the passing of the by-law." He said (p. 78): "'Defect' has been defined as 'the fact of being wanting, or falling short, lack or absence of something essential to completeness': new English Dictionary; Tate v. Latham, [1897] 1 Q. B. 555, 66 L. J. Q. B. 351." He held the defect to be cured by the certificate.

"The discretion granted . . . is absolute" per Haultain, C.J., in Canadian Agency Ltd. v. Tanner, 24 W. L. R. 71 (1913), at p. 78.

See Molison v. Woodlands, p. 465, infra.

295. (3*a*). In the case of a by-law for raising money for any of the works, or purposes mentioned in ss. 89 and 94 of *The Public Health Act,* the Board may, upon the presentation of a certificate of the Provincial Board of Health approving the said works, grant a certificate approving the by-law, notwithstanding that the certificate of approval by the Provincial Board of Health was not obtained prior to the passing of the by-law, or that the by-law does not contain a recital of such approval. This sub-section shall be deemed to have been in force since 24th March, 1911.

Added by 4 Geo. V. c. 33, s. 8.

295.—(4) Every by-law approved by the Board and the debentures issued or which may thereafter be issued in substantial conformity with its provisions, shall be valid and binding upon the corporation and upon the property liable for the rate imposed by or under the authority of the by-law, and the validity of the by-law and of every such debenture shall not thereafter be open to question in any Court.

[Originally 8 Edw. VII. c. 51, s. 5. See the notes to 295 (1).

"And the Debentures."—If the debentures are in substantial compliance with the provisions of the by-law so approved are also validated. The debentures may also be certified under s. 295 (5) infra.

Alberta.—The Towns Act, s. 192, omits the word "substantial."

Saskatchewan.—The Cities Act, s. 299. The Towns Act, s. 296.

Other Provinces.—See notes to 295 (5) infra.
See Harper v. Flamborough, p. 461, supra, and the cases noted under the following sub-section.

"The Validity shall not be Open to Question in any Court."

"I do not know of any rule of construction which would limit the meaning of (these words). Here we have a by-law dealing with a subject within the jurisdiction of the council, and an alleged substantial defect, which as I have already stated (see p. 463, supra), is in my opinion, cured by the certificate of the minister. The whole object of the sections providing for that certificate would be lost if, in spite of the clearest and widest language to the contrary, the validity of the by-laws we are discussing could be open to question in this or any other court. The object of this legislation was to put municipal stock and debentures upon a stable basis, and thus to enable municipalities to go into the money markets of the world with unquestionable securities. This, in my opinion, has been accomplished in the present case," per Haultain, C.J., in Canadian Agency Ltd. v. Tanner (1913), 24 W. L. R. 71 at pp. 78 and 80, 6 Sask. 152. See the cases noted under s. 295 (5) infra.]

295.—(5) Where a by-law has been approved the Board may also approve the debentures issued or which may thereafter be issued under the authority of the by-law, and every debenture so approved shall be valid and binding upon the corporation and upon the property liable for the rate imposed by or under the authority of the by-law and the validity of any debenture so approved shall not be open to question in any Court. 8 Edw. VII. c. 51, s. 6.

[Originally 8 Edw. VII. c. 51, s. 6. See notes to 295 (1).
The debentures may be valid under the provisions of 295 (4), *supra*, q. v.

Alberta.—The Towns Act, s. 193, while more comprehensive in its language, is to the same effect and gives the powers to the Deputy Minister. (See 1913, 2 Sess. c. 22, s. 10). See notes to s. 295.

Manitoba.—Upon the by-law being certified under the provisions of s. 400 and upon presentation of the certificate to the Municipal Commis-

sion within 6 months thereafter of the debentures issued in pursuance of the by-law, he shall place the following certificate on the back of each of the debentures, "I certify that the within debenture is valid and binding" upon the municipality of (giving name of municipality) and sign the same and affix the seal of his office thereto, [s. 400 (2)]. Such certificate shall be conclusive evidence that [all the formalities in respect to the by-law and the issue of the debentures have been complied with and the legality of the issue of such debentures shall be thereby conclusively established, and its validity shall not be questioned in any court but the same shall be a good and indefeasible security as against the municipality in the hands of any bona fide holder thereof] for value, and such consent shall validate any irregularity in the proceedings leading up thereto, [s. 400 (3)].

New Brunswick and Nova Scotia.—By ss. 15 and 18 respectively every debenture so issued and bearing said certificate shall be valid and binding on the municipality issuing the same and its validity shall not be open to question in any court. The debentures alone are certified, there being no by-law required. See p. 461, and notes to 295 (1).

Saskatchewan.—The Cities Act, s. 300; the Towns Act, s. 297.

A section almost identical with the words of the Manitoba s. 400 (3) appearing in brackets was considered in Molison v. Woodlands (1915), 30 W. L. R. 634; 32 W. L. R. 452, 25 M. R. 634. In this case an action was brought for a declaration that a certain school district was not legally in existence, from which it would follow that debentures issued by the district were worthless. This was changed at the trial into an application for a declaration that although the district was legally formed for the purpose of sustaining the validity of its debenture issue, and although the debentures had become a charge upon the district to the extent of its revenues, it had otherwise no legal existence. Prior to the action the loan had been assented to by the Department of Education under the provisions of s. 219 (*g*) of the Public Schools Act, R. S. M. 1913, c. 165, and the debentures signed by the Provincial Secretary and the Great Seal of the Province affixed thereto, which provides that such signature and the affixing of the seal "shall be conclusive evidence that such corporation has been legally formed," and then proceeds in almost identical language within set out in s. 400 (2) of the Manitoba Act, supra, placed in brackets. Mathers, C.J.K.B., said at p. 639: "It would be impossible to use more comprehensive language. It was manifestly the intention of the legislature that no matter what defects or irregularities existed in the formation of the School District, once a loan was approved by the Department of Education and the debentures were signed by the Provincial Secretary and sealed with the Great Seal of the Province, they would thereafter constitute an indefeasible security in the hands of an innocent purchaser."

And the same judge said at p. 640: "It is contended that this sub-section at most only operates to cure defects and irregu-

larities in so far as the debentures issued and sold are in the hands of a bona fide holder. The bona fides of the holder of these debentures is not questioned. Even if such a contention be well founded, for the purpose of supporting the debentures at least, the signature of the Provincial Secretary is 'conclusive evidence' that the . . . district 'has been legally formed . . . '" The plaintiffs' action was dismissed with costs.

This judgment was sustained on appeal. Richards, J.A., said (26 M. R. 647), after quoting the first portion of 219 (*g*), "Because of further provisions in the sub-section, that the validity of the issue of the debentures shall not thereafter be questioned, it is argued that the above-quoted provision, as to the signature and seal being conclusive evidence of the corporation having been legally formed, is one that can only be invoked by bona fide holders of the debentures. There is nothing in the language used that necessarily so limits the effect; on the contrary, the wording is very broad. It would have extraordinary and worse than useless results as to the very school district in question, if we were to hold that while the debentures were a lien on the district yet in fact no such district exists. It would also very materially injure the financial credit of the school districts of the province. I cannot see how evidence, however strong, of previous defects in the creation of the corporation can be admitted as against proof of the signature and seal which are to be 'conclusive evidence' of that which such first mentioned evidence is produced to impeach."

Cameron, J.A. (p. 651), said: "The word ('conclusive') is used generally, absolutely, without qualification. In my judgment it means 'conclusive as against the world.' Then such signature and affixing of the seal is evidence as against the world that such a corporation as that purporting to issue the debentures 'has been formed' . . . And defects in the organization of corporations under a general law may be cured by subsequent recognition of the existence of the corporation, Cyc. X. 241. There can be entertained no doubt, I think, of the power of the Legislature to pass such legislation and thus create a corporation, either directly, by express enactment, or, indirectly, whether by recognation in an enactment, or by authorizing such recognition through some defined instrumentality, such as the Executive Government of the province or a member thereof. This last method, it is true, may seem to be an awkward way of attaining the result aimed at, but there can be no doubt that it can be done adequately and conclusively, and it seems to me that that is the effect of the words of the sub-section now under consideration. I have read and considered the cases to which plaintiff's counsel referred us upon his

contention that the action of the minister in signing, and affixing the seal of the province to, the debentures, could not create a corporation that had no pre-existence. The Ontario decisions cited mainly proceeded upon the ground that there was to be found in the proceedings "a fundamental error which vitiates all proceedings based on the assumption that a valid corporation had been called into existence.' Per Boyd, C., in Trustees, etc. v. Arthur, 1890, 21 O. R. 60. But the Ontario cases refer to statutory provisions curing defects in a by-law by virtue of registration after the lapse of a certain period without proceedings being taken to quash and other provisions of a similar character. [See notes to s. 296]. The English case of Wenlock v. Dee, 38 Ch. D. 534, refers to the effect of the certificate of certain government officials which it was held did validate a mortgage upon a company for a greater amount than it had statutory power to borrow, which certificate was made 'conclusive evidence,' but only as to the specific matters set out in the Act, p. 540. But here the authority given by the statute before us is exercised by the Crown through the action of a minister of the Executive Council in placing his signature upon the debentures and affixing thereto the Great Seal of the province. It is an act of the Executive Government of the province, which has been appointed an instrument to recognize and thus call into existence a school district proposed to be formed, but not formed, in accordance with the Act. There is no question of the authority of the Legislature to delegate such power. And I think there can be no doubt that such power has been in this case validly executed. I adopt the view expressed by Haultain, C.J., in Canadian Agency v. Tanner, 1913, 6 Sask. at p. 161." . . . [See p. 464].

As to the effect of Registration see s. 296 and notes and further as to the applicability of the decisions under that section see Canadian Agency v. Tanner, 1913, 24 W. L. R. 71, at p. 79, per Haultain, C.J., "A number of Ontario decisions were cited to me on this point: Alexander v. Township of Howard, 1887, 14 O. R. 22; Clark v. Township of Howard, 16 A. R. 72; Confederation Life v. Township of Howard, 25 O. R. 197; Sutherland v. Township of Romney, 1897, 26 A. R. 495; 30 S. C. R. 495; Village of Georgetown v. Stimson, 1892, 23 O. R. 33. [See these cases and others noted at p. 472, infra]. In connection with these authorities, reference was made to ss. 185 (*d*), 193 and 204 of the City Act. Owing to the substantial difference between the provisions of the Ontario and Saskatchewan statutory law, these cases do not lend very much assistance to the present discussion. The last case cited, Village of Georgetown v.

Stimson, is most in point: and, if the reasoning in that case is correct, it applies *a fortiori* in the present case."

295.—(6) The certificate may be in the following form:

"In pursuance of *The Municipal Act, 1913,* the Ontario Railway and Municipal Board hereby certifies that the within by-law (*or debenture*) is valid and binding, and that its validity is not open to be questioned in any Court on any ground whatever.

Dated *Chairman."*

(Seal.)

[Originally 8 Edw. VII. c. 51, s. 7. See notes to 295 (1) *supra.*

Alberta.—The Towns Act, s. 190 (3).

Manitoba.—S. 400 (2) and see notes to 295 (5).

New Brunswick and Nova Scotia.—Ss. 14 and 17 respectively.

Saskatchewan.—The Cities Act, s. 297 (3); the Towns Act, s. 294 (3).

Registration of Money By-laws.

296. — (1) Within four weeks after the passing of a money by-law the clerk shall register a duplicate original or a copy of it certified under his hand and the seal of the corporation, in the case of a county, in the registry division in which the county town is situate, and, in the case of a local municipality, in the registry division in which it is situate, or if the municipality comprises parts of two or more registry divisions in either of them.

[Originally 44 V. c. 24, s. 28, recently s. 396 (1). Section 396 (1) was expressly made subject to the provisions of s. 398, excepting by-laws for the issue of debentures under the Municipal Drainage Act or the Local Improvement Act. See now s.-s. (4) infra to the same effect.

Money By-law.—These words were new in 1913, replacing the words "every by-law passed by any municipality for contracting any debt, by the issue of debentures for a longer term than 1 year and for levying rates for the payment of such debts on the rateable property of the municipality or any part thereof."

R. S. O. c. 124, s. 23 (5), provides that a By-law book is to be kept to record money by-laws; the entry is to contain the registration number of every money by-law, the number of the by-law and its title, the name of the municipality, the amount of the debt, the rate of interest and the period for which the debentures are to run: where the rates are to be levied on part only of the rateable property in the municipality that fact shall be stated.

S. 23 (6). No entry in respect of the by-law shall be made in the General Register.

S. 70 (4) A money by-law . . . shall be authenticated for registration by the production of a duplicate original or a copy of the by-law certified under the seal of the corporation and the signature of the head thereof, or of the person presiding at the meeting at which the by-law has been passed and that of the clerk of the corporation.

S. 70 (5). The by-law or copy so certified shall be open to public inspection and examination at all reasonable times and hours upon payment of the proper fees. [The provisions formerly appeared in s. 396 (3) and (4).]

By s. 47 (1) every instrument which may be registered . . . shall be registered upon and by delivery to and deposit with the Registrar of the instrument or a duplicate or other original part thereof with all necessary affidavits.

See Siemens v. Dirks (1913), 23 M. R. 581.

By s. 4 of the Municipal Act, "Where registration in a registry office is prescribed or provided for by this Act, it shall mean, where the Land Titles Act is applicable, registration in the office of the Master or Local Master of Titles of the locality in which the land is situate."

See s. 281 (2) and notes.

British Columbia.—Sec. 174 as amended by 5 Geo. V. c. 46, s. 27, provides for the registration of the by-law in the office of the County Court for the district in which the municipality is situate by depositing with the Registrar a true copy of the by-law, written or printed and certified by the clerk of the municipality and under the seal of the municipality, and that such by-law shall take effect and come into force and be binding on all persons as from the date of such registration, or if any subsequent date is by such by-law fixed for the coming into force thereof then at such subsequent date.

Quebec.—Art. 5889 requires copies of all debenture by-laws to be sent to the registrar of the county or registration division in which such municipal corporation is situated, a duly certified copy of such by-law, together with a return shewing the nature and object of the same, the amounts to be borrowed under it, the number of debentures to be issued under it, etc. See also, Art. 5894.]

In Sweeny v. Smiths Falls, 1895, 22 A. R. 429, a by-law was attacked on a number of grounds and the defendants relied on the facts that the by-law had been registered. Osler, J.A., in giving the judgment of the Court of Appeal quashing the by-law, after calling attention to the fact that the by-law was not registered within the time prescribed by the statute, said:

> "It is not necessary to decide whether . . . a valid registration would cure anything more than a defect in form or substance so far as the by-law ordained prescribed or directed anything within the proper competence of the council to ordain, prescribe or direct, leaving a jurisdictional defect, open to attack, or whether the party might obtain such relief by way of action to restrain the enforcement of the rate as could be granted without quashing or setting aside the by-law. In the case at bar, there was, in my opinion, no valid registration. If the municipality desire to get the benefit of the stringent provisions of the Act they should at least be careful to observe the conditions on which only they can do so."

And he distinguished Re Farlinger and Morrisburgh, 1889, 16 O. R. 722, pointing out that it merely decided that non-registration within the time limited did not ipso facto render it invalid.

The by-law under consideration in Sweeny v. Smiths Falls was amended to correct a clerical error by a later by-law, and the two were registered together, the latter being registered within the statutory period, and the municipality claimed that the registration of the later by-law validated the earlier one, but this contention was rejected on the ground that the later by-law was dependent upon and a mere amendment of the former, and by itself had no operation, and therefore, the registration of the amending by-law could not help the original by-law.

296.—(2) A clerk who neglects to perform within the prescribed period the duty imposed upon him by subsection 1 shall incur a penalty of $200, recoverable by action, and, in default of payment, shall be liable to imprisonment for such period not exceeding twelve months, as the Court may direct.

[See notes to s.-s. (1) immediately *supra*. Recently s. 396 (6) — originally added by 60 V. c. 45, s. 47—redrafted in 1913.

"Recoverable by Action."—These words replace the words "to be recovered by prosecution in the name of the Attorney-General for Ontario in any court of competent jurisdiction."

S. 498 (infra), would seem not to apply to this section.

See the Summary Convictions Act, R. S. O. 1914, c. 90.

Quebec.—Art. 5899 is identical.]

296. — (3) Notice, Form 24, of the registration of every such by-law, except a by-law which has received the assent of the electors, or a by-law mentioned in subsection 4, shall immediately after its registration be published at least once a week for three successive weeks.

[Originally 44 V. c. 24, s. 28, part, and s. 29. Recently s. 397.

"Except a By-law which has received the Assent of the Electors."—See ss. 289 and 290 and notes.

"Or a By-law Mentioned in s.-s. 4."—Municipal Drainage By-laws or Local Improvement By-laws. The registration of these by-laws is not obligatory (s.-s. 4), but permissible. See notes to s.-s. 4.

"Published at Least Once a Week for 3 Successive Weeks."—By s. 397 the publication was to be in some public newspaper published in the municipality—the county town or in an adjoining local municipality as the council might by resolution direct.

By s. 2 (o) published means published in a newspaper in the municipality to which what is published relates, or which it affects, or if there is no newspaper published in the municipality, in a newspaper published in an adjacent or neighbouring municipality; and "publication" shall have a corresponding meaning.]

FORM 24.

NOTICE OF REGISTRATION OF BY-LAW.

Notice is hereby given that a by-law was passed by the of on the day of 19 , providing for the issue of debentures to the amount of $, for the purpose of , and that such by-law was registered in the registry office of the county of on the day of 19 . Any motion to quash or set aside the same or any part

thereof must be made within three months after the first publication of this notice, and cannot be made thereafter.

Dated the day of 19 .

Clerk.

Formerly 397 (2).

3 & 4 Geo. V. c. 43, Form 24.

296.—(4) It shall not be obligatory to register a by-law for the issue of debentures, passed under *The Municipal Drainage Act,* or under *The Local Improvement Act.*

[Recently s. 398, originally 44 V. c. 24, s. 28.
S. 398 permitted registration at the option of the municipality. S.-s. 8 contemplates registration. It would seem to be permissible.
The Municipal Drainage Act, R. S. O. 1914, c. 198. The Local Improvement Act, R. S. O. 1914. c. 193.]

296. — (5) Every by-law registered in accordance with the provisions of sub-section 1, or *before the sale (or other disposition of the debentures issued under it)*, and the debentures shall be valid and binding [A.], according to the terms thereof, and the by-law shall not be quashed [B.], unless within one month after the registration in the case of by-laws to which sub-section 4 applies, and in the case of other by-laws, within three months after the registration or where publication of the notice provided for by sub-section 3 is required within three months after the first publication of the notice, an application or action to quash the by-law is made to or brought in a Court of competent jurisdiction, and a certificate under the hand of the proper officer of the Court and its seal, stating that such application has been made or action brought is registered in such registry office within such period of three months, [or one month, as the case may be].

[The words in brackets were added by 5 Geo. V. c. 34, s. 19, to cure the evident ambiguity. The section was recently 399 (1) originally 44 Vic. c. 24, s. 28.
The words in italics except those in brackets were first added in 1897; (60 V. c. 45, s. 7 (2). Those in brackets were first added by s. 339 (1), had at [A.] the words "upon the municipality" and at [B.] the words "or set aside on any ground whatever."

[*Note.—S. 400, providing that local improvement by-laws which have been registered shall not be quashed, unless a motion is made within one month after registering, struck out, as being covered by new s. 296 (5). S. 401, providing for registration of certificate of application to quash, struck out, as covered by s. 296 (5).*]

Shall be Valid and Binding.

Validation of by-laws and debentures. See the note at the end of this section, and the notes to ss. 281 (2); 282 to 286 both inclusive; 295, and 315.

Illegal by-laws are not validated. See s.-s. (7) infra—added by 55 Vic. c. 42, s. 352 (6) 1892.

In Re Village of Georgetown v. Stimson, 23 O. R. 33 (1892) a by-law, *passed before s.-s.* (7) *was added,* was considered. All the formalities required by the Act were observed, the purpose was within the jurisdiction of the council but the requirements of s. 386 (now 288 (4)), as to the equality of the amount to be raised in each year had not been complied with. The by-law had received the assent of the electors and had been duly registered. It was held upon an application to quash made within 3 months after the publication of the notice (a special case being stated) that the defect was cured by the registration and by-law and debentures were valid and binding upon the municipality. [See the reference to this case in Canadian Agency v. Tanner, referred to in the notes to sec. 295, p. 467, supra.]

In Sutherland-Innes Co. v. Township of Romney, 26 O. A. R. 495 (1898), Ferguson, J., said, at p. 500: "These enactments seem very strongly to show that a by-law so registered and not attacked and the certificate registered within the time prescribed is valid and binding even although the by-law is one that the municipality had not proper power to pass."

The by-laws in question were duly registered and the certificate that the action to quash was pending was dated and registered more than three months after the later of the registrations of these two by-laws.

Ferguson, J., held that this was a fatal objection to the plaintiffs' action, but also held the by-laws were intra vires. This judgment was affirmed in general terms by the Court of Appeal, and the reasoning of Ferguson, J., adopted, per Lister, J.A., at page 503. Upon appeal to the Supreme Court of Canada, 30 S. C. R. 495 (1900), the Court held that one of the by-laws was ultra vires and set it aside. The question dealt with above was not apparently raised and no mention is made of it in the judgment of the Court, except that Gwynne, J., in giving directions as to the form of the judgment, directed a declaration that the registration of the by-law was ineffectual and void and had imposed no lien upon the lands in respect of the assessments in the said by-law assumed to be imposed.

Commenting upon this decision, in 1900, Biggar said (p. 419), "Notwithstanding this dictum, it would seem better to hold that

since the passing of s.-s. 6 (now 7) the validating effect of this section is restricted to defects (other than jurisdictional defects), not apparent on the face of the by-law (or, if so apparent, not excluded by the language of s.-s. 6 (now 7)—e.g., failure to comply with any of the formalities required by sec. 338 (now 263), or the omission or inaccuracy of recitals prescribed by sec. 384 (10), etc. (now 288 (1)). He referred to Bickford v. Town of Chatham, 14 A. R. 32 (1886), per Hagarty, C.J.O., at p. 36, and s.c. 16 S. C. R. 235 (1888), per Sir Wm. Ritchie, at p. 263, and Strong, J., at pp. 264-5.

Biggar only had before him the decision of Ferguson, J. His reasoning was apparently given effect to by the Supreme Court in the Township of Romney case.

The decision is explained in Ottawa Electric Light Co. v. Corporation of Ottawa, 12 O. L. R. 290, at p. 302 (1906). Meredith, J.A., said: "It seems to have been held by a higher Court (see Sutherland-Innes Co. v. Romney (Twp.), 30 S. C. R. 495, and the same case (26 A. R. 495), that the saving effect of s. 399 (now 296 (5)), does not apply to a by-law which is ultra vires of the corporation; and unless the section be restricted to the protection of bona fide purchasers of the debentures, that is a conclusion not very hard to be reached, but it would have been more satisfactory if the reasons for the conclusion had been given and the fact that the similar s. 377 (now 281) expressly excepts such by-laws, whilst this does not, adverted to."

Garrow, J.A.. says, p. 300: "I am of the opinion that the whole scheme outlined in these by-laws is ultra vires, and all three by-laws should be set aside, unless the defendants' objection that the plaintiffs' failure to register a certificate of lis pendens as required by s. 399 of the . . . Act should prevail. There is no dispute about the facts. The action was commenced in time, but no certificate was registered; and the debentures were disposed of, although under rather peculiar circumstances and in great and unexplained haste. The by-law under which the debentures issued is on its face quite regular and within the powers of the defendants. It was passed before the complementary by-law for the purchase of power, which has been before fully referred to, and a bona fide holder of the debentures would probably not be affected by the subsequent acts of the defendants in relation to the latter subject matter. Considerations such as these induce me to the conclusion that the proper course now is not to quash (the) by-law, and to declare that our refusal to do so is to be without prejudice to any further proceedings if it can be made to appear that the debentures are still within the control of the defendants."

And per Moss C.J.O., at p. 296: "It was duly registered . . . the action was commenced on July 21st, but no certificate under the hand and seal of the Clerk of the Court stating that the action had been brought was registered within the period of three months from the registration of the by-law, as required by s. 399. The by-law is therefore protected from attack in this action by virtue of s. 399, unless, as is contended, there was no jurisdiction to pass it."

It should be observed, in considering the above statements of the law, that it was argued in Ottawa, etc., Co. v. Ottawa, supra, that the registration of the certificate of *lis pendens* is for the protection of the purchasers of the debentures, and that it would be futile to register one where the action as in that case, was commenced after the sale of the debentures. See the cases cited in the argument.

Conclusion.—The rule as indicated by Biggar, p. 472, supra, would seem to be the correct one.

"An application or action to quash the by-law is made to [or brought in] a Court of competent jurisdiction."

Per Ferguson, J., 26 O. A. R. 495—"The certificate of *lis pendens*, if I may call it by that name,"—Osler, J.A., calls it a "certificate lis pendens." —12 O. L. R. 300.

Fundamental Jurisdictional Defect. By-law Duly Registered. Publication of Notice Regularly Made. No Application or Action within Three Months.—The foregoing conditions existed in Sutherland Innis p. Romney, 1898, 26 A. R. 495; 30 S. C. R. 495; the Supreme Court delivered a judgment, declaring that the registration of the by-law was ineffectual and void.

Sutherland Innis v. Romney was followed in Warwick v. Brooke, 1901, 2 O. L. R. 433, and in Re Rochester and Mersea, 1901, 2 O. L. R. 435, C.A., both of which were decided by the Court of Appeal, but it does not appear from the reports whether or not the by-laws were registered.

In Ottawa Electric Light v. Ottawa, 1905, 12 O. L. R. 290, C. A., a by-law was registered duly but action was commenced within the three months, although no certificate of lis pendens was registered as required by sub-sec. 5. The debentures authorized by the by-law were, while the action was pending, disposed of under rather peculiar circumstances and in great and unexplained haste. Garrow, J.A., with whom Moss, C.J.O., and Osler, J.A., agreed, said:

> "The by-law under which the debentures issued is on its face quite regular and within the powers of the defendants . . . and a bona fide of the debentures would probably not be affected by the subsequent acts of the defendants (i.e., the passing of two other by-laws). Considerations such as these induce me to the conclusion that the proper course now is not to quash the by-law and to declare that our refusal to do so is to be without prejudice in any further proceedings if it can be made to appear that the debentures are still within the control of the defendants."

And Meredith, J.A., said:

> "It seems to have been held by a higher court (see Sutherland Innis v. Romney, 1900, 30 S. C. R. 495), that the saving effect of sec. 399 of the Municipal Act does not apply to a by-law which is ultra

vires of the corporation; and unless the section be restricted to the protection of bona fide purchasers of the debentures that is a conclusion not very hard to be reached."

Invalid Debenture Sold Directly by Corporation to Plaintiff.—In Confederation Life v. Howard, 1894, 25 O. R. 197, debentures were sold which did not on their face state the purpose for which they were issued, but did refer to the by-law under which they were issued. The by-law disclosed purposes for which the council had no power to pass such a by-law. It was held that there was no estoppel and that the plaintiffs could not recover on the debenture, but that they could recover on their alternative claim for money received by the defendant to the plaintiffs' use.

Recovery of Ultra Vires—It Lies upon the Party Buying Debentures to Ascertain all Facts Essential to Their Validity.—Athenæum Life Insurance Co. v. Pooley, 28 L. J. Ch. 119.

Particular Provisions of Money By-law Apparently Contrary to Statute when Considered Separately, but Valid when Read with Other Provisions.—In Re Cameron and East Nissouri, 1856, 13 U. C. Q. B. 190, Draper, J., refused to quash a by-law which provided that the reeve might issue debentures for sums from time to time as required not to exceed a certain authorized total, overruling the complaint that this made it uncertain what sum was to be borrowed. A subsequent clause made it plain that the reeve was to borrow the whole amount authorized, and merely had a discretion as to when from time to time successive amounts should be borrowed.

Another objection to the by-law, which was overruled, was, that while the preamble stated that the annual rate of two and half d. in the pound was necessary, the exacting clause which imposed that rate did not say that it was an annual rate, holding that the by-law in fact did impose an annual rate. The Court laid down the rule of construction that where upon a consideration of the whole by-law and by construing one part with another or other parts, it is possible to give effect to the whole this must be done, and that every reasonable help of construction must be applied in aid of the by-law, and that it ought not to be presumed that a municipal council is trying to evade a statute under which it is acting.

Money By-law Authorizing an Uncertain Debt and Giving Disposition of Funds to Certain Persons without Supervision.—In re Hawke and Wellesley, 1856, 13 U. C. Q. B. 631, a by-law authorized the sale of the township hall by auction and directed that the proceeds should be applied to the building of a new hall, and further provided that any money required over and above the proceeds of the sale should be levied on the rateable property of the municipality, and the by-law further appointed commissioners to draw plans for and to superintend the erection of the building, and gave them authority to draw on the treasurer for the amounts required. The Court held that the sale of the old hall was authorized, but the rest of the by-law was held illegal, on the following grounds: (1) They did not fix the amount to be raised and levied. (2) They put no limit on the cost of the building. (3) They did not fix a rate on the pound to be levied. (4) It authorized a debt and a rate to be levied without the recitals and provisos required by the statute. (5) It authorized named persons to draw on the treasurer for unlimited amounts.

Where Statutory Authority Authorizes the Raising of a Loan not Exceeding a Specified Amount, as May be Necessary to Carry out Works therein Specified, and a By-law is Passed Authorizing the Borrowing of the Whole Amount without Containing Any Positive Statement that the Sum is Necessary for the Authorized Purposes, the By-law will be Quashed.—In ex parte Hayes v. Toronto, 1856, 7 U. C. C. P. 255, Hagarty, J., in dealing with the foregoing situation said:

"The absence of any averment in the by-law from which its necessity under the statute can be fairly inferred is as strong an objection to its legality as an untrue statement of a necessity to raise a named sum when a much smaller sum would suffice. . . . Should such an objec-

tion pass the examination of a Court of Justice, I should fear we would be establishing a vicious precedent for the loosest municipal legislation. Powers conferred by the legislature on corporate bodies to raise if necessary enormous sums of money for specific objects and to create a suitable mortgage of the strictest kind on the whole property, real and personal of the ratepayers, ought I conceive to be exercised with reasonable precision."

Failure to Register Money By-law within Time Limit Specified in Statutes.—In re Farlinger and Morrisburgh, 1889, 16 O. R. 722, the then Act provided that every by-law creating a debt "shall be registered" within two weeks. A by-law was passed but was not registered. Street, J., dismissed a motion to quash on the ground that the by-law was invalid because not registered, saying:

> "The by-law has been passed by a council having jurisdiction to pass it, and all the conditions entitling them to pass it have been performed; their power to pass it has not been improperly exercised, and the by-law itself is in substantial compliance with the provisions of the Act. This being the case, I do not think it would be proper to declare it invalid under a section of the Act which does not declare that a non-compliance with its provisions shall have that effect, and I prefer to treat the section as merely directory."

Estoppel of Corporation from Setting up the Defence of Illegality in the Issue of a Debenture Against a Holder for Value.—In Webb v. Commissioners of Heron Bay, 1870, L. R. Q. B. 642; 39 L. J. Q. B. 221, debentures otherwise valid were improperly issued to one of the commissioners who was prohibited by statute from contracting with the commissioners in any way, and debentures were consequently sold to the purchaser for value. The Queen's Bench Division applied the principle laid down in Pickard v. Sears, 6 Ad. & E. 469; Freeman v. Cooke, 2 Ex. Rep. 654, and in Re Bahia and San Francisco, L. R. 3 Q. B. 584; 37 L. J. Q. B. 176, holding that the commissioners were precluded as against any person who had really bona fide acted upon the representations made on the face of the debentures and was a transferee from denying the accuracy of the statements made in the debenture. Lush, J., referring to the provisions of the Act, said:

> "The effect of those sections is, I think, to make those mortgages negotiable securities and to attach to them the incidents of negotiable securities, one of which is, that innocent holders of value, as it is admitted the plaintiffs are, require a title of their own unaffected by any infirmity to which the title of their assignor might have been subject."

The Court in Confederation Life v. Howard, 1894, 25 O. R. 197, distinguished the foregoing case.

Alberta.—Towns Act, ss. 225, 226 and 188 contain provisions similar to those in the Saskatchewan Acts below.

Quebec.—Art. 5623 permits any municipal elector in his own name to petition the Superior Court or a Judge thereof to quash any by-law (or a part thereof, Art. 5624), on the ground of illegality. Such application must be served on the council 4 clear days before it is presented to the court, Art. 5626. The right to petition must be exercised within three months of the coming into force of the by-law, Art. 5634.

Saskatchewan.—By the Cities Act, s. 284 (Towns Act, s. 281), any elector of the town may within 2 months after the passing apply to a Judge on motion to quash the same in whole or in part for illegality upon 7 clear days' notice. By s. 282, in case no application is made within the two months the by-law shall be valid and binding notwithstanding any want of substance or form therein or in the proceedings prior thereto or in the time or manner of the passing thereof. By s. 305 all debentures issued under a by-law which has received the consent of the electors and no successful motion to quash which has been made within such two months, are validated.]

296.—(6) After the expiration of the period prescribed by sec. 5, if no application or action to quash the

by-law is made or brought, the by by-law shall be valid and binding according to its terms. 5 Geo. V. c. 34, s. 19 (2).

[This section was first added by 5 Geo. V. c. 34, s. 19 (2).

"Shall be Valid and Binding."—See the notes to s.-s. 5, *supra.*]

296.—6 (*a*) If an application or action to quash the by-law is made or brought within the period prescribed by sub-section 5, but part only of the by-law is sought to be quashed, the remainder of it, if no application or action to quash it is made or brought within that period, shall, after the expiration of that period be valid and binding according to its terms.

[Added by 5 Geo. V. c. 34, s. 19 (2).

"Valid and Binding."—See the notes to s.-s. 5, *supra.*]

296.—6 (*b*) If the application or action is dismissed in whole or in part a certificate of the dismissal may be registered, and [after such dismissal and] the expiration of the period prescribed by sub-section 5, [if it has not already expired] the by-law, or so much of it as not quashed, shall be valid and binding according to its terms.

[This section passed in 1915 (5 Geo. V. c. 34, s. 19 (2)), replaced former s. 399 (3) originally 44 Vic. c. 24, s. 28. The words in brackets are new.

See the notes to 296 (1) *supra.*]

296.—(7) Nothing in this section shall make valid a by-law, which requires, but has not received, the assent of the electors, or a by-law where it appears on the face of it that any of the provisions of sub-sections 2, 3, 4 and 6 of section 288 have not been substantially complied with.

[Recently 399 (6). For the history and effect of this sub-section see notes to s. 296 (5) *supra.*]

296.—(8) Failure to register a by-law [or to publish notice of the registration of a by-law] as prescribed by this section shall not invalidate it.

[The words in brackets were added by 5 Geo. V. c. 34, s. 19 (3). The section was new in 1913. See the notes to 296 (1) *supra.*]

The legislature has in this sub-section adopted the rule laid down in Re Farlinger and Morrisburgh, 1889, 16 O. R. 722, as explained in Sweeny v. Smith's Falls, 1895, 22 A. R. 429; see notes to sub-sec. 1.

PART XIII.

Yearly Rates and Estimates.

297.—(1) Subject to sub-section 13 of section 397, [the council of every municipality shall in each year assess and levy on the whole rateable property within the municipality, a sum sufficient to pay all [A] debts of the corporation, whether of principal or interest, falling due within the year], but shall not assess and levy in any year more than [B] two and a half cents in the dollar on the assessed value of such property according to the last revised assessment roll, exclusive of school and local improvement rates.

[Recently s. 402 (1). Originally 12 V. c. 81, s. 177, [the words in brackets]: later 22 V. c. 99, s. 221. A 2-cent limit was imposed by 29-30 V. c. 51, s. 225 (1866), which exempted school rates: 60 V. c. 15, Sched. A. (68), excepted local improvement rates (1897). Section 402 (1) had at [A] the word "valid," and [B] the words "an aggregate."

Two and a half cents.—Until 1917 the limit was two cents—the change was made by the Municipal Amendment Act, 1917, s. 4. By s. 397 (13) the limit is not to include bonuses to railways; the annual rate is not, however, to exceed three cents. See s.-s. 2 and the remarks at p. 480, *post*.]

Rates and Rating.—In Vienna v. Roszkosz (1904), 6 Terr. L. R. 51, Scott, J., said, at p. 53, "The fixing of the rate of taxation for the year is one of the more important acts of the board . . . ." and these words apply with equal force to the duties cast upon municipal councils by this and the following sections of this part.

The principles to be followed have been clearly defined more than once. "It is said, and truly said, that the policy of the Act is to require the expenditure of each year to be borne by the taxation of that year. This is true, not only of school sections, but in respect to the whole municipal government; . . ." per Middleton, J., in Re Athens High School Board and Township of Rear of Yonge and Escott (1913), 29 O. L. R. 360, at p. 361. It is a general principle of rating law that as far as possible the ratepayers of one year shall not be called upon to discharge obli-

gations which ought to have been met by the ratepayers of a preceding year." Per Cozens-Hardy, M.R., in Croydon v. Croydon (1908), 77 L. J. Ch. 800, at p. 807.

The Estimates.—The council is to prepare the estimate called for by s. 298—as to which, see the notes at p. 496, *post.* It receives also the estimates from the various Boards of School Trustees under the Acts next referred to.

Estimates of the School Boards.—The School Board's estimates are referred to at p. 486, *post.*

The Assessment.—The council is next to consider and determine the whole sum to be raised "sufficient to pay all debts of the corporation." See the remarks of Lord Esher, M.R., in Mogg v. Clark (1885), 16 Q. B. D. 79, at p. 82.

These debts include the amount required to be levied in any year for the sinking fund. See s. 288 (3)-(5). Wilkie v. Clinton (Village), 18 Gr. 557 (1871); Clarke v. Palmerston (Town), 6 O. R. 616 (1883); the amounts required to be raised by bonuses to railways or subscription for shares under s. 397 (13), *infra,* etc.

The rate is to be assessed and levied by by-law. See s. 298 (2) and notes. Reference may be made to the case of Vienna v. Roszkosz, [1904] 6 Terr. L. R. 51, at p. 53, where Scott, J., said: "The fixing of the rate of taxation for the year is one of the more important acts of the board, and it appears to me that, in order to render it valid, some record of it should have been made. I doubt whether a mere verbal understanding arrived at by all the members of the board, that a certain rate should be struck, even if it were arrived at during a regular or special meeting duly held, would be sufficient in the absence of any such record."

Without statutory authorization a municipal council may not hold meetings for the transaction of any administrative, legislative or judicial business of the municipal corporation at a place outside of the territorial boundaries of the municipality, and a by-law levying a rate and authorizing the collection of taxes is illegal and of no effect if passed at such an outside point. Anderson v. Municipality of South Vancouver (1911), 20 W. L. R. 434.

Statutes giving taxing powers are to be strictly construed: Minto v. Morrice (1912), 21 W. L. R. 255, 2 W. W. R. 374; McCutcheon v. Minitonas (1912), 20 W. L. R. 729; O'Brien v. Cogswell (1890), 17 S. C. R. 424, and each step taken to impose taxes must be in conformity with the statutory powers given for such purposes: Anderson v. South Vancouver (1911), 20 W. L. R. 434, 1 W. W. R. 728; Goodison v. McNab

(Township) (1909), 19 O. L. R. 188, 214; Barton v. Hamilton (City) (1908), 11 O. W. R. 1118, 1131; Re Hodgins and Toronto (1909), 1 O. W. N. 31, 32.

In Dugas v. McFarlane (Yuk. 1911), 18 W. L. R. 701, it was held that the making of estimates for the city of Dawson by the Yukon Territorial Council, which had no statutory functions in that regard, was illegal and void; that the making of estimates for the expenditure of the city of Dawson and settling the same six months before the assessment roll was made up, was illegal and void; that the failure to observe the requirements of the statutes and by-laws in regard to preparing a rate-book, having the same submitted to the city clerk, as provided by statute, and reported to the Commissioner as also provided by statute, and a rate struck, was fatal to the roll.

The repeal of an enactment to enable a municipal corporation to levy a tax by by-law abrogates *ipso facto* any by-law passed in the exercise of the power conferred; and sums paid under such a by-law, after the repeal of the enabling Act, may be recovered by action against the corporation: Royal Insurance Co. v. Montreal (1906), 29 Que. S. C. 161.

A town cannot exceed the limit set to the taxing power conferred on it by its special Act of incorporation. The right given it therein to make by-laws, as provided by the Towns Corporation Act (Que.) and the Municipal Code, is subject to the restriction above. A by-law passed by the town under the general Acts which involves taxation beyond the limit prescribed in the special Act is, therefore, null and void: McGuire v. Waterloo (1906), 29 Que. S. C. 189.

See also Colquhoun v. Driscoll (1894), 10 M. R. 254.

The Rate.—The rate is to be sufficient to raise a sum sufficient to pay *all* debts due within the year, but must not be more than two and one-half cents in the dollar. In estimating the two and one-half cents, however, the amount levied for school and local improvement is excluded, and a bonus may be granted or shares subscribed for under s. 397 (13), so long as the rate does not exceed three cents in the dollar. If the aggregate rate must exceed two and one-half cents the further amount must be levied, but no further debt may be contracted until the annual rate is reduced to two and one-half cents: s. 297 (2).

Retrospective Rates.—The section refers to "debts falling due within the year." The question frequently arises: "What about debts remaining over from a previous year?" They should

be paid out of the moneys levied for the year in which the debts fell due: see the language of Middleton, J., in Re Athens High School (1913), 29 O. L. R. 360, quoted on p. 478, *ante*, to which, however, he adds, . . . "but it would scarcely be thought that the failure to levy adequate rates would constitute a defence to a municipality if sued by its creditors.

This question of "prospective" and "retrospective" rates has received considerable attention from the Courts in England, and has been before the Canadian Courts more than once. The question arises when the rates for the year fall short of raising the amount required. The estimate should make due allowance for costs of collection, abatement of taxes and non-collection.

It should be observed that in the estimates provided for by the various school Acts set out at p. 486, no such allowance is provided for, and it was held in Re Therriault and Town of Cochrane (1914), 30 O. L. R. 367, that the town council had no right to add to the amount requisitioned by the Separate School Board a sum sufficient to cover the contingency of part of the rates not being collectible: see the remarks of Meredith, C.J., quoted at p. 488.

If the amount collected in any year falls short of the amount required the deficiency may be made up from any unappropriated fund, or, if there be no such fund, the deficiency may be deducted from the sums estimated or any of them: see s. 299 (1).

If no such deduction is made and the debts are carried forward into the succeeding year, the only provisions the statute makes for them are the following:—In the case of a county council by borrowing under s. 290, or by borrowing or issuing debentures under s. 483 (11), or by by-law passed with the assent of the electors as provided in s. 289.

The council is expressly forbidden to incur any debt the payment of which is not provided for in the estimates for the current year—s. 289—except in the manner provided for by that section.

It has been laid down that no corporation created by statute and given statutory borrowing powers may exceed those powers: Re Companies Acts, Ex parte Watson (1888), 21 Q. B. D. 301; Baroness Wenlock v. River Dee (1885), 54 L. J. Q. B. 577 (1888), 57 L. J. Ch. 946, and where a council is expressly forbidden to incur a debt—as in s. 289—the same cases are authority for holding it to be *ultra vires* the council to incur it and that the incurring of such a debt can not be subsequently validated and adopted afterwards. And see C. P. R. v. Township of Chatham (1895),

22 A. R. 330. Certain English statutes permit retrospective rating up to six months, and it has been held that retrospective rates to cover debts not within such limit are void:- Smith v. Southampton, 71 L. J. K. B. 639 (1902). A limitation of the borrowing power to a certain amount excludes the implication of any greater power: Wenlock v. River Dee (1885), 54 L. J. Q. B. 577; Reg. v. Reed (1880), 49 L. J. Q. B. 600. A borrowing power given for a specific purpose does not permit the use of the money so borrowed for general purposes: A.-G. v. West Ham Corporation (1910), 2 Ch. 560.

But it has been held that retrospective rates are not illegal.

Cozens-Hardy, M.R., after using the language referred to at p. 479, *ante,* in the case of Croydon v. Croydon (1908), 77 L. J. Ch. 800 (C.A.), goes on to say, . . . "In the language of Abinger, C.B., in Woods v. Reed, 6 L. J. M. C. 105, 107, 'the general inconvenience of retrospective rates has long been known and recognized in the Courts of law on the ground that succeeding inhabitants cannot legitimately be made to pay for services of which their predecessors had the benefit.' But this principle, which is an absolute rule of law, cannot be strictly adhered to in all circumstances. Some margin must be allowed. For example, the public body may honestly dispute the existence or the amount of the alleged debt, and although the creditor may promptly commence an action judgment may not be recovered for a long time."

Reference should be made to Reg. v. Locke (1911), 1 K. B. 680, 80 L. J. K. B. 358; A.-G. v. Tottenham M. D. C. (1909), 73 J. P. 437, and A.-G. v. De Winton (1906), 2 Ch. 106.

The following recent cases deserve consideration:

The case of Re Athens High School Board and Township of Rear of Yonge and Escott (1913), 29 O. L. R. 360.

A High School Board, acting under s. 24 of the Act: requisitioned among other sums, $916.20, the deficit from last school year." The council refused to levy this amount and an application was made for a mandamus to compel the levy. The extra expense was occasioned by the fact that the number of pupils was greater than had been foreseen, and it had been necessary to employ an extra teacher. The municipality argued that as the Board's expenditure had exceeded the estimate there was no provision in the Municipal Act by which the Board could compel a levy for the excess. Middleton, J., after laying down the general principles set out at pp. 478 & 481, *ante,* referred to the case of Re Toronto Public School Board and City of Toronto (1901), 2 O. L. R. 727, and particularly the judgment of

Meredith, C.J., at p. 751. He then discussed the following cases:—A.-G. v. Corporation of Lichfield (1848), 17 L. J. Ch. 472, where an injunction to restrain the levying of a rate which included a balance with respect to expenditure during the previous year was refused: see the judgment of Cottenham, L.C.: Jones v. Johnson (1850), 5 Ex. 862, per Pollock, C.B. In Haynes v. Copeland (1868), 18 U. C. C. P. 150, Sir Adam Wilson, and said, at p. 364, "I realize the difficulty in applying this law, in view of the wording of the statute in question here; yet I think it is applicable. Where there is no deliberate intention on the part of the Board to postpone the payment of debts incurred one year to the next, but the obligation arises by reason of the insufficient estimate, and money has had to be borrowed to pay the necessary expenses for maintaining the school, that money may, I think, be regarded during the next year as a sum required for the maintenance of the school for the ensuing twelve months; as if it is not obtained on requisition to the municipal council, it cannot be obtained at all, and the creditor could sue and take in execution the school property, without which the school cannot be maintained or continued. Totally different considerations would arise if there was any room for supposing that there had been any deliberate attempt on the part of the Board to shift the burden of taxation from one year to the other, or if the contract had been a contract void upon its face as being a contract to incur liability in one year payable in another. Had it not been for the decision in the Toronto case, I would have thought that the legislature had intended the Board alone to determine the amount to be levied, and that, in the absence of bad faith, the municipal council had no right to criticize the demands made; but I am precluded from acting upon that view by the decision in question. The mandamus will . . . go . . ."

Middleton, J., also said, at p. 362: . . . "it would scarcely be thought that a failure to levy adequate rates would constitute a defence to the municipality if sued by its creditors."

In County of Frontenac v. City of Kingston (1869), 20 C. P. 49, 30 U. C. R. 584 (1871), Wilson, J., discussed at length this question of retrospective rates and suggested that it is the duty of the lenders to the municipality to see to the levy each year of the rates in which they are interested. In this case it was laid down that the fact that it was possible that no rate might legally be imposed to collect a debt was no ground for refusing the plaintiff judgment in an action to recover such debt. And see the same case, 32 U. C. R. 348 (1872).

The Council is Compellable to Levy the Rate.—Section 302 (8) *post,* provides a penalty for failure to levy for the sinking fund. A mandamus will lie to compel the levy of the rate: Re Athens High School Board and Township of Rear of Yonge and Escott (1913), 29 O. L. R. 360, where the application was made by the High School Board. In Clarke v. Town of Palmerston (1883), 6 O. R. 616, the application was made by the holder of a municipal debenture, and a mandamus went ordering the levying of a rate sufficient to pay the amount of the debt in which he was interested.

See Hart v. Halifax (1902), 35 N. S. R. 1.

In Quebec, mandamus lies to compel the corporation, but not the treasurer, . . . to deposit in an incorporated bank or the hands of the Provincial Treasurer, appropriations in hand, but not those of previous years diverted to other uses, to the credit of interest and sinking funds on loans made in virtue of by-laws, passed under the provisions of 56 V. c. 52, ss. 374-6, 380 and 412. Where appropriations for payment of interest and sinking funds for previous years had been collected from the taxpayers and diverted and no money remained in the treasury to pay except the current year's interest and sinking funds—as the city had exceeded the limit of its borrowing powers—to order the city to pay the previous year's interest would be to suspend its function of municipal government; and the petitioner's demand was granted for the current year's appropriation only: Trudel v. Hull (1903), 24 Que. S. C. 285. An occupant—not an elector—paying municipal taxes, may obtain such relief: *Ib.*

As to the conditions imposed by s. 334 of the Montreal City Charter, see Laren v. Lapointe (1909), 36 Que. S. C. 249, 42 S. C. R. 521, 30 C. L. T. 175.

In Whelihan v. Hunter (1903), 2 O. W. R. 20, the plaintiffs sued on behalf of themselves and all ratepayers of the town of St. M. The action was brought against the town and the members of the finance, fire, water and light committees of the Council for 1902. They asked for a declaration that a certain item in the report of the finance committee, which it was alleged was introduced into the estimates for the purpose of building a certain water-main, was a valid debt of the corporation which they were bound to provide for during the current year, and for an injunction restraining them from making any payment upon the contract for the water-main in question on the ground that there was no valid or subsisting contract for the work, there having been no by-law authorizing it until after the action was begun

Falconbridge, C.J., held that in view of ss. 402 (now 297) and 435 (now 319), it was doubtful if the debt was a valid debt of the corporation, and that this doubt was sufficient reason for dismissing the action since the holders of the note given for the liability were not parties. And see the same case as to costs.

Mandamus to Levy Sinking Fund.—Failure to levy a rate for a sinking fund is a breach of duty upon which the right arises to have it corrected, and a corporation will be compelled by a mandamus at the suit of a debenture holder or a ratepayer suing on behalf of himself and all others of his class to raise the sinking fund for a current year, but the mandamus cannot direct the levy of a rate for future years nor to provide arrears: Clarke v. Palmerston, 1883, 6 O. R. 616.

An Injunction will lie to Prevent the Levy of an Illegal Rate.—Generally a Court of Equity should not grant an injunction to restrain the action of the taxing power, except where it may be necessary to protect the rights of the citizen whose property is taxed and he has no remedy by the ordinary process of law: Per Mathers, J., in Dominion Express Co. v. Brandon (City) (1909), 19 M. R. 257, in which he distinguished Central Vermont Ry. v. St. Johns, 14 S. C. R. 288 (1887). An injunction was refused as another adequate remedy existed, namely, to pay the tax under protest and sue to recover it: C. P. R. v. Cornwallis (1890), 7 M. R. 1, applied.

The Levy.—Levy means to collect: See per Meredith, C.J.O., in Re Therriault and Town of Cochrane (1914), 30 O. L. R. 367, at pp. 371-2. The machinery is provided by the Assessment Act, R. S. O. 1914, c. 195.

Certain township debentures authorized for the purpose of raising a sum to bonus a railway were duly executed but remained unissued in the possession and under the control of the municipality. It was held in an action for an injunction to restrain the levy of the rate, that until the debentures were sold or negotiated there was no debt on the part of the township, and that the special rate by which they were to be met was not leviable, though the time fixed for payment of some of the debentures had passed. Judgment of the Court below (1900), 32 O. R. 135, 20 C. L. T. 384, reversed: Bogart v. King (1901), 1 O. L. R. 496, 21 C. L. T. 229.

Exclusive of School and Local Improvement Rates.

School Rates.—By the Public Schools Act, R. S. O. 1914, c. 266, s. 73 (O.), it is the duty of the Board of Trustees to submit to the municipal council, on or before the first day of August, or at such time as may be required by the council, an estimate for the current year of the expenses of the schools in their charge. The council of each local municipality is required by s. 47 (1) to levy and collect upon the taxable property of the public school supporters, in the manner required by the Act and the Municpial Act and Assessment Act, such sums as may be required by the Board for school purposes and pay the same to the treasurer of the Board as required from time to time by the Board. An annual account and payment is required by s. 47 (2). The council is also authorized to raise, by assessment, in addition to the sums required by the Board, such other sums as it may deem expedient for the establishment and maintenance of a school library or for aiding new or weak schools, or continuation schools or fifth classes within such municipality [see R. S. O. c. 267, s. 3 (8)], or for supplementing teachers' salaries or retiring allowances. Section 47 (5) provides for correction of errors in collection of rates for preceding years. Section 92 provides for a county rate in aid of schools, and s. 93 for a township grant.

The School Board's Estimates.—In Toronto School Board v. City of Toronto (1901), 2 O. L. R. 727, (1902) 4 O. L. R. 468 (C.A.), Osler, J.A., said, at p. 473: "To summarize, the right of the School Board in preparing their estimate is to include therein everything that, in their best judgment, may be needed to meet legitimate expenditure—that is to say, expenditure upon objects or for purposes within their lawful authority; and their duty to the council is to prepare it in such a manner as to show generally what these purposes are and what is required in respect of each. The right and duty of the council is to examine the estimate so far as to ascertain that it is for purposes *intra vires* the School Board. If an item or class of items is clearly for a purpose for which the Board is not authorized by law to expend money, it is the right and duty of the council to reject it. But beyond this, in my opinion, the council cannot go. I refer to Canadian Pacific R. W. Co. v. City of Winnipeg (1900), S. C. R. 558, and to Public School Trustees of Nottawasaga v. Corporation of Township of Nottawasaga (1888), 15 A. R. 310."

See the notes of these decisions at p. 453, *ante,* in the notes to s. 289 (2) (*j*), and also the argument in this case and Board of Education of City of London v. Corporation of City of London (1901), 1 O. L. R. 284.

Fixing the School Rate.—Municipal valuation rolls are the basis upon which school commissioners should determine the rate of taxation for school purposes. It is only where there is no municipal valuation roll or that it is prepared too late for school purposes, that school commissioners are empowered to prepare one of their own. School commissioners have no authority to amend a municipal tax roll. If changes are made in the municipal tax roll the school commissioners should be notified of them, otherwise they are justified in assuming the municipal tax roll is correct and in fixing the school rates accordingly: Legare v. Wolfe Township School Commissioners (1914), 20 R. de J. 287. And see Dionne v. Grantham (1914), 46 Que. S. C. 349, as to the nullity of the valuation roll.

See Art. 5746, cited p. 490, *post.*

The High Schools Act, R. S. O. 1914, c. 268, s. 24 (*h*), requires the Board to apply before August first for such sums as they may require from the proper council for maintenance of the school for the twelve months next following the date of the application, and s. 37 provides that the council shall levy and collect such amounts.

The Separate Schools Act, R. S. O. c. 270, provides two plans for school support.

By s. 67 (1) it may impose and levy school rates and collect school rates and subscriptions upon and from persons sending children to or subscribing to the support of such schools, and may appoint collectors for collecting the school rates and subscriptions, who shall have all powers in respect thereof possessed by collectors of taxes in municipalities.

By s. 45 (*f*) where no collector is appointed, the Board may apply to the proper municipal council before August first for the levying and collection of all sums for the support of their schools to be collected from separate school supporters.

By s. 70 (1) the municipal council, if so requested by the Board, shall cause to be levied upon the taxable property liable to pay the same, all sums for rates or taxes imposed thereon in respect of separate schools.

It has been held that s. 70 does not give the council power to impose the rates: Re Therriault v. Cochrane (Town of) (1914),

30 O. L. R. 367. Meredith, C.J.O., said, p. 371: "The scheme of the Act seems to be that the Board itself shall impose the rates; and, having imposed them, it has two courses open to it for the collection of them: either, as provided by s. 67 (1), to collect them by its own collector, or as provided by s. 70 (1), to require the council to collect them by its collectors and other municipal officers." And at p. 370 he said: "All that the corporation is bound to do is to pay over the rates and taxes, as and when collected, to the School Board, not later than the 14th December, and, if it should turn out that a part of them was then unpaid, owing to the inability of the collectors to collect it, any resulting loss or inconvenience would be borne by the School Board and the separate school supporters, and not by the corporation." See the remarks of the same Judge in this case at p. 372, in which he contrasts this system with that provided by the Public Schools Act.

Local Improvement Rates.—Riddell, J., in Re Hodgins and City of Toronto (1909), 1 O. W. N. 31, 14 O. W. N. 642, speaking of local improvement rates, said:—"This is called a local improvement, and it is now law that a municipality may, in certain instances, compel owners of property on the side of a public street to pay for the asphalting of the street, upon the theory that they are the persons benefited thereby. While it is notorious that many such owners contend that they are not in the least benefited, or not more than the rest of the community, and that they are therefore made to pay for the advantage of the general public, the Court has no concern with the propriety or advisability of the legislation, but must take the law as the Court finds it."

See the provisions of the Local Improvement Act, R. S. O. 1914, c. 193.

In Re Hodgins and City of Toronto (1909), 1 O. W. N. 31, 14 O. W. N. 642, a by-law assessing rates for local improvements was quashed *pro tanto* on the ground that the provisions of s. 671 had not been observed.

Alberta.—The Towns Act, s. 294, provides that the council is to fix by by-law and levy on all lands assessed upon the last revised assessment roll such rate or rates as shall be sufficient to pay all debts of the town falling due within the year and the estimated expenditures of all town school districts transmitted by each board of trustees under the provisions of s. 268, making due allowance for the cost of collection and for the abatement and losses which may occur in the collection thereof.

Section 294 provides for a levy by the town where, at the time of the erection of a village into a town, no assessment has been made for village purposes.

Section 294 (3) provides that in the case of a town school district the rate of taxation on unsubdivided farm lands situated outside the town limits shall not exceed 8 mills on the dollar.

Section 294 (4) permits a uniform frontage tax of an amount not exceeding 10 cents per foot, to be assessed, levied and collected along with and as part of the ordinary municipal taxes and forming a lien upon the lands affected in the same way—and see s. 204 (*b*) and (*c*).

Section 298 adds the words, "but if any portion of the amount in excess has been collected on account of a special tax upon any particular locality the amount in excess collected on account of such special tax shall be appropriated to the special local object for which it was so collected."

Section 268 requires the Board of Trustees of every town school district to transmit to the treasurer of the town before August 1st (*a*) a map or plan showing the area or boundaries of such district, (*b*) the estimated expenditure of the district for the year, and (*c*) a certified copy of a resolution of the Board of Trustees fixing the amount for which the school district is liable for school purposes.

Section 268 (*a*) makes it the duty of the council to pay to the school district on demand the amounts required from time to time for school purposes, provided the total demanded does not exceed the total estimate transmitted by the Board under the provisions of s. 268.

By the Villages Act, s. 112, and the Rural Municipalities Act, s. 293, the council is empowered to authorize the treasurer—by resolution—to levy, making due allowance for non-payment. In villages the rate is not to exceed 20 mills: s. 113; in rural municipalities, by s. 294, the uniform rate is not to exceed 1 per cent. of the assessed value of the land in the municipality, as shown be the last revised assessment roll, together with the amount required to pay the debenture coupons, if any, and the hail insurance. In villages where the tax on a lot would be less than 50 cents, that amount is made a minimum and the rate may be raised by the amount necessary to pay any water supply rental.

Section 296 of the Rural Municipalities Act contains provisions similar to the Towns Act, s. 268, and requires the School Board to make its demands before March 1st. By s. 308 the council is required to pay to the Board the amount of its total estimate in quarterly payments, commencing March 31st—any deficit is to be made up from the general fund.

British Columbia.—By s. 201 the council may, in each year, pass a by-law or by-laws for levying a rate or rates on all the land and improvements as assessed (provided that the rate on improvements shall not be levied on more, and may, in the discretion of the council, be no less than 50 per cent. of the assessed value thereof, or such improvements may be exempted altogether), to provide for all sums which may be required for the lawful purposes of the municipality for such year:

Provided that the rate so levied shall not exceed one and one-half cents on the dollar, in addition to what is required for Board of Health and hospital purposes and for school purposes, and for payment of interest and sinking fund on any debt of the municipality:

Provided further, that wild land may be taxed at a rate not to exceed five per cent. of its assessed value.

Section 202, as amended in 1915 by c. 46, s. 31, provides that "the council may, in every year, pass a by-law or by-laws for levying a special rate of not more than one mill on the dollar for Board of Health and hospital purposes."

By the Public Schools Amendment Act, 1913, c. 67, s. 8, s. 50 of R. S. B. C., 1911, contains similar provisions.

The Board is to prepare its estimates and lay them before the council before 1st February in each year, and the sums so required shall be paid over from time to time as required upon the order of the Board [s. 50 (1)]. Detailed estimates of the sums required to meet special or extraordinary expenses of the Board are also to be furnished, classified as required by s. 50 (2). If the council approves these latter estimates they are to pay the required sums over to the Board from time to time. If the council does not approve and within 30 days submit a by-law to the electors as to each class of estimates disapproved.

Manitoba.—By s. 416 the council of every municipality shall each year by by-law or by-laws, levy a rate or rates of so much in the dollar upon the assessed value of the property therein as the council deems sufficient to raise the sums required on the estimates provided for by

s. 415: see s. 298, *post*. Section 422 provides that in cities and towns the rate to be levied in any year, in addition to what is required for the payment of interest on outstanding debentures and the amount required for the sinking fund thereof and for school purposes and for the maintenance of the police force, shall not exceed the sum of one cent on the dollar.

Section 417 provides for the levy of a special rate upon portions of rural municipalities for improvements therein.

By the Manitoba Public Schools Act, R. S. M. 1913, c. 164, s. 118 (*h*), the School Board is (*h*) "to prepare from time to time, and lay before the municipal council of the city, town or village on or before the first day of August, a detailed estimate of the sums which are requisite for all necessary expenses of the schools under their charge, said estimate to show the amounts required respectively for (1) salaries, (2) sinking fund or debentures, (3) interest, (4) school buildings, (5) school sites, (6) furnishings and repairs, (7) transportation, (8) fuel, (9) sundry expenses not specified."

By s. 185. The clerk of every municipality shall, upon request and free of any charge, furnish the public school inspector and the person appointed by the Department to equalize the assessments of school districts, a statement of the several requisitions of the trustees for school moneys and a true statement of the area or number of acres and the assessed value of all properties in those parts of each union school district in the said municipality, giving separately the assessment of any rural part, and town or village part, and of personal property in each school district, and, where part of such land is in a drainage district and part is not in a drainage district, giving separately the area and assessed value of each such part, as shown by the revised assessment roll for that year. The said statement shall also show on what proportion of actual selling value the assessment is based in his municipality, both in regard to farm lands, village lands, village improvements and personal property.

By s. 186. For the purpose of supplementing the legislative grant, it shall be the duty of the council of each rural municipality to levy and collect each year, by assessment upon the taxable property within the municipality, a sum equal to twenty dollars for each month for which school has been kept open in each school district in the municipality during the current year; and for each school district partially included within the municipality, they shall levy and collect in like manner a proportionate part of twenty dollars per month as fixed in the manner hereinafter provided. A school district which employs more than one teacher shall receive said sum of twenty dollars per month for each teacher employed.

By s. 196. The municipal council of every city, town and village shall levy and collect upon the taxable property within the municipality, in the manner provided in this Act and in "The Municipal Act" and "The Assessment Act," such sums as may be required by the public school trustees for school purposes.

By s. 198. The taxable property in a municipality for school purposes shall include all property liable to municipal taxation, and also all property which has heretofore been or may hereafter be exempted by the municipal council from municipal taxation but not from school taxation. No municipal council shall have the right to exempt any property whatsoever from school taxation.

New Brunswick.—See the Rates and Taxes Act, C. S. N. B. c. 170, ss. 33, 35, 36, 37 and 80, 81 and 96.

Nova Scotia.—See R. S. N. S. c. 70, s. 131.

Quebec.—By Art. 5730 the council may impose and levy annually, on every immoveable in the municipality, a tax not exceeding 2 per cent. of the real value, as shown on the valuation roll.

Article 5746 provides that the council shall, on the requisition of the school commissioners or trustees of any school municipality situated within the municipality, accept the school assessment roll . . . and order the treasurer to collect such taxes, in the same manner and at the same time as municipal taxes.

Saskatchewan.—Sections 419 of the Cities Act and 405 of the Towns Act respectively, correspond to the part of s. 297 in brackets. Of the Villages Act, ss. 227 *et seq.* correspond to the provisions of the Alberta Villages Act quoted above. See also the Rural Municipality Act, R. S. S. c. 87, s. 294, and R. S. S. c. 89, ss. 107-109, 129-133 (school taxes) both inclusive. Reference should be made to the School Assessment Act of 1915, c. 24, ss. 13 *et seq.* Sections 424 (2) of the Cities Act and 410 (2) of the Towns Act correspond to s. 298 of the Alberta Towns Act quoted, *ante.*

Supplementary Notes on s. 297 (1)—Rate must be Imposed by By-law.—In Whelan v. Ryan, 1891, 20 S. C. R. 65, the plaintiff was the assignee of the purchaser of lands at a tax sale and Ryan was a mortgagee of the lands, and an issue was stated under the Real Property Act of Manitoba to determine the validity of the tax sale. The plaintiff's claim failed on the ground that the taxes had not been legally levied. The Act under which the rates were imposed provided that "the council shall in each year pass a by-law for levying a rate, etc." The rate was not levied by by-law, with the result that there was no legal rate, and that the imposition of the taxes was wholly illegal. This conclusion was reached notwithstanding a validating Act, which provided "all assessments made and rates heretofore struck by the municipality are hereby confirmed and declared valid and binding upon all persons and corporations affected thereby," on the ground that the validating Act must be restricted to defective proceedings in the nature of irregularities and that it could not be extended to give life to absolute nullities.

All Debts Falling Due Within the Year.—Section 297 provides that every municipality shall assess and levy a sum sufficient to pay all debts of the corporation falling due within the year. It frequently happens that owing to unforeseen circumstances a debt arises within a particular year which cannot be paid in that year because the estimates are not sufficient to yield the necessary money. Section 297 would seem to prevent the inclusion of such a debt in the sum authorized to be levied by s. 297.

A similar provision is found in the Public Schools Act, which requires school boards to submit estimates for the expenses of the schools for the current year to municipal councils, and requires the latter to levy and collect such sums. See the Public Schools Act, R. S. O. 1914, c. 266, s. 73 (o): In re Toronto School Board and City of Toronto, 1901, 2 O. L. R. 727; 4 O. L. R. 468, a board included in their estimates certain sums which were not expenses of the schools for the current year, which were a part of the expenses of a previous year deliberately withheld by the school board from their estimates of the previous year. Street, J., thought that the municipality was right in refusing to levy a sum necessary to enable the board to pay the debts contracted in the previous year, and Meredith, C.J., in delivering the judgment of the Divisional Court, said:—

> "My learned brother Street decided that these payments do not form part of the expenses of the schools under the charge of the Board for the current year, and should not therefore have been included in the estimate; and with that view I agree. The Act makes no express provision for cases which must sometimes occur, where it has become necessary, owing to too small an estimate having been made to cover the necessary expenses of the year, to incur liabilities beyond the amount provided for in the estimate of the year; and I desire to leave open, as far as I am concerned, until it comes up for decision, the question whether in such circumstances the Act may not be so construed as to justify the amount of the over-expenditure being treated as an expense of the following year, at all events where the payment has been made in that year; but, as far as the present case is concerned, I do not see how the Act can be interpreted so as to bring the expenditure in question within its terms."

The point was not discussed by the Court of Appeal in 4 O. L. R.

The question came up again before Middleton, J., in Re Athens High School Board and Young and Escott, 1913, 29 O. L. R. 360, where the School Board in its requisition inserted an item "deficit from last school year dollars one nine and six and twenty cents." The municipal council refused to levy this amount, and the School Board moved for a mandamus to

compel the corporation to levy and collect the amount. The deficit arose from the fact that the number of pupils was greater than had been foreseen and it became necessary to appoint an additional teacher. There was no suggestion of bad faith. The fault of the Board, if any, was that it did not make an adequate allowance for unforeseen contingencies. Middleton, J., in granting a mandamus considering the question open notwithstanding Toronto Public School Board and Toronto, said:—

> "It would be a most serious reflection upon the legislation if . . . the ratepayers could be relieved from paying for services incurred on their behalf by their duly elected representatives; and it would be equally unfortunate if the failure of the Board to demand a sum sufficient to cover the necessary outgoings, is to impose personal liability upon the members of the Board.
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> "It is said, and truly said, that the policy of the Act is to require the expenditure of each year to be borne by the taxation of that year. This is true not only of school sections, but in respect to the whole municipal government; but it would scarcely be thought that the failure to levy adequate rates would constitute a defence to a municipality if sued by its creditors . . .
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> "A series of cases which appear to me to throw much light upon this problem was not cited in the Toronto case. While it is true that these cases by reason of the difference of legislation, may not be strictly conclusive, yet the principle indicated seems to govern.
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> "In Attorney-General v. Lichfield, 1848, 17 L. J. Ch. 472, the Court refused an injunction to restrain the levying of the rate which included a balance with respect to expenditure during the previous year. The learned Lord Chancellor (Cottenham) points out:—
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> "'If then it should turn out that the money raised by the rate was not applicable to antecedent debts, the corporate fund, so far as it existed, must be applied in payment of antecedent demands, and the money raised by the rate would be applicable to the demands of the year. In cases where corporate property existed, it would be a very idle case to discuss the question. The result would be the same, and there would only be a different mode of keeping the accounts.'"

Not More Than Two Cents in the Dollar.—In Wilkie v. Clinton, 1871, 18 Gr. 557, an injunction was granted at the suit of a ratepayer to restrain the erection of a market house on the ground that its erection would involve the levying of a rate exceeding the then statutory limit of two cents in the dollar.

Shall Not Levy in any Year More Than Two Cents in the Dollar.—In Hill v. Crediton U. D. C. 1898, 78 L. T. 351 D. C.; 80 L. T. 861 C. A., the D. C. held that a rate which exceeded the statutory limit of 3s. 6d. in a pound contrary to the provisions of a special Act, was bad. This finding was reversed by the Court of Appeal on the grounds that the council had power to levy the additional amount under another Act.

Exclusive of School Rates.—Foster v. Hintonburg, 1897, 28 O. R. 221, was an action for an injunction to restrain the corporation from proceeding to collect taxes imposed by it in a particular year, on the ground that the rate exceeded two cents on the dollar. The excess above two cents was due to a special levy under a by-law which authorized the issue of debentures to provide money for the purchase of a school site for the erection of a school house. In refusing the injunction McMahon, J., pointed out that under the by-law only one particular school section in the township was affected, and that there were a number of other school sections in the township, and further that if it were a township debt both the property of separate school supporters and public school supporters would be affected.

Local Improvement Rates.—Local improvement taxes are not in the nature of a payment by frontagers for works by which their property is benefited, but are in the strict sense of the term "municipal taxes" and an agreement granting total exemption from taxation includes exemption from local improvement taxes: Halifax v. Nova Scotia Car Works, 1914, A. C. 992; 84 L. J. P. C. 17.

Retrospective Rates.—Section 297 (1) casts a duty on every municipality in each year to levy a sum sufficient to pay "all debts of the corporation falling due within the year." There is no prohibition which expressly makes it illegal to levy sums to pay debts which fell due in previous years or for that matter making it illegal to levy a sum to provide for a debt which falls due in the following year. It may frequently happen, even after due care has been taken, that estimates will fall short or that persons may fail to pay their taxes or that particular taxes may become unproductive from some cause, with the result that notwithstanding the exercise of all good faith debts have to be carried over from a previous year and the question then arises whether under the provisions of s. 297 (1) and other provisions of the Act, a rate can legally be struck to provide sums to pay such debts.

In Harrison v. Stickney, 1847, 2 H. L. C. 107, the House of Lords had to consider the validity of a restrospective rate which had been imposed by a local authority. It was laid down that there is no rule of law which prohibits a restrospective rate. The power to levy such a rate depends upon the intention of the Legislature and the question is, whether the Act under which each rate is made does so expressly or impliedly. While a retrospective rate is not prohibited the general principle is that such a rate cannot lawfully be made, because as a general rule the ratepayers of each year ought to bear the expenses of the year and the ratepayers of a subsequent year (who may be different persons), ought not to be made liable in respect of that which should have been paid by their predecessors.

In R. v. Leigh, R. D. C., 1898, 2 A. C. 836, the defendants disputed an amount claimed by an urban district council for water supplied to the defendant, and also set up a cross-claim against the urban council in respect of another matter. Correspondence and negotiation took place over a considerable time, but ultimately the urban council brought an action and recovered a judgment for a balance of their debt above the defendants' counterclaim. The defendants refused to levy a rate to raise the amount, and the urban council applied for a mandamus. The Court of Appeal granted the mandamus holding that the rate would not be illegal as being retrospective and consequently repugnant to s. 230 of the Public Health Act, 1875, because not only was the judgment technically a fresh debt, but substantially it was only at the date of it that the real debt due was ascertained.

In Croydon v. Croydon, 1908, 2 Ch. 321, the defendants under agreement were to pay the plaintiffs annually a yearly rental for the privilege of connecting with the plaintiffs' sewers equal to sixpence in a pound on the rateable property in the defendants' district which was served by the connection. By a mistake the rent for a number of years demanded and paid was only the amount calculated on houses actually connected with the drainage system instead of an amount calculated on the rateable value agreed on. When the mistake was discovered the plaintiffs demanded the arrears, and brought action for the same and for a mandamus to compel the defendants to level a rate to pay the arrears. The defendants admitted the debt, but contended that a mandamus to enforce payment of a retrospective rate would be illegal as repugnant to the Public Health Act, 1875, s. 230. This contention was upheld by the Court of Appeal with respect to part of the debt, but with respect to the part which accrued in a later year and for which a demand had been made which might have been complied with in the year in which it was made, Kennedy, L.J., said:—

> "It is, I think, futile to try to draw any inference of general principle from the reported decisions as to the grant of mandamus in cases to which these sections of the Acts of 1848 and 1875 apply. All that can safely be deduced from the cases is that, on the one hand if no proceedings of any kind to enforce the claim for debt have been taken within six months after the debt has become ascertained and due, there must, even if a judgment be obtained, be some very special circumstances to justify the Court in granting a mandamus: see the decision in Burland v. Kingston-upon-Hull, L. B. 3 B. & S. 271; and on the other hand even although no action has been taken for six months after the accrual of the right of action yet if within six months after the judgment: see Worthington v. Hulton, L. R. 1 Q. B. 63—or even if the interval between the judgment and the application for mandamus had exceeded six months owing to an agreement between

the parties—R. v. Rotherham, L. B. 8 E. & B. 906—the Court might grant the mandamus to a plaintiff who was able to offer a reasonable explanation of his delay in taking and prosecuting legal proceedings.."

Smith v. Southampton, 1902, 2 K. B. 244, was a stated case upon appeal against a general district rate which included amounts to pay off certain debts which had been carried in a suspense account for a number of years. Section 210 of the Public Health Act of 1877, 1875, which authorized the making of a rate retrospectively in order to raise money for the payment of charges incurred at any time within six months of the making of the rate. The King's Bench Division held the rate illegal. It was contended that the amount to be raised was really to pay a debt due to the corporation's bankers, who had advanced the moneys necessary to pay the deficits from time to time, but Alverston, C.J., pointed out that if that argument were allowed to prevail it would only be necessary to borrow money from the bankers to pay the debts in order to defeat altogether the provisions of s. 210. It was also contended that it might be assumed that these debts would be paid out of the revenues of the corporation from its corporate property, and not out of the amount to be raised by the general rate; as to this it was pointed out that even if this were done the amount is increased, and therefore the debts are in reality paid out of the rate.

Rate to Provide for Illegal Borrowing.—In Smith v. Southampton, Alverston, C.J., said, referring to a rate to provide for illegal borrowing:—

"I was much impressed by the argument that in such a case the mere illegality of the borrowing might not be sufficient to justify an objection to the rate. I desire, however, to express no opinion on the point one way or the other."

Rating for Debts Past Due.—In Frontenac v. Kingston, 1870, 30 U. C. R. 584, the corporation neglected to levy annually certain sums required for the sinking fund. The conflict between the rights of creditors and the doctrine against rating for debts past due was considered.

In Elderslie v. Paisley, 1884, 8 O. R. 270, the defendants failed to recover judgment for the amount, notwithstanding that they could not levy to collect the money. The Court adopted with approval the rule laid down in Frontenac v. Kingston, as follows:—

"The defendants are by law liable to the demand now made . . . then why should not the plaintiffs obtain a judgment against them? The objection can only be because it may be said it may be of no use to the plaintiffs; they will not be able to enforce it; it would be illegal on the part of the defendants if they were to pay it. But the inability to make the judgment productive is no defence to the action, nor any reason why the judgment should not be obtained."

Relation of Estimates to Rate.—R. v. Worksop, L. B. 1857, 21 J. P. 451; R. v. Worksop, L. B. 1865, 5 B. & S. 951. In consequence of the last case, s. 218 of the Public Health Act, 1875, provided that the estimate "shall not be deemed part of the rate or in respect affect the validity of the same."

297.—(2) If the aggregate amount of the rates necessary for payment of the current annual expenditure of the corporation, and the principal and interest of such debts exceeds the rate mentioned in sub-section 1, the council shall assess and levy such further sum as may be necessary to discharge such debts, but shall not contract any further debt until the annual rates are reduced to that rate.

[Originally 29-30 V. c. 51, s. 225 (1866)—Recently 402 (2)—redrafted in 1913.

"**Current Annual Expenditure.**"—The section formerly had for the word "expenditure" the word "expenses." The effect would seem to be the same: See s. 289 (1) and notes, p. 435, *supra.*

"**Such Debts.**"—Section 402 (2) had for this phrase the words: "of the debts contracted by the municipality on or prior to the 29th day of March, 1873."

"**Such Further Sum.**"—These words were substituted in 1913 for the words "such further rate."
See the notes to the preceding sub-section, particularly at p. 492, *ante.*

Manitoba.—By s. 418, "if the amount collected fall short of the sums required the council may direct the deficiency to be made up from any unappropriated fund belonging to the municipality."]

298.—(1) The council of every [A] municipality shall, in each year, prepare estimates of all sums required for the purposes of the municipality during such year, making due allowance for the cost of collection, and for the abatement of taxes and for taxes which may not be collected.

[Recently s. 404, taken originally from the Assessment Act of 1853, 16 Vic. c. 182, s. 31.
Section 404 had at [A] the words "county and of every local."

The question of estimates under the various schools Acts is discussed in the notes to s. 297 (1) at pp. 486 & 488, *ante,* and see p. 453, *ante.*

Reference should also be made to the case of Whelihan v. Hunter (1903), 2 O. W. R. 20, noted at p. 484, *ante.*

An application was made in Re Cartwright and Town of Napanee (1910), 1 O. W. N. 502, to quash a rating by-law. The Court held that although the town's system was extremely crude and unbusinesslike (it had been discontinued), and there was a *bona fide* mistake in one or more of the estimates, as no one had suffered and the excess had gone into the general funds in accordance with the statute, the action should be dismissed. In this case the estimate and assessment for a particular sewer had not been properly "labelled," "so to speak," but the money was used to repay money belonging to that sewer "fund" or "account" which had been used for general purposes instead of borrowing money from the bank The system, the Court held, was irregular and improper, but there had been no "graft" or corruption, and neither the municipality nor the applicant nor any other ratepayer had been the loser by one cent.

Alberta.—The Towns Act, s. 292, does not provide for an allowance for collection or abatement, but requires an estimate to be made of probable expenditures, including temporary loans and debenture coupons due during the year. The Villages Act and Rural Municipalities Acts contain similar provisions.

British Columbia.—See s. 201, noted under s. 297, *ante.*

Manitoba.—Section 415.

Saskatchewan.—The Cities Act, ss. 420 and 422, adds the promotion of agriculture and support of a Board of Trade. By s. 330, before the rate is struck, the treasurer is to lay before the council a statement of the amount required for the sinking fund. The Towns Act, s. 406. Section 408 adds the entertainment of distinguished guests and travelling expenses. Section 312 corresponds to s. 330 of the Cities Act. Other provinces: see the notes to s. 297.]

Shall in Every Year Prepare Estimates.—Section 218 of the Public Health Act, 1875 (Imp.), provides that every urban authority before proceeding to make a general district rate shall cause an estimate to be prepared of the money required for the purposes in respect of which the rate is to be made showing the several sums required for each of such purposes, and the rateable value of the property assessable, and the amount of rate on the pound of such value necessary for those purposes, and further provides that the estimate so made after approval shall be kept open to public inspection, but the estimate "shall not be deemed part of the rate nor in any respect affect the validity of the same."

This last provision was added in consequence of the decision in R. v. Worksop, L. R. 1865, 5 B. & S. 951, in which Cockburn, C.J., said, after referring to the provisions above given for the making of an estimate, and the public inspection of it:

> "An estimate was in the present instance prepared and approved of . . . but some of the items appear to us to be open to objection as combining incongruous items in one lump sum in a manner inconsistent with the requirements of the Act and tend to conceal instead of conveying the information as to the local expenditure which it was intended that the ratepayers should have. . . . As respects the sixth and seventh items, viz.: 'Election expenses, filling in and covering old sewers and drains, and cleansing sewers and outfall, £65; law charges, surveyor's instruments and incidental expenses, £74. We think the ratepayers are entitled to know the amount of election expenses and law charges. We think election expenses and law charges should not be mixed up with expenses of a totally different character, and which do not in the smallest degree assist in the formation of a proximate conjecture as to their amount. A very serious difficulty presents itself as to what should be held to be the consequence of the defectiveness of the estimate as regards the validity of the rate. On the one hand it is contended that compliance with provisions of the section as regards the estimate is a condition precedent to the authority to make the rate; on the other hand it is said that the enactment is directory only and at most can only expose the local board to such proceedings as may be the consequence of disobedience to the directions of a statute."

The Court did not decide the question, but pronounced judgment against the rate on another ground, and shortly afterwards Parliament added the proviso found at the end of s. 218.

Estimates.—Former ss. 404 and 405 were as follows:—

> 404. The council . . . shall in every year make estimates of all sums which may be required for the lawful purposes of the . . . municipality for the year in which such sums are required to be levied . . . making due allowance for the cost of collection and of the abatement and losses which may occur in the collection of the tax and for taxes on the lands of non-residents which may not be collected.

405. The council . . . may pass one by-law or several by-laws authorizing the levying and colecting of a rate or rates of so much on the dollar upon the assessed value of the property therein as the council deems sufficient to raise the sums required on such estimates.

Holmes v. Goderich, 1902, 5 O. L. R. 33, D. C., decided under the foregoing sections, was a ratepayer's action against the town and the bank to restrain the discounting of a note for two thousand dollars to provide funds to pay law costs. The Divisional Court held that the corporation had exceeded its powers, saying:—

"The borrowing was objectionable on another ground. By s.-s. 3 of s. 345 (see 319), the powers conferred by the section 'shall not be exercised except for the purpose of meeting the ordinary expenditure of the municipality.' It is admitted that no provision was made in the estimate for the year 1901 for this sum of two thousand dollars. An outlay which was not contemplated when the estimates were prepared, and for which no provision either special or as a possible contingency was made in the estimates for the year, cannot possibly be deemed 'part of the ordinary expenditure' for the year without disarranging the whole financial scheme provided for by the estimates. An exceptional case might, of course, occur when some contingency which had not been provided for had been found to be unnecessary, but there is no suggestion of such a state of things here."

The Act does not contain a prohibition such as was found in former s. 435 (3), but by s. 319 temporary loans are only authorized to meet "the current ordinary expenditure of the corporation."

In re McLean and Cornwall, 1871, 31 U. C. R. 314, the Court of Queen's Bench quashed a by-law on several grounds, the first being "on the ground of the appropriation (a grant of money to the mayor), being a most extravagant and unreasonable one, and out of all proportion to the revenues of the town."

Duty of Treasurer as to Illegal Payments.—If an order is made on a county treasurer to pay expenses wholly disconnected with county matters, such an order is without jurisdiction and one which the treasurer would be bound to disobey: R. v. Williams, 3 B. & Ald. 215; R. v. Saunders, 1854, 24 L. J. M. C. 45; Atty.-Gen. v. De Winton, 1906, 2 Ch. 107.

298.—(2) One by-law or several by-laws for assessing and levying the rates may be passed as the council may deem expedient.

[Originally 16 Vict. c. 182, s. 31, recently 405.

See the notes to s.-s. (1) *supra.*

If the taxes imposed under the first by-law fall short for any of the causes mentioned at p. 491, *supra,* either of two courses may be adopted—(1) an additional rate or rates may be imposed by by-laws under this section, or (2) if s. 299 (1) applies a by-law may be passed under that section.

See notes to s. 297 (1) at p. 478, *ante.*

Alberta.—See the Towns Act, s. 295.

Manitoba.—Section 416 provides for several by-laws.

Saskatchewan.—The Cities Act, s. 421; the Towns Act, s. 407.]

299.—(1) Where the amount collected falls short of the sum required, the council may direct that the deficiency be made up from any unappropriated fund, or, if there is no such fund, the deficiency may be deducted [proportionately] from the sums estimated, or from any one or more of them.

[This section combines former ss. 406 and 407, which were originally taken from 16 Vic. c. 182, s. 31. The word in brackets was new in 1913.
See the notes to s. 297 (1), at p. 478, *ante*.

Alberta—The Towns Act, s. 296, corresponds to the first half of this section; s. 297 to the second half.

Manitoba.—Section 418 corresponds to the first half of this section; s. 419 to the second half.

Saskatchewan.—The Cities Act, s. 423; the Towns Act, s. 409.]

299.—(2). Where the amount collected exceeds the estimates, the surplus shall form part of the general funds, and shall be at the disposal of the council, unless otherwise specially appropriated.

[Recently part of s. 408, taken originally from 16 Vict. c. 182, s. 31 (1859).
See the notes to s. 297 (1). p. 478, *ante*.

Alberta.—The Towns Act, s. 298, corresponds to the first half of this section.

Manitoba.—Section 420—the first clause—corresponds.

Saskatchewan.—The Cities Act, s. 424, and the Towns Act, s. 410. By s. 424 (3) of the Cities Act and 410 (3) of the Towns Act, if any part of the excess has been collected for school purposes, or under a free library rate, the amount in excess shall be held to the credit of the proper school or library board.]

300. The rates imposed for any year shall be deemed to have been imposed and to be due on and from the 1st day of January of [such year] unless otherwise expressly provided by the [A] by-law by which they are imposed.

[Recently s. 409 taken from the Assessment Act of 1866 (29-30 V. c. 53, s. 18), which was passed after the decisions in Corbett v. Taylor (1864), 23 U. C. R. 454, and Bell v. McLean (1862), 9 Gr. 478.]

This section, until amended in 1913, had for the words in brackets the words "the then current year ending with the 31st day of December thereof," and at [A] the words "enactment or." "Imposed" substituted in 1913 for "directed to be levied."

"Deemed to have been imposed." The words "to be deemed to be" were considered in Mutchenbacker v. Dominion Bank (1911), 21 M. R. 320.

Alberta.—The Towns Act, s. 299.

British Columbia.—Section 235 corresponds to the former s., 409.

Saskatchewan.—The Cities Act, s. 425; the Towns Act, s. 411.]

RESPECTING FINANCES.

Accounts and Investments.

301. Every council shall keep a separate account of every debt, and shall also keep two additional accounts in respect thereof, one for the interest and the other for the sinking fund [or the instalments of principal], and both to be distinguished from all other accounts by a prefix designating the purpose for which the debt was contracted; and the accounts shall be kept so as to exhibit at all times the state of every debt, and the amount of money raised, obtained, and appropriated for payment of it.

[Recently s. 417, which was taken from 14-15 Vic. c. 109, s. 107. The words in brackets were added by 36 Vic. c. 48, s. 265 (1873).

"One for the Interest."—This phrase formerly (before 1913), read, "*one for the special rate.*" Since s. 288 (3) took on its present form a *specific sum* in each year is fixed by the by-law. Prior to 11th March, 1879, the by-law settled a *special rate* to be levied. [See the notes to ss. 304 and 312 (1).]

In a case decided in 1871 (Wilkie v. Village of Clinton, 1871, 18 Gr. 557), Spragge, V.C., said it was a "culpable neglect of duty" on the part of municipal officers not to comply with the directions of the section."

Two accounts should be kept of each debenture debt, namely: 1. The interest account, showing all moneys received and paid or payable on account of interest; 2. The sinking fund or principal account showing only all moneys received and paid or payable on account of principal.

The sections corresponding in the various provinces are usually identical in language to the sections in the Ontario Act before redrafting or amendment in 1913.

Alberta.—The Towns Act, s. 242.

[By s. 196 A, added by 6 Geo. V. c. 44, s. 35, the provisions of ss. 191 to 196 inclusive, shall be deemed to apply to all moneys which have been or which shall be raised to provide for debts incurred by the municipality where sinking funds are required to be raised under the by-law authorizing such debt, whether such debts have been or are incurred under this Act, or under The Local Improvement Act.]

302.—(1) If, in any year, after paying the interest, and appropriating the necessary sum to the sinking fund, or in payment of the instalments, there is a surplus properly applicable to such debt, it shall so remain until required in due course for the payment of interest or for the sinking fund, or in payment of the principal.

Recently s. 418 (1), taken from 22 Vic. c. 99, s. 227 (1858). The words in brackets were added by 36 Vic. c. 48, s. 266 (1873).

Manitoba.—Section 444.

New Brunswick.—See the notes to s. 305 (1).

Nova Scotia.—By s. 9 (3) of The Municipal Debentures Act, the bank or trust company with which the sinking fund is deposited must keep it in a separate account.

Saskatchewan.—The Cities Act, s. 326, and The Towns Act, s. 308.

Alberta.—The Towns Act, s. 243, is identical with the old s. 418 (1).

British Columbia.—Section 194 is similar.

Manitoba.—Section 445 is similar.

Saskatchewan.—Section 327 of The Cities Act, and s. 308 of The Towns Act.]

302.—(2) No money collected for the purpose of a sinking fund shall be applied towards paying any part of the current or other expenditure of the corporation.

[Recently s. 418 (2). Taken from 54 Vic. c. 42, s. 12 (2) (1891), and see 55 Vic. c. 42, s. 373 (1-2).

Spragge, V.C., in Wilkie v. Village of Clinton, 18 Gr. 557 (1871), held that monies levied and collected for a sinking fund to pay off a debt formed a trust fund, and Boyd, C., in Reg. ex rel. Cavanagh v. Smith, 26 O. R. (1895), held that their diversion to any other purpose was a breach of trust.

In Smith v. Township of Raleigh, 3 O. R. 405 (1883) moneys were raised by local assessment for the construction of a drain. In accordance with a promise made to certain petitioners for the work the council passed a resolution applying certain of these moneys towards the construction of another drain not mentioned in the petition. *Held,* that a petitioning ratepayer was entitled to an order compelling the corporation to complete the first drain according to the by-law, and to an account, the by-law having

created a trust which had been violated: also that the facts above-mentioned constituted no justification of the breach of trust committed by the defendants.

"Current Expenditure."—See s. 297 (2) and notes.

Alberta.—The Towns Act, s. 244.

Manitoba.—See s. 453 referred to below.

Nova Scotia.—Section 8 (2) provides that the sinking fund may not be used otherwise than as provided in the Act, namely, invested or deposited. Section 11 imposes a penalty of $400.

Saskatchewan.—The Cities Act, s. 328, The Towns Act, s. 310. By s. 340 of The Cities Act and s. 323 of The Towns Act, new in 1915 and 1916. No money borrowed for capital expenditure or in the hands of the city or town as capital funds shall be applied towards current expenditure. Sections 341 and 324 declare the liability of any member voting for such expenditure, and permits suit in any Court of competent jurisdiction. Sections 342 and 325 declare it to be an offence by the mayor and treasurer, punishable on summary conviction by a fine of $100.]

302.—(3) If the council applies any of such money in paying current or other expenditure, the members who vote for such application shall be personally liable for the amount so applied, which may be recovered in any Court of competent jurisdiction.

[Recently the first part of s. 418 (3) taken from 54 Vic. c. 42, s. 12 (3) (1891).

See the notes to s. 302 (5), *ante*, which provides a further penalty, and to s. 311.

Alberta.—The Towns Act, s. 246.

Manitoba.—Section 453 provides a similar penalty for any member of a council taking part in or being a party to any investment not authorized by the Act. which does not authorize paying current or other expenditure with sinking fund money.

Nova Scotia.—See s. 11.

Saskatchewan.—The Cities Act, s. 329, the Towns Act, s. 311.]

302.—(4) If the council, upon the request in writing of a ratepayer, refuses or neglects for one month to bring an action therefor, the action may be brought by any ratepayer on behalf of himself and all other ratepayers.

[Recently the last clause of s. 418 (3). See notes to the preceding section.

SIMILAR LEGISLATION.

Alberta.—The Towns Act, s. 246 (2) part. The action may be brought by an elector on behalf of the town.

Saskatchewan.—The Cities Act, s. 329 (2) and The Towns Act, s. 311 (2).]

302.—(5) The members who vote for such application shall be disqualified from holding any municipal office for two years.

[Recently part of s. 418 (3). See notes to s. 302 (3).

SIMILAR LEGISLATION.

Alberta.—The Towns Act, s. 246 (2) part.

Saskatchewan.—The Cities Act s. 329 (3); The Towns Act, s. 311 (3).

302.—(6) The treasurer of a municipality in which any sum is required by law to be raised for a sinking fund, shall prepare and lay before the council in every year, previous to the striking of the annual rate, a statement showing what amount will be required for that purpose.

[Recently the first clause of s. 418 (4), taken from 56 Vic. c. 35. s. 9 (1893).
See the notes to s.-s. 8, *post.*

Saskatchewan.—Section 330 of The Cities Act; s. 312 of The Towns Act.]

302.—(7) For every contravention of sub-section 6, the treasurer shall incur a penalty not exceeding $25.

[Recently part of s. 418 (3). See the notes to the preceding sub-section. See the provisions of The Summary Convictions Act, noted in the notes to ss. 294 and 296 (2), *ante.*

Saskatchewan.—The Cities Act, s. 330 (2); The Towns Act, s. 312 (2).]

302.—(8) If the council neglects in any year to levy the amount required to be raised for a sinking fund, each member of the council shall be disqualified from holding any municipal office for two years, unless he shows that he made reasonable efforts to procure the levying of such amount.

[Recently s. 418 (5), redrafted in 1913, originally passed in 1893, as 56 Vic. c. 35, s. 9.
This section and s.-s. 6, *ante*, apply to all by-laws passed under s. 288, s.-s. 3 and 4, although they do not specifically mention a sinking fund, the "specific sum" referred to in such sections being the "amount required by law to be raised for a sinking fund."

New Brunswick.—By s. 9, if the sinking fund assessment is not levied, the Lieutenant-Governor may, by order-in-council, direct an assessment, unless good cause is shewn.

Nova Scotia.—By s. 16, where in any municipality a sinking fund is not raised and deposited, the Commissioner may sue for it and pay it into the fund.

Alberta.—The Towns Act, s. 247.

Saskatchewan.—The Cities Act, s. 331; the Towns Act, s. 313.]

303. Subject to the provisions of sections 304 and 305, the council shall invest the sinking fund in such securities as a trustee may invest in under *The Trustee Act*, or with the approval of the Municipal Board in any debentures of the corporation.

[Recently part of 420 (1), taken from 47 Vic. c. 32, s. 9 (1884), and see 55 Vic. c. 42, s. 375.

"**Subject to the Provisions of ss. 304 and 305.**"—See these provisions immediately following:—

The Trustee Act.—The securities in which such money might be invested were formerly set out at length in this section.

The Trustee Act, R. S. O. 1914, c. 121, s. 28, permits a trustee to invest funds in stocks, debentures or securities of the Dominion of Canada, Ontario, or any other province of Canada; debentures or securities guaranteed by the Dominion or any province; the debentures of any municipal corporation in Ontario, including debentures issued for public school purposes, or in securities which are a first charge on land held in fee simple in Ontario, Manitoba, Saskatchewan or Alberta.

By 5 Edw. VII., c. 22, s. 15, amending s. 420 (1), the funds were permitted to be invested in the debentures of loan companies whose debentures are authorized by law as investments for trust funds. This is now covered by the above section, read in conjunction with s. 29 of The Trustee Act, which provides that "a trustee may deposit money with any of the societies or companies hereinafter mentioned, or may invest any money which it is his duty, or which it is in his discretion, to invest at interest, in terminable debentures or debenture stock of any such society or company, provided that such deposit or investment is in other respects reasonable and proper, and that the debentures are registered, and are transferable only on the books of the society or company in his name as trustee for the particular trust estate for which they are held, and that the deposit account in the society's or company's ledger is in the name of the trustee for the particular trust estate for which it is held, and the deposit receipt or pass book is not transferable by endorsement or otherwise:—

(*a*) Any incorporated society or company authorized to lend money upon mortgages on real estate, or for that purpose and other purposes, having a capitalized, fixed, paid-up and permanent stock, not liable to be withdrawn therefrom, of not less than $400,000, and a reserve fund of not less than 25 per cent. of its paid-up capital, and the stock of which has a market value of not less than 7 per cent. premium; or

(*b*) Any society or company heretofore incorporated under c. 164 of the Revised Statutes (O.) 1877 [The Building Societies Act] or c. 169 R. S. O. 1887 [The Building Societies Act] having a capitalized, fixed, paid-up and permanent stock, not liable to be withdrawn therefrom, of not less than $200,000, and a reserve fund of not less than 15 per cent. of its paid-up capital, and the stock of which has a market value of not less than 7 per cent. premium."

By s.-s. (2) clause (a) shall not apply to any society or company not approved by the Lieutenant-Governor-in-Council, as one coming within the provisions of that clause, and as one in the debentures or debenture stock of which trustees may invest, or with which they may deposit money.

[See notes to s. 309.]

Alberta.—Towns Act, s. 248, practically corresponds in terms to the former section, 420 (1), and permits the investment in school debentures of the town. The words "such other manner as the Lieutenant-Governor-in-Council may by general or special order-in-council direct," are omitted from the Alberta Act. This section (248) corresponds to the Saskatchewan sections.

British Columbia.—Section 191 permits purchase of Dominion or Provincial Government securities, the deposit in an incorporated bank, or the investment in the other securities allowed by law to trustees except mortgages. Section 195 permits borrowing to make up deficiency in special rates.

Manitoba.—Section 447 permits investment by deposit with the Provincial Treasurer, [see s. 305, post], who pays 4 per cent. compounded yearly, or in Government securities or school debentures of school districts situate in rural municipalities, or by deposit in a chartered bank, or in such manner as authorized by the Lieutenant-Governor-in-Council.

Nova Scotia.—By s. 8 (2), if there is no provision for investment in the statute authorizing the issue of the debentures they may be deposited in a bank in Nova Scotia, or in a trust company approved by the Lieutenant-Governor [s. 9 (1)], and the amount shall only be used for the purpose of paying off the principal, etc., and for no other purpose [ss. 8 (2) and 9 (2)]. See the notes to s. 301.

Saskatchewan.—The Cities Act, s. 333, and The Towns Act, s. 316, permit investments in Canadian Government securities and Provincial security or securities guaranteed by either; municipal or school debentures, or debentures under The Rural Telephone Act; local improvement or other debentures of the city (or town), or first mortgages, or real estate, up to one-third of the sworn cash valuation of an independent appraiser, and on maturity of such securities in other like securities.

(2) The council may regulate by by-law the manner in which the investment may be made.

(3) It shall not be necessary that any of the debentures referred to in this section shall have been disposed of by the council, but the council may apply the sinking fund, to an amount equal to the amount of such debentures, for the purposes to which the proceeds of such debentures are property applicable; and they shall hold the debentures as an investment on account of the sinking fund, and deal with the same accordingly.

(4) The council may direct by by-law that any surplus moneys in the hands of the treasurer, and not specially appropriated to any other purpose, shall be credited to the sinking fund account of any debenture debt; and may invest such sinking fund in any of the securities named in and according to the provisions of this section.

(5) Requires the consent of the local government board to the investment of any money at the credit of sinking fund account in any such securities.]

304. The Municipal Board, on the application of a council, may direct that any part of the sinking fund, instead of being invested as hereinbefore provided, shall, from time to time, be applied to the redemption of any of the debentures, to the payment of which such sinking fund is applicable, to be selected as provided by the order of the Board, at such value as may be agreed on by the council and the holders of the debentures.

[Recently s. 419—redrafted in 1913—so as to apply to by-laws passed since 11th March, 1879, [see notes to ss. 301 and 312 (1)]. The original of this section was added to the original of s. 303 by 22 Vic. c. 99, s. 228 part (1858).

"The Municipal Board." — Formerly the Lieutenant-Governor-in-Council.

"Any Part of the Sinking Fund."—This part formerly read "such part of the produce of the special rate levied, and at the credit of the sinking fund account or of the special rate account."

For the reasons pointed out in the note to s.-s. 301, p. 499, *ante*, this clause was redrafted, as in its recent form it could only apply to by-laws passed before 11th March, 1879, that is those levying a special rate. See the notes to ss. 288 (3) (a) (b) and (4).

"At Such Value as May be Agreed Upon."—Between 1858 (22 Vic. c. 99, s. 228, part), and 1866 (29-30 Vic. c. 51, s. 232), this clause was qualified by the words "*not exceeding par.*"

SIMILAR LEGISLATION.

Alberta.—The Towns Act, s. 245. provides that the council subject to the approval of the Minister may, by by-law, direct such redemption.

British Columbia.—Section 193 is similar in wording to former s. 419. Section 195 permits the council to apply the sinking fund to the redemption of the debentures.

Manitoba.—Section 446 is identical with former s. 419.

Nova Scotia.—Section 10 permits the use of the sinking fund to purchase or extinguish any debenture of the same series at par, plus accrued interest.

Quebec.—By Art. 5908 the council may employ sinking fund to redeem bonds issued for a loan, provided that the interest on the debentures so redeemed shall be in future employed in the same manner as the sinking fund.

Saskatchewan.—The Cities Act, s. 336; the Towns Act, s. 319.]

305.—(1) A council may provide by a money by-law that the annual amount to be levied on account of the sinking fund shall be paid by the treasurer of the municipality to the Treasurer of Ontario, and if the by-law does not provide for such payment the council may pass a by-law providing therefor.

[This section and s.-s. (2), (3) and (4), were first enacted as part of the Ontario Municipal Securities Act (8 Edw. VII., c. 51, s. 8 (1)-(4)). It was amended in 1909, when the Treasurer of Ontario was given the duties formerly imposed by this and the following sections, upon the secretary of the Municipal Board. See ss. 306 and 307.

SIMILAR LEGISLATION.

Alberta.—The Towns Act, s. 259.

Manitoba.—Section 447 provides, *inter alia*, that the surplus moneys raised on special rates may from time to time be invested by depositing the same with the Provincial Treasurer, who is thereby authorized to receive the same and pay interest on it at the rate of four per cent. per annum, compounded annually, or such other rate per annum as may from time to time be fixed by the Lieutenant-Governor-in-Council.

New Brunswick.—By s. 10 (1) (2), the sinking fund is to be held by the Receiver-General, and appropriated for the purposes for which it was created. It bears interest computed half yearly at the current bank rate [s. 10 (3)].

Saskatchewan.—The Cities Act, s. 351; the Towns Act, s. 335.]

305.—(2) Where a council avails itself of the right conferred by the next preceding sub-section, the Treasurer of Ontario may receive from the treasurer of the municipality the annual amounts so levied on account of the sinking fund and allow and credit the municipality with interest thereon at the rate of four per cent. per annum, compounded yearly until the time when the debentures to which the sinking fund is applicable become payable and the sinking fund is required for their redemption.

[See notes to s.-s. 1, preceding.

Alberta.—The Towns Act, s. 259 (2).

Manitoba.—See the notes to the preceding sub-section.

Saskatchewan.—The Cities Act, s. 351 (2); The Towns Act, s. 335 (2).]

305.—(3) All money received by the Treasurer of Ontario under the provisions of this section shall form part of the Consolidated Revenue Fund, and a statement of the amount at the credit of each municipality shall be set forth annually in the Public Accounts of Ontario.

[See notes to s.-s. 1, preceding.

Alberta.—The Towns Act, s. 259 (3).

New Brunswick.—Compare s. 10 (4).

Saskatchewan.—The Cities Act, s. 351 (3), and The Towns Act, s. 335 (3).]

305.—(4) The Treasurer of Ontario may invest the amount at the credit of a municipality or any part thereof in the debentures of such municipality, to redeem which such sinking funds were paid to the Treasurer.

[See notes to s.-s. 1 preceding—formerly 8 Edw. VII. c. 51, s. 8.

Alberta.—By The Towns Act, s. 259 (4), the Lieutenant-Governor in-Council may from time to time, should the course be deemed advisable, direct the Provincial Treasurer to invest the amount at the credit of the town, or any part thereof as directed by s. 26 of the Treasury Department Act, being c. 5 of The Alberta Statutes, 1906, or any Act passed in amendment or substitution thereof, or in the debentures of such town to redeem which such sinking funds were paid to the Provincial Treasurer.

Saskatchewan.—The Cities Act, s. 351 (4) and The Towns Act, s. 335 (4), require the consent of the Lieutenant-Governor.]

305.—(5) The amount payable in any year to the credit of the sinking fund which under the provisions of the by-law is to be paid to the Treasurer of Ontario shall be deemed a debt due to him, and in default of payment thereof he may sue therefor in his own name as for a debt due to the Crown in any court of competent jurisdiction.

[See notes to s.-s. 1 preceding. Taken from 8 Edw. VII. c. 51, s. 9.

Alberta.—The Towns Act, s. 261.

Saskatchewan.—The Cities Act, s. 352; The Towns Act, s. 336.]

305.—(6) Upon the maturity of the debentures to redeem which a sinking fund has been paid to the Treasurer, the amount to the credit of the sinking fund shall be payable out of the Consolidated Revenue Fund upon the order of the Treasurer to the holder of the debentures or to his agent or into a bank or otherwise according to the tenor of the debentures or as the Treasurer may direct.

[Added by 5 Geo. V. c. 34, s. 20.]

306. Every corporation the council of which shall hereafter pass a money by-law shall within thirty days after the final passing of the by-law transmit a certified copy of it to the Treasurer of Ontario.

[Originally 8 Edw. VII. c. 51, s. 10, which cast the duty upon the secretary of the Board: 9 Edw. VII. c. 76, s. 3, cast it upon the Treasurer of Ontario. See the notes to s. 305 (1).

Alberta.—The Towns Act, s. 262. The return must be made to the Minister.

Saskatchewan.—The Cities Act, s. 353, and The Towns Act, s. 337, apply to by-laws passed under ss. 351 and 335, respectively.]

307. Where by any by-law heretofore or hereafter passed provision is made for raising a sinking fund to meet the debentures to be issued under the authority of the by-law the council in each year in which a sinking fund is required to be raised shall transmit to the Treasurer of Ontario a return showing whether the sinking fund for the year has been raised and how it has been applied or dealt with, and the state of the investment

of any part of the sinking fund theretofore collected, which return shall be verified by the affidavit or statutory declaration of the head and the treasurer of the municipality.

[Originally 8 Edw. VII. c. 51, s. 11. See the notes to ss. 305 (1) and 306. By 9 Edw. VII., c. 76, s. 3, the Treasurer of Ontario was notified instead of the Secretary of the Board. See s. 312 and notes.

Alberta.—The Towns Act, s. 263.

Nova Scotia.—Section 11 provides for an annual return to the Commissioner of the sinking fund by the mayor or warden.

Saskatchewan.—The Cities Act, s. 338; The Towns Act, s. 321. The return must be made to the Minister of municipal affairs.]

308. A corporation the council of which does not comply with the provisions of the next two preceding sections shall incur a penalty not exceeding $100.

[Originally 8 Edw. VII. c. 51, s. 12. See the notes to s. 305 (1), *ante*.

Alberta.—The Towns Act, s. 264. The mayor and secretary-treasurer are also liable to a similar fine. The fine is to be recovered with costs by summary conviction.

Nova Scotia.—Section 15.

Saskatchewan.—Section 339 of The Cities Act and s. 322 of The Towns Act, correspond to s. 264 of The Alberta Act.]

309.—(1) [Where a corporation has surplus money derived from "The Ontario Municipalities Fund," or from any other source, the council may set it apart for educational purposes and may invest it as well as any other money held by the corporation for, or appropriated by it to such purposes, in the securities mentioned in section 303], or may lend the same to any board of public school trustees in the municipality for such term and at such rate of interest as may be agreed upon, *or may apply any part of such money in aid of poor school sections in the municipality.* 3 Edw. VII. c. 19, s. 423 (1) and 424, *redrafted.*

[**I.** The part in brackets was recently s. 423 (1), which was taken from the Act of 1873 (36 Vic. c. 48, s. 423).

"The Securities Mentioned in s. 303."—Section 423 (1), specified the securities as "public securities of the Dominion, municipal debentures, or first mortgages on real estate held and used for farming purposes, being the first lien on such real estate." By s. 423 (2), no sum so invested should exceed two-thirds [raised from one-third by 32 Vic. c. 44, s. 21 (1868)], of the value according to the last revised and corrected

wise than as authorized by this Act; and, if he does so, he shall be personally liable for any loss sustained by the corporation in respect of the investment.

[Recently s. 425, taken from 27 Vic. c. 17, s. 6, re-drafted in 1913.

"Any Such Money."—The section originally applied only to the surplus moneys derived from the Upper Canada Municipalities funds. [See s. 309 and notes]. Section 425 had a much wider scope, being applicable to "such moneys *as are mentioned in this Act.*" The words in italics were dropped in 1913.

The original section declared the act here forbidden to be a misdemeanour and punished it by fine or imprisonment, or both. By s. 164 of the Criminal Code, R. S. O. 1906, c. 146: "Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any Act of the Parliament of Canada, or of any Legislature in Canada by *wilfully* doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law." (Originally s. 138 of the Criminal Code of 1892 (55-56 Vic., c. 29, s. 138.)

See also the notes to ss. 302 (3), (5).

Alberta.—The Towns Act, s. 250, corresponds to the previous s. 425.

Manitoba.—Section 453 corresponds to s. 425. [See also the notes to ss. 302 (2), (3)].]

312.—(1) Every corporation shall, on or before the 31st day of January in each year, transmit to [the Secretary of the Bureau of Industries] in such form as may be prescribed by the Lieutenant-Governor in Council a statement as to the debts of the corporation, as they stood on the preceding 31st day of December, specifying, in regard to each debt of which any part remained unpaid on that day.

[Recently s. 427 (part), taken from 36 Vic. c. 48, s. 274 (1873), and see 16 Vic. c. 163, s.-s. 1, 2, 3; 22 Vic. c. 99, s. 277; 29-30 Vic. c. 51, ss. 241, 242; 55 Vic. c. 42, s. 382.

Section 427 has for the words in brackets, the words "to the Lieutenant-Governor, through the Minister of Agriculture."

"The Secretary of the Bureau of Industries."—This office was created by 10 Edw. VII. c. 17, s. 9 (see R. S. O. 1914, c. 45, s. 9—The Department of Agriculture Act). The Bureau collects, tabulates, and publishes industrial information for public purposes.

Manitoba.—Section 454 applies to "every council," as did former s. 427 (Ont.).]

312.—(1)

(*a*) The original amount of the debt;

(*b*) The date when it was contracted;

(*c*) The time fixed for its payment;

(*d*) The interest payable;

(*e*) The amount to be raised annually for the payment of the debt and interest, or the instalments of them;

(*f*) The amount actually raised in the year ended on the 31st day of December;

(*g*) The part (if any) of the debt redeemed or paid during that year;

(*h*) The amount of interest (if any) unpaid on that day; and

(*i*) The amount of principal still unpaid.

[Recently part of s. 427. See notes to preceding sub-section.
Section 427 had at (e) the words, "the rate provided for the redemption of the debt and interest;" and at (f) the words, "the proceeds of such rate for the year ending on said 31st day of December." This was changed in the redrafting for the reasons set out in the notes to ss. 301 and 304, *ante*.

Manitoba.—Section 454 similar—corresponding to former s. 427—adds (j) "such other information as may be required by the municipal commissioner upon schedules furnished for that purpose"—and (2), "such account shall be certified to by the auditors or auditors of the municipality."]

312.—(2) For every contravention of sub-section 1, the corporation shall incur a penalty not exceeding $40.

[Recently part of s. 427. See the notes to s. 312 (1). The penalty was previously "$20—in case of default to be paid to the Treasurer of Ontario." The penalty is recoverable under the Summary Convictions Act; see the notes to ss. 294, 296 (2) and 302 (7).]

Commission of Inquiry into Finances.

313.—(1) The Lieutenant-Governor in Council, on the application of one-third of the members of a council [or of thirty municipal electors], may issue a commission to inquire into the financial affairs of the corporation and any matter connected therewith and the commissioner shall have all the powers which may be conferred on commissioners appointed under *The Public Inquiries Act*.

[Recently s. 428 (1), which was taken from 22 Vic. c. 99, ss. 239, 240 (1858). The section was redrafted in 1913.
The words in brackets read "or thirty duly qualified electors of the municipality." When they first appeared as 34 Vic. c. 30, s. 15, a definition of electors appears in s. 2 (d), and see sec. 56.

The Public Inquiries Act is c. 18 of R. S. O. 1914.

This Act is passed to permit of inquiries being made into any matter connected with or concerning the good government

of Ontario, or the conduct of any part of the public business thereof, or of the administration of justice therein [s. 2], including inquiries into matters connected with elections to the Assembly [s. 4].

The Commissioners may be given the power of summoning any person and requiring him to give evidence on oath, and to produce such documents and things as the Commissioners deem requisite for a full investigation [s. 2]. The Commissioners when appointed have the same power to enforce the attendance of witnesses, and to compel them to give evidence and produce documents and things, as is vested in any Court in civil cases [s. 3].

It was held that The Enquiries Act of Manitoba, R. S M. 1913, c. 34, which gave the Commissioner the same powers to enforce the attendance of witnesses as is vested in a Court of law in civil cases, which comprises the power to commit, is *intra vires* the Legislature of the province, as being within the provisions of s. 92, s.-s. 16 of the B. N. A. Act. Kelly et al. v. Hon. T G. Mathers et al., 1915, 31 W. L. R. 931; 32 W. L. R. 33; 25 M. L. R. 580 (1915); Attorney-General of Australia v. Colonial Sugar Refining Co., [1914] A. C. 237, distinguished; Richards, J.A., dissenting. See also Re Edward Beck, 35 W. L. R. 657 (1916).

In Re Township of Eldon and Ferguson, 6 U. C. L. J. 207 (1860), Richards, J., pointed out that the power conferred is one of inquiry, and may be of great advantage to municipalities in enabling them to enforce the attendance of witnesses and compel them to give evidence.

Robinson, C.J., in Township of East Nissouri v. Horseman, 16 U. C. R. (1858), laid down that since it is a public inquiry conducted under a public Act of Parliament which says nothing about compensation to witnesses, it would seem that persons called before the Commissioners are not entitled—any more than they would have been so entitled at common law in the case of a prosecution for a misdemeanour—to compensation for expenses or loss of time. But see the provisions of The Saskatchewan Cities Act, s. 531 (3), and Towns Act, s. 514 (3), p. 515, *post*.

Inquiries into other than financial matters, such as charges of malfeasance, are authorized by s. 248. If councillors whose duty it is to give all necessary and reasonable information, maliciously conspire to withhold information, and contrive and intend to cause expense and damage to the corporation by increasing the costs and expenses of the Commission, and throw upon the corporation any costs, and if it be charged and proved that councillors in

pursuance of such contrivance and intention have misconducted themselves to the damage of the corporation, an action may be maintained against them at the suit of the corporation for recovery of damages: Township of East Nissouri v. Horseman (*ante*). In this case it was shewn that the clerk had absented himself and kept back the books, etc., in collusion with the defendants, and that in consequence the costs of the commission—which otherwise would not have exceeded £75 or £100 — had been increased to £328, it was held that the sum of £250 damages was not excessive.

Richards, J., held in Township of Eldon v. Ferguson (*ante*) that there is nothing in the section to prevent the corporation from suing for money due them; and it would be unreasonable to hold that the power to inquire should deprive the corporation of the right to resort to a more speedy and economical mode of investigating accounts, and of obtaining payment of the amount due when ascertained.

See Bristow v. Town of Cornwall, 36 U. C. R. 225 (1875). The expenses are to be 'determined' by the Treasurer of the Province of Ontario. 313 (2) No appeal is provided for. When so determined the account may (is to) be certified. When certified the amount becomes a debt due by the municipality to the Commissioner or Commissioners, payable 'within three months after demand,' etc. The Commissioners are entitled to recover the money by action after the amount has been determined, certified and demanded; and the plaintiff in such an action is not obliged to prove the regularity of the issue of the commission."

Re Rural Municipality of Macdonald, 10 Man. R. 294 (1894), s. 431 of the then Manitoba Act was considered. This section is to much the same effect as the present s. 455 (see p. 514, *post*), and it was held that the municipality in question had no power to provide for payments of the expenses of counsel and witnesses in attendance upon a Royal Commission issued under s. 431 of the Act to inquire into the financial affairs of the corporation.

It should be observed that this section does not interfere with the powers given the provincial municipal auditors by R. S. O. 1914, c. 200, which Act, however, since 1914, does not apply to cities of over 15,000 population, by the latest enumeration of the assessors.

In Kelly v. Mathers, 31 W. L. R. 931 (1915), it was argued in support of a motion for an injunction to restrain Commissioners appointed under the Manitoba Enquiries Act, that as it was admitted that a criminal action would follow the investigation, the witness who was to be prosecuted should not be

compelled to answer incriminating questions. Prendergast, J., said at p. 935: "With respect to the principle that no man can be compelled to criminate himself in evidence, the principle is still recognized in the Canada Evidence Act, as well as in the Manitoba Evidence Act, although in a manner that at the same time makes allowance for the exigencies of full and complete judicial enquiry. That is to say, the witness is bound to answer, but the statute puts a bar against using such answers to criminate him." See the report in 25 M. R. 580.

Alberta.—The Department of Municipal Affairs Act, 1911-12, c. 11, contains similar provisions. Section 11 corresponds to s. 3 of The Public Inquiries Act.

British Columbia.—Section 488 authorizes the appointment by the Lieutenant-Governor-in-Council of a Commission of Inquiry into the good government of any municipality or into the conduct of any part of the public business thereof, or of the administration of justice therein, and makes the provisions of The Public Inquiries Act applicable.

Manitoba.—By s. 455 the Lieutenant-Governor may appoint a board of three commissioners to hold office during pleasure. In the event of (1) a resolution being passed by the municipal council requesting an investigation into the financial affairs of the municipality or (2) of creditors representing one-half of the aggregate indebtedness of the municipality; or (3) at least twenty-five resident property owners thereof making a requisition to the same effect, the Lieutenant-Governor-in-Council may call upon such Commissioners to investigate the financial affairs of the municipality [s. 456]. Notice of the investigation must be published for 30 days in the Manitoba Gazette and in a newspaper published in the municipality, or if there is none, then in the judicial district in which such municipality is situate [s. 457].

The Commissioners have power to order the production of books for the purposes of investigation, and may take evidence under oath—parties may be represented by counsel or agents [s. 458].

The Commissioners must (1) investigate the financial affairs of the municipality; (2) ascertain the amount of its indebtedness or the claims which are outstanding against it; (3) the means or power it then has or may have to meet its indebtedness; (4) report to the Lieutenant-Governor-in-Council [s. 456]. Section 460 provides for inspection of the books of municipalities in arrears upon seed grain loans by a person appointed by the Lieutenant-Governor-in-Council.

Quebec.—Article 5940 provides for an inquiry by a Judge of the Superior Court upon a resolution of the city or the petition of fifty electors. See Arts 5941 to 5951.

Saskatchewan.—Section 530 of The Cities Act provides for a commission of inquiry into the financial affairs of a city to be issued by the Lieutenant-Governor-in-Council upon the petition of one-third of the members of the Council, or one-fourth of the electors of the city. The Commissioner is to have the powers given to commissioners appointed under The Act Respecting Inquiries into Public Matters which corresponds to the Ontario Act. See R. S. S. 1909, c. 18.

Section 531 *et seq.* permits an inquiry by a Judge upon the resolution of the Council.

The Towns Act contains similar provisions, ss. 513 and 514 *et seq.*]

313.—(2) The expenses of and incidental to the execution of the commission shall be determined and certi-

fied by the Treasurer of Ontario, and shall thereupon become a debt due by the corporation to the commissioner, payable within three months after demand therefor.

[Recently s. 428 (2). See the notes to the preceding sub-section.

Quebec.—Article 5941 requires security for costs to be put up by petitioning electors.

Manitoba.—Section 459.

Saskatchewan.—Section 531 (3) of The Cities Act provides that the council requesting a judicial commission of inquiry may engage and pay counsel to represent the city, and pay all proper witness fees to persons summoned to give evidence at the instance of the city. Section 514 (3) of The Towns Act contains similar legislation.

Commissioners or Trustees of the Sinking Fund.

New Brunswick.—By s. 9 the Receiver-General, and by ss. 18, 16 and 17, the Auditor-General is given certain powers over the sinking fund. See the notes to s. 303 of the Ontario Act.

Nova Scotia.—Section 12 provides for the appointment of a Commissioner of the sinking fund, who is to have supervision over municipal sinking funds, s. 13. Section 14 requires a return to the Commissioner by the mayor or warden, and s. 15 provides the penalty for failure to make such a return.

Saskatchewan.—Section 343 of The Cities Act and s. 327 of The Towns Act provide for the appointment by by-law of sinking fund trustees.

By s. 343 (2) [327 (2)], the fund shall be deposited by the Treasurer in a special sinking fund account in a chartered bank, designated by the council, and invested in the name of the city by three trustees, two appointed by the Judge [of the local District Court, s. 2, s.-s. 9; s. 2, s.-s. 10] on the application of the city, and the third by the council, in such securities mentioned in s. 333 [316] as the trustees think fit. By s. 343 (3) [327 (3)] the trustees requisition the funds required by them for investment from the Treasurer. The trustees hold office until removed by the council or the Judge [343 (6), 327 (6)].

By s. 344 [328] the trustees are given powers (a) to invest and reinvest in authorized securities, to sell, etc., and call in the same; (b) to collect money due on mortgages, etc., and to enforce the securities; (c) to foreclose securities, to vest the title in the city; (d) to lease, rent and insure the property foreclosed; (e) to sell, etc., the same, and to sell under power of sale: provided the conveyances shall be signed by at least two of the trustees in their official capacity, and (f) to discharge mortgages and give receipts for money, such receipts to be signed by at least two trustees in the name of the city.

The trustees may temporarily borrow from a chartered bank, for not more than 6 months, not more than $25,000 on the security of any stock, debentures or mortgages held by them. The consent of the council must be given by resolution [s. 345]. In towns the limitation is $10,000 [s. 329].

All sinking fund moneys coming into the trustees' hands must be deposited in a special account in a chartered bank doing business in Canada or in London, England, only to be withdrawn upon cheque signed by at least two trustees, and for the purpose of the trust [s. 346, s. 330].

Two trustees are a quorum and may transact business [s. 347. s. 331].

The trustees may purchase any of the debentures, stock or other securities of the city or town [s. 348, s. 332].

Sections 349 and 333 respectively give the council powers to require a change of investments. By resolution it may call in investments already made. By ss. 350 and 334 a trust company may be appointed instead of trustees; the company must be one approved by the Lieutenant-Governor-in-Council under the provisions of The Trust Companies Act. The company is given the same powers and duties as the trustees.]

MUNICIPAL DEBENTURES.

What is a Debenture?

There is no definition in the Act or the Interpretation Act. "No accurate definition of the word can be found," 5 Halsbury 345, referring to the definition in the new English Dictionary (Murray): "A certificate or voucher certifying that a sum of money is owing to the person designated in it; a certificate of indebtedness."

"It means a document which either creates or acknowledges a debt," 5 Halsbury 345 and cases there cited. In England "the term . . . is usually associated with a company of some kind, and most debentures are securities given by companies, but they are often granted by clubs and occasionally by individuals." 5 Halsbury 345.

Wharton, 8th ed., p. 214, defines a debenture as "a deed poll, charging certain property with the repayment at a time fixed of money lent by a person therein named at a given interest," and says, "the terminibility and fixity in amount of debentures, being inconvenient to lenders, has led to their being superseded in many cases by debenture stock, which is frequently irredeemable, and usually transferable in any amounts except fractions of pounds."

The term is also applied at the Custom House to a kind of certificate, signed by the officers of the customs, which entitles a merchant exporting goods to the receipt of a bounty or drawback. (Debeo, Lat. to Owe). Wharton, p. 263, and see the note on the same word in the 12th Edition.

See Palmer's Debentures (Company), for the definitions given there, p. 1, citing the judgment of Lindley, J., in British India, etc., Co. v. Commissioners of Inland Revenue, 7 Q. B. D. 165-172, 173 (1881). "What the correct meaning of debenture is I do not know. I do not find any where any precise definition of it. We know that there are various kinds of instruments commonly called debentures. You may have mortgage debentures which are charges of some kind on property. You may have debentures which are bonds . . . You may have a debenture which is nothing more than an acknowledgment of indebtedness. And you may have a thing like this which is something more; it

is a statement by two directors that the company will pay a certain sum of money on a given day, and will also pay interest half-yearly at certain times, and at a certain place upon the production of certain coupons by the holder. I think any of these things which I have referred to may be debentures within the Act" [Stamp Act, 1870.]

See also the remarks of Grove, J., ibid., and per Chitty, J., in Edmonds v. Blaine (1887), 56 L. J. Ch. D. 815.

Are Such Debentures Negotiable?

A Statutory Corporation Must Have Express Power to Enable it to Issue Negotiable Securities.—The foregoing seems to follow on the decision of the Court of Common Pleas, consisting of Erle, C.J., Byles, Keating and Montague Smith, JJ., in Bateman v. Mid Wales Railway Company, 1866, L. R. 1 C. P. 510; 35 L. J. C. P. 205, where the plaintiffs as endorsees sued the defendants as acceptors of certain bills of exchange. Erle, C.J., said:

> "It appears that the defendants are a corporation constituted for making a railway by virtue of a special act of parliament and certain general statutes incorporated therewith, a corporation constituted for the distinct purposes stated in these statutes. It has been perfectly established, that a corporation constituted for a specific purpose cannot be bound by a contract which is not connected therewith; such contract does not bind, because it is *ultra vires*. This company then, being a corporation constituted for making a railway, can it be bound by a bill of exchange? I am of opinion that it cannot. A bill of exchange is a cause of action in itself, a contract of itself, which binds not only as between the original parties, but also in the hands of third persons, and indorsees. And I consider that it is altogether contrary to the principles of the law of bills of exchange, that a bill can be valid or not according as the consideration between the original parties was good or bad, or, in the case of a corporation, whether or not it was accepted for the purposes for which the corporation was constituted. The consideration of bills of exchange given at the very same time by a railway company, might be partly for work done on the railway, a valid consideration, and partly for money borrowed in fraud of their borrowing powers, an invalid one, and it would be most pernicious to hold that the bills given for work were valid, and that those given to obtain money, invalid. So much for the principle of the matter. Now, what is the state of the authorities? I can find no case as to the acceptance of a bill of exchange where the bill has been enforced subject to the question of whether the original consideration was valid. The only cases in which it has been held that a corporation could validly accept a bill of exchange are the cases of the Highgate Archway Company, the Bank of England and the East India Company, and in all these cases the corporations were specially authorized to do so. And in Broughton v. the Manchester Waterworks Company (3), Mr. Justice Bayley entertained a doubt whether a holder of such a bill of exchange could sue without the proof lying on him that there was power to accept. What he laid down generally, applies *a fortiori* where the corporation is formed for specific purposes. This being so, I think, both on principle and authority, the acceptances were not binding on this company, constituted for purposes of which we have judicial notice.

A Statutory Corporation Must have Power, etc.—The Supreme Court of the United States had repeatedly held that a power to borrow does not of itself give power to issue negotiable securities: Clatborne v. Brooks, 111 U. S. 400; Hill v. Memphis, 134 U. S. 198; and the Illinois cases, Bourdeaux v. Coquard, 47 Ill. App. 254, and Coquard v. Oquawke, 192 Ill. 355, illustrate the rule.

The General Rule.—As Palmer says, [Part III. Debentures, 1912] p. 31: "It is well settled that according to the law of England an instrument can only be negotiable (1) by statute, or (2) by the custom of merchants, i.e., the law merchant. As to statutes, there is, so far as debentures are concerned, only one which touches the matter, namely, the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). Under that Act the promissory note of a company may be under the company's seal (s. 91). [See Maclaren, p. 140]. A debenture to bearer containing an unconditional promise to pay (s. 83), may thus be held to be a promissory note and as such negotiable under the statute, and there are debentures in existence which have been issued in this form. But by far the greater number of current debentures to bearer issued by companies in England contain conditions which exclude them from ranking in the category of promissory notes, and in the case of these conditional debentures the only mode of establishing negotiability is to shew that they are treated as negotiable by the general custom of merchants. That the custom of merchants has in the past been competent to attach the quality of negotiability to divers instruments circulating here, whether made in England or abroad, is clear beyond controversy."

The question is then discussed at length in the following pages of Palmer.

N.B.:—Debentures of not less than £5, may be issued by County Councils under the Local Loans Act (1875), 38 & 39 Vict. c. 83.

The Rule as Applied By the English Courts to Debentures Generally.

The English authorities all deal with bonds and debentures of companies which have frequently been considered by the courts on this point of negotiability. These cases are not directly in point in considering Canadian municipal debentures owing to the statutory provisions noted below which have been interpreted by the courts as set out establishing conclusively the negotiability of such debentures. The present state of the law as to company debentures is stated in Maclaren on Bills and Notes (1916), at p. 482, where the learned author says: "Even when they were made payable to order or bearer, the transferee has sometimes been denied the right to sue in his own name, although as a general rule the company which has issued such securities has been held to be estopped from denying their negotiability. The course of the jurisprudence has been towards placing such instruments more

nearly on the same footing as bills and notes. The case of Sheffield v. London Joint Stock Bank, 13 A. C. 333 (1888), in the House of Lords, was understood to have somewhat restricted their negotiability. This interpretation was put upon it in Simmons v. London Joint Stock Bank, [1891] 1 Ch. 270, but the House of Lords, in reversing this later decision, explained that the Sheffield judgment was based upon the particular facts of that case, [1892] A. C. 201. In Bechuanaland Exploration Co. v. London Trading Bank, [1898] 2 Q. B. 658, the cases were carefully reviewed and it was held that the negotiability of debentures might be established by evidence of modern commercial usage, and that Crouch v. Credit Foncier, L. R. 8 Q. B. (1873), see p. 381, in so far as it held the contrary, must be considered to be overruled by Goodwin v. Robarts, L. R. 10 Ex. 337 (1875), and Rumball v. Metropolitan Bank, 2 Q. B. D. 194 (1877). In Edelstein v. Schuler, [1902] 2 K. B. 144, it was laid down that ordinary bonds payable to bearer were negotiable instruments, and that it is not now necessary to tender evidence to this effect as the Courts will take judicial notice of that fact."

See also the discussion of these cases in Falconbridge (1913), at p. 416, and in Palmer III., Company Debentures (1912), at pp. 34 et seq.

The English Rule as to the Classes of Negotiable Instruments.

The question has been raised as to whether—and the opinion is held (Willes, Negotiable Instruments) that—the categories of negotiable instruments, aside from new categories which may be created by statute, are now closed and that we cannot make fresh categories which will be recognized by the Common Law. Owing to the statutory provisions dealing with this subject in Canada it seems to have become a question of academic interest but of no practical importance so far at least as municipal debentures are concerned.

In 3 Halsbury, p. 459, the question of negotiable instruments is discussed at length. See s. 776. "On the important question what is meant by a negotiable instrument, it may be laid down as a safe rule that where an instrument is by the custom of trade transferable like cash by delivery, and is also capable of being sued upon by the person holding it pro tempore, then it is entitled to the name of a negotiable instrument. The custom of trade in one country may differ from the custom of trade in another, and instruments negotiable in one country may therefore not be so in another. This, indeed, is the case with many such instruments

as Government Bills, debentures, . . . etc., which are only gradually and tentatively taking their places in the category of negotiable instruments."

See the same volume, pp. 564 et seq., ss. 965 to 973 both inclusive.

The Rule in the United States.

"In the United States, such municipal bonds negotiable in form, notwithstanding they are under seal, are clothed with all the attributes of commercial paper, pass by delivery or indorsement, and are not subject to equities (where the power to issue them exists) in the hands of bona fide holders for value before maturity without notice." Maclaren, p. 481, citing 1 Dillon, 5th ed., ss. 486, 513, [871 and 879] and Cromwell v. Sac. Co., 96 U. S. 51 (1877).

The Canadian Rule.

The consideration of this question is governed by the statutory provisions as to negotiability found in the various provinces.

Maclaren on Bills, 5th ed., at pp. 479 et seq., discusses the question of negotiability of Municipal Debentures referring to the provisions of 18 Vic. c. 80 (1855), and to R. S. O. c. 192, s. 287 to 295, c. 109, s. 50, R. S. Q. Art. 5900 and 5901, C. S. N. B. c. 169, R. S. M. c. 133, ss. 426 to 443; C. O. N. W. T. c. 70, ss. 212 to 218; R. S. S. c. 146; R. S. B. C. c. 170, s. 165.

At p. 480, he says: It has been thought that on account of their being under seal they would not be treated as promissory notes, but in view of s. 5 of the Act, this would no longer be an objection. The coupons are usually in the form of ordinary promissory notes signed by one or both of the officers who execute the debentures."

P. 480: "In Ontario such debentures have been held to be negotiable and bona fide holders for value have been protected.

In Quebec, they have been held to be negotiable like promissory notes, and in suing might be declared upon as such.

Canadian Statutory Provisions.

See s. 314 (3) and notes, for these provisions in full.

Restrictions upon Negotiability.

"The negotiability of municipal debentures may be restrained by inserting a provision requiring registration in the books of the corporation, for which most Acts provide, or by inserting words

prohibiting transfer: s. 21 (Bills of Exchange Act)." Maclaren, p. 480.

And see s. 316 and notes as to statutory restrictions by way of registration.

Debentures Issued for an Illegal Purpose.

Where a debenture refers to a by-law and the by-law on its face shews that it is for a purpose not authorised by law, the debenture is invalid. Confederation Life v. Howard, 25 O. R. 197 (1894); Wiltshire v. Surrey, 2 B. C. R. 79 (1891); Marsh v. Fulton County, 10 Wallace (U.S.) 676 (1870).

See also Alexander v. Township of Howard, 14 O. R. 22 (1887), and Re Clark & Township of Howard, 16 A. R. 72 (1889).

As to statutory provisions curing defects, e.g., by certificate, see s. 295 and notes.

In Confederation Life v. Howard, ante, it was held that "as defendants were bound to keep the drain in repair and to pay for repairs out of their general funds, as they had received the price of the debenture directly from the plaintiffs, and had the full benefit of it, without giving any consideration, the plaintiffs were entitled to recover for money received by the defendants."

Bona Fide Holders for Value Without Notice.

In Anglin v. Kingston, 16 U. C. Q. B. 121 (1857), the defendants pleaded in bar to an action upon two debentures issued by them, that they were issued upon a by-law which was illegal, for want of its compliance with the requisitions of the law in that behalf (no special rate was settled by the said by-law to be levied in each year for payment of the debt created), and that in consequence the debentures issued under the by-law were void. The plaintiff's replication set up he was a bona fide holder for value without notice, and he assumed it to be a legal inference that the defendants could not treat the debentures as void in his hand. The defendants did not question the legal inference by demurrer but joined issue upon the plea and the jury found it to be true. The judge refused a new trial, a re-pleader and an arrest of judgment. Held that there had been no substantial injustice. In Crawford v. Cobourg (Town of), 21 U. C. R. 113 (1861), it was held on demurrer that a plea that debentures were issued for a purpose wholly unauthorized by by-law was bad as forming no defence against a bona fide holder for value without notice.

See also Eastern Townships Bank v. Compton, 7 R. L. 446 (1871); Corporation of Roxton v. Eastern Townships Bank,

Ramsay, A. C. 240 (1882); Macfarlane v. St. Césaire, M. L. R. 2 Q. B. 160 (1886); St. Césaire v. Macfarlane, 14 S. C. Can. 738 (1887); County of Ottawa v. M. O. & W. Ry. Co. ibid. 193 (1886). Pontiac v. Ross, 17 S. C. R. 406 (1890), all noted in Maclaren, at p. 480. Also, Robinson v. St. John (School Trustees), 34 N. S. 503 (1898), ibid.

The bona fide holder for value of a municipal debenture was held entitled to sue upon it, though the debenture after being signed and sealed, had been stolen from the defendants by the person through whom the plaintiff derived title. Trust & Loan Co. v. City of Hamilton, 7 C. P. 98 (1858).

In Sceally v. McCallum, 9 Grant 434 (1862), the purchaser of a municipal debenture issued under a by-law later held to be illegal sued the representative of his vendor for rescission and a return of the money paid. There was no evidence of fraud and Spragge, V.-C., dismissed the bill, holding that it lay upon the purchasers of debentures to satisfy themselves as to their validity.]

314.—(1) [Subject to sub-section 2 (*a*)] A debenture or other like instrument [A], shall [B], be sealed with the seal of the corporation, and signed by the head of the council, or by some other person authorized by by-law to sign it, and by the treasurer [C].

[Recently s. 429 (1) part, which was taken from 22 v. c. 29 s. 209. Re-drafted in 1913. The words in brackets were added by 4 Geo. V. c. 33, s. 9.

S. 429 (1) had at [A] the words "duly authorized to be issued on behalf of a municipal corporation." And at [B] the words "unless otherwise specially authorized or provided."

"Shall be Sealed and Signed."—The question arises as to whether these provisions are imperative or directory merely. The section until 1913 when it was redrafted had at [C] the words, "*otherwise the same shall not be valid.*" As to the effect of these words see the notes to s. 288 (1) (a) and (b) supra.

By the Interpretation Act, R. S. O. 1914, c. 1, s. 29 (8) "may" shall be construed as permissive and (9) "shall" as imperative.

"The Head of the Council."—S. 214 provides who is to be head of the Council.

"Or by Some Other Person Authorized by By-law to Sign it."—This section (then 213) was considered in Municipality of Brock v. T. & N. Railway Co. (1870), 17 Gr. 425. Mowat, V.-C., said p. 430: "The by-law . . . contains this clause—'Which said debentures shall be sealed with the seal of the said municipality, and be signed by the Reeve, and countersigned by the Treasurer. . . . .' This is a mere re-enactment of the Municipal Act, adding a requirement of the signature of the Treasurer (which was not in s. 213), a directing of that to be done which would be done, as of course, without such direction. This direction was not in terms carried out, the council passing a by-law, under the provisions to that effect, in the clause from the Municipal Act, appointing a person other than the Reeve to sign the debentures, and the debentures were in fact signed

by the person so appointed." The Vice-Chancellor held that the direction that the Reeve should sign did not abridge the power of the Council of appointing some other person to sign—that the direction was mere surplusage and that the debentures were duly executed.

For forms of debentures see appendix.

Alberta.—The Towns Act, s. 186, contains a similar provision requiring signature by the Mayor and Secretary-Treasurer or persons authorized by by-law. Local Improvement debentures must be marked as such on the face of the debentures issued in respect of that part of the cost which is to be raised by special assessment.

British Columbia.—S. 135 contains similar provisions and corresponds with the former s. 429 (1), which added the words "otherwise the same shall not be valid." S. 135 also contains the clause dropped from the Ontario Act in 1903, declaring it to be the duty of the Treasurer to see that the amount collected under the by-law is properly applied to the payment of the principal and interest of the debentures. As to this see s. 224 of the Ontario Act, supra, defining the Treasurer's duties.

Alberta.—The Rural Municipality Act, s. 240, requires signature by the Reeve and Treasurer and sealing and countersignature of the coupons by the Minister under s. 247. The Villages Act, s. 78, validates debentures signed by the Reeve and Secretary-Treasurer, sealed, the coupons so signed and the debentures countersigned by the Minister under s. 80.

Manitoba.—S. 426 requires sealing and the signature of the head of the Council or some other person authorized by by-law to sign unless otherwise specially authorised or provided, but not of the Treasurer. This section corresponds to that in the British Columbia Act and contains a similar clause as to the duty of the Treasurer which was added by 3 Geo. V. c. 37 as s.-s. (2). These duties are required also by s. 296.

New Brunswick and Nova Scotia.—The respective Municipal Debenture Acts of the two provinces, 1 Geo. V. c. 6 (N.B.) and 4 Geo. V. c. 3 (N.S.) contain similar provisions, ss. 2 (N.B.) and 3 (N.S.). A record of such debentures is to be kept by the Treasurer and they are to be numbered consecutively. These sections contain specific enactments as to the quality of the paper and size and shape of the debentures and coupons.

Quebec.—By Art. 5779 the bonds, obligations or debentures are to be signed by the Mayor and countersigned by the Clerk and to bear the seal of the corporation.

Saskatchewan.—By the Cities Act, s. 302, the debenture shall be signed by the Mayor or some person authorized by by-law to sign the same in his stead, and the Treasurer or some person authorized to sign in his stead. The Towns Act, s. 299, is the same except that no one may be authorized to sign for the Treasurer. By s. 188 of the Villages Act the debentures are binding when signed by the Overseer and Secretary-Treasurer and sealed with the corporate seal, signed and sealed by the Local Government Board, and countersigned by the Minister or Deputy Minister under s. 194. R. S. S. c. 87, s. 241, requires signature by the Reeve and Treasurer and countersignature by the Minister.]

314.—(2) A debenture may have coupons for the interest attached to it which shall be signed by the treasurer, and his signature to them may be written, stamped, lithographed or engraved.

[Recently 429 (2) added in 1896 by 59 Vict. c. 51, s. 8.
For forms of debenture coupons see Appendix V.
[See the notes to the preceding sub-section.]

Alberta.—The Towns Act, s. 186 (2) requires the coupons to be signed the same way as the debentures, but the signature of the *coupons* may be engraved or lithographed.

British Columbia.—See notes to s.-s. 1 supra.

Manitoba.—S. 426 contains a similar provision but permits the signature of the Treasurer to the coupons to be lithographed or printed when the debentures are issued by a city.

New Brunswick, s. (3) and **Nova Scotia,** s. (4).—The countersignature of the Clerk or Secretary to the coupons, only, may be lithographed.

Quebec.—By art. 5780 coupons to the amount of the half-yearly interest signed by the Mayor and countersigned by the Clerk and payable to bearer where the interest specified falls due, may be annexed to each bond, obligation or debenture.

At the time of payment, the coupons shall be handed to the Treasurer; and the possession by such officer, of any coupon, shall be prima facie evidence that the half-yearly interest specified therein has been paid. Ibid.

Decisions conflict as to whether coupons are entitled to grace. The weight of authority is in favour of their being payable on the very day of maturity without grace: 2 Daniel, ss. 1499 (a), 1505; Maclaren, p. 481.

314.—(2*a*) In a city having a population of not less than 200,000, the signature of the head of the council of the said corporation to all debentures or other like instruments issued by the said corporation may be written, stamped, lithographed or engraved.

[Added by 4 Geo. V. c. 33, s. 9 (2). See the notes to s. 314, *supra.*]

314.—(3) A debenture may be made payable to bearer or to a named person or bearer and the full amount of it shall be recoverable notwithstanding its negotiation by the corporation at a discount.

[Recently part of 429 (3), taken originally from 29-30 Vic. c. 51, s. 217 (1866).

S. 429 (3) provides that such negotiation was "subject to any Act of the Parliament of Canada which may be passed respecting the lawful rate of interest."

Negotiation.—See pp. 517 to 521.

"At a Discount."—The section formerly read, "at a rate less than par or at a rate of interest greater than 6 per cent. per annum or although a rate of interest greater than 6 per cent. per annum is reserved thereby or made payable thereon."

In Corporation of N. Gwillimbury v. Moore et al., 15 C. P. 445 (1865), it was held "that municipal corporations are not restricted any more than individuals as to the rate of interest to

be received upon moneys loaned by them, but that they may take any rate of interest agreed upon."

In re Nichol and the Corporation of the Township of Alnwick, 41 U. C. R. 577 (1877), the N. Gwillimbury case was followed but not agreed with, and the case of Corporation of Township of Westminster v. Fox, 19 U. C. R. 203 (1860), was distinguished as being decided upon the 16 Vict. c. 80.

In Scottish Am. Invest. Co. v. Corporation of Elora, 6 A. R. 628 (1881), Spragge, C.J.O., said, pp. 637 and 638: "The Corporation of Elora has still another objection to its debentures. They are made to bear interest at 7 per cent. when, as the defendants say, they could not lawfully bear interest at a higher rate than 6 per cent. In the last Municipal Act for Upper Canada passed by the Legislature of the old Province of Canada, 29-30 Vict. c. 51, the issue of debentures bearing a higher rate of interest than 6 per cent. is expressly authorized. In re Nichol and Corporation of Alnwick (ante), Wilson, J., cites the s. 217 in full, and says if that section 'had remained in force there could have been no doubt upon the question,' and in that I entirely agree. 'But,' the learned judge says: 'it was not continued in the Act of 1873. In the schedule of that Act the above s. 217 is marked *effete*.'"

The learned judge then suggests the reason for such non-re-enactment referred to by Biggar and proceeds: "If I may hazard a conjecture, I should say it is probable that the compiler of the schedule, aware of the decision of the case of N. Gwillimbury (ante), nine years before, considered that it settled the law, placing municipalities upon the same footing as individuals as to interest payable or receivable by them. . . . In my opinion s. 217 of the old Act of 1866 stands unrepealed."

STATUTORY PROVISIONS AS TO NEGOTIABILITY, PLEADING, ETC.

The Act to Facilitate the Negotiation of Municipal Debentures (1854), 18 Vict. c. 80 (Can.), ss. 1, 2, 3 & 4, practically the same as the provisions of the present Arts. 5900 to 5902 (Quebec Statutes), was the forerunner not only of the Quebec Articles but also of similar statutory provisions in Ontario, Manitoba and British Columbia. [See C. S. C. 1859, c. 9, ss. 11 & 14.]

In Ontario.—It first appeared as 35 Vic. c. 12, s. 2 (1872), An Act to make debts and choses in action assignable. S. 7 provided it should not be construed to apply to Bills of Exchange or Promissory Notes. In 1877 (R. S. O.), it was R. S. O. c. 116,

ss. 8 to 12. In 1887 (R. S. O.), it appeared in the Mercantile Amendment Act, c. 122, as s. 9. S. 13 corresponded to s. 7 supra. In 1897 (R. S. O.), it appeared in the Conveyancing and Law of Property Act, c. 119, s. 38 (1) & (2), and later as 1 Geo. V. c. 25, s. 36. Now the same Act, R. S. O. 1914, c. 109, s. 50 (1) provides that the bonds or debentures of a corporation made payable to bearer, or to any person named therein or bearer, may be transferred by delivery, and if payable to any person or order, after general endorsation thereof by such person, shall be transferable by delivery, 50 (2).

Any such transfer shall vest the property in the bond or debenture in the holder thereof and enable him to maintain an action thereon in his own name.

Kehoe on Choses in Action, p. 84, discusses R. S. O. 1887, c. 116, s. 8. See the valuable collection of cases noted there.

In Manitoba.—38 Vic. (1875), c. 11, s. 6, introduced the present s. 26 (j) of the King's Bench Act, R. S. M. 1913, c. 46, into the statutes as part of an Act to make debts and choses in action assignable at law. S. 7 was to the same effect as s. 26 (k). By s. 3, the plaintiff in any action for the recovery of the subject of any assignment made in conformity with the Act was required to plead his chain of assignment shewing how he claimed title; but in all other respects the pleadings were to be the same as if the action had been brought in the name of the original creditor or the person to whom the cause of action accrued.

This appeared in the Administration of Justice Acts, C. S. M. (1880), c. 37, ss. 104 & 105, 48 Vic. c. 17, ss. 130, 131, R. S. M. 1892, c. 1, ss. 7, 8, and then was taken into the Queen's Bench Act of 1895, c. 6, ss. 6, 7. In the Act of 1880 a clause similar to Art. 5902 and s. 139 of the British Columbia Act appeared. This was dropped (except as s. 26 (e) preserves it) in 1885 (48 Vic., supra, did not carry it on).

In British Columbia.—S. 139 corresponds to Art. 5902 (Quebec), following.

Quebec.—By Art. 5779 the debentures, etc., may be made payable to bearer. By Art. 5900 specially applicable to "Cities, Towns and other Corporations," any debenture issued, with the formalities required by law, by any corporation or corporate body, payable to bearer or to any person named therein or to bearer, may be transferred by delivery and such transfer shall vest the property of such debenture in the holder thereof, and enable him to maintain an action thereon in his own name. By Art. 5901

any debenture as aforesaid shall be transferable after general endorsation if made to any person or to any person or order shall be transferable by delivery from the time of such endorsation, the transfer to have the same effect in that in Art. 5900. By Art. 5902, it is not necessary to allege or prove in an action upon such debenture the mode by which the plaintiff became the holder or to set forth or prove the notices, etc., under which it was issued, but it shall be sufficient to describe the plaintiff as the holder—alleging the general endorsation if any—and shortly to state the legal effect and purport of the debenture and to make proof accordingly.

By Art. 5903, subject to 5777, any such debenture shall be valid and recoverable to the full amount notwithstanding its negotiation by the corporation at a rate less than par or at a rate of interest less than 6 per cent. per annum, and shall not be impeachable in the hands of a bona fide holder for value without notice. [Art. 5777 limits the rate of interest to the legal rate.]

Alberta.—See the notes to s. 316 post.

British Columbia.—S. 143 corresponds to the last part. S. 136 permits any debenture payable to bearer or a named person or bearer to be transferred by delivery. S. 138 permits a debenture made payable to any person or order to be transferred by delivery after the person named has endorsed it in blank. Such transfers vest the property of the debenture in the holder and enable him to maintain an action upon it in his own name. See notes to s. 316 post.

Manitoba.—See the notes to s. 316.

New Brunswick (s. 4) and **Nova Scotia** (s. 5) :—These Acts contain similar provisions and add a clause requiring the time and place of payment to be certain and specified on the face of each debenture. Such debentures shall be "negotiable or transferable by delivery in like manner as a promissory note payable to bearer," unless registered according to the Act. As to registration see s. 316 infra.

Saskatchewan.—See notes to s. 316.]

315. Where the interest for one year or more on the debentures issued under a by-law heretofore or hereafter passed and the principal of any debenture which has matured has been paid by the corporation the by-law and the debentures issued under it shall be valid and binding upon the corporation.

[This section was first introduced in the Act in a form similar to its present form by 3 Ed. VII. c. 18. s. 93, and appears in the Consolidated Act, 3 Ed. VII. c. 19. as s. 432. As a result, probably, of Standard Life v. Tweed, infra, p. 528, it was re-drafted in its present form in 1913 by 3-4 Geo. V. c. 43, s. 315. A section was added in 1911 by 1 Geo. V. c. 57, s. 7, as number 432 (a) which provided that local improvement debentures

containing a general promise to pay were binding on a municipality. This was dropped when the Act was recast in 1913.

Alberta.—S. 192 (a) of the Towns Act added in 1914 by c. 7, s. 3, correspond. S. 188 of the Towns Act corresponds to s. 140 of the British Columbia Act.

British Columbia.—S. 141 provides that debentures or treasury certificates, issued under a by-law which has not been quashed and the interest upon which has been paid for one year, cannot be questioned, and validates the by-law and the debentures or certificates or so much as remains unpaid. The section saves litigation pending 1st March, 1911. S. 140 validates debentures notwithstanding any insufficiency in form or otherwise of the by-law or debenture or in the authority of the corporation if the by-law has received the consent of the electors, where necessary, and if no successful application has been made to quash the same within the time limited by the Act. See s.-s. 177 et seq.

A village by-law after reciting that it was necessary to raise $5,000 for a certain purpose and that it would be necessary to issue debentures for that sum, the by-law then provided for an annual special rate to supply the sum necessary for payment of interest at 5½ per cent., being $275 a year for ten years. No provision was made for payment of the principal although the Reeve was given authority to sign and issue such debentures and they were made payable as to principal and interest at a private bank in Tweed. The principal sum of $5,000 was directed to be paid in 1902. The plaintiff company bought the debentures in 1893. All interest was paid as it fell due, but payment of principal was refused when the debentures were presented at maturity.

Upon the passing of this section in 1903 as 432 the plaintiff company commenced action on the debentures and moved for summary judgment under Rule 603 (now 57). The defendants contended s. 432 did not apply to the debentures in question: that if there had been no mention of overdue principal very different considerations might have arisen: that no principal of the matured debentures had been paid, payment having been expressly refused. The Master held that a substantial defence was set up and that the defendants should have the opportunity of going down to trial. Standard Life Assurance Co. v. Village of Tweed, 2 O. W. R. 731 (1903).

Upon appeal to Ferguson, J., 2 O. W. R. 747, he held that s. 432 did apply. "The interest on the debentures was paid for a long series of years, and there were no matured debentures on which the principal would have been paid. There were no debentures falling due till the debentures sued on matured."

The parties then by consent stated a case for the opinion of a Divisional Court (2 O. W. R. 983). The judgment of the Court, 2 O. W. R. 922, upon the merits confirmed that of Ferguson, J. Boyd, C., traced the history of the section and said, p. 923: "It

is to be borne in mind that municipal debentures are broadly of two classes: (1) in which the principal money is to be paid at the end of a fixed period, with interest payable in the interval; and (2) in which the principal is payable by annual instalments with proportionate interest: ..... The principal enunciated in (this) curative enactment appears to be that one payment of interest will validate the debentures in respect of which it is paid, and one payment of principal will validate the series in respect of which it is paid. It cannot be said that the original section of 1881 is happily or even lucidly expressed, and it has not been made plainer in the course of subsequent legislation."

In Wilson v. Delta Corporation, [1913] A. C. 181, s. 146 (now 141) of the British Columbia Act was considered and Lord Moulton said at p. 188: "It was suggested on behalf of the appellant that the effect of this section was limited to the validation of the debentures issued. Their Lordships can see no ground for this contention. The section provides plainly that under circumstances which are admittedly to be found in the present case ['the statute and] the by-law . . . shall be valid . . . [and shall not be quashed on any ground whatever.'] For these reasons it is wholly unnecessary to inquire whether the contentions of the appellant as to the existence of irregularities in the procedure for obtaining the by-laws are well-founded or not."

[This section, 1892 Act, s. 146, later 1896, c. 37, s. 107, had the words in brackets which appeared in the same section as R. S. B. C. 1897, c. 144, s. 107—1906, c. 32, s. 108, and were dropped in 1911, c. 37, s. 12—later, R. S. B. C. 1911, c. 170, s. 170, and now s. 141.]

316.—(1) Where a debenture contains or has endorsed upon it a provision to the following effect:—

"This debenture, or any interest therein, shall not, after a certificate of ownership has been indorsed thereon by the treasurer of this corporation, be transferable, except by entry by the treasurer or his deputy in the Debenture Registry Book of the Corporation at the of ."

the treasurer, on the application of the owner of the debenture or of any interest in it, shall endorse upon the debenture a certificate of ownership and shall enter in a book, to be called the Debenture Registry Book, a copy of the certificate and of every certificate which is subsequently given and shall also enter in such book a memorandum of every transfer of such debenture.

[Recently s. 434, which was taken from 36 Vic. c. 48, ss. 300, 301 and 302 (1873). Biggar (p. 453), points out the analogy those provisions bear to the provisions prohibiting transfer of property in a ship, except in a particular mode, after certificate of ownership is granted. He also points out that the design of these provisions is "so far to control the negotiability of the debenture as to enable the municipal corporation at all times to know who is the holder of it. This is effected in the first instance by a declaration on the face of the debenture, in the form given in the section." By s. 434 (1), before it was amended, "Debentures issued by any municipal council" might contain a provision in the words set out in brackets above. This phraseology is still retained in most of the Acts of the other provinces.

Alberta.—The Towns Act, ss. 257 and 258.

The Rural Municipality Act requires a debenture register to be kept, s. 248. In The Towns Act, Alberta, ss. 254 and 255 correspond to ss. 307 and 308 of the Cities Act, Saskatchewan.

British Columbia.—Section 138, A, B and C, added in 1916 by c. 44, s. 28.

Manitoba.—Sections 438 and 439 contain provisions to the same effect.

New Brunswick and Nova Scotia.—By ss. 11 and 22 (2) of the respective Acts a book is to be kept by the clerk for the registration of debentures; a copy of every entry is to be endorsed on every debenture, [s. 12 N. B.]. By s. 24 of the Nova Scotia Act, any body corporate may appoint any trust company as registrar of its debentures.

Saskatchewan.—The Cities Act, ss. 309 and 310, contain similar provisions: s. 306 requires a debenture book to be kept by the treasurer, The Towns Act, ss. 306, 307 and 303, correspond to the above respective provisions of The Cities Act. By The Villages Act, s. 195, a debenture register is required to be kept; s. 193 also requires registration with the Minister, as do ss. 249 and 247 of c. 89.

The Cities Act, s. 306, and Towns Act, s. 303, require a debenture register to be kept by the treasurer, wherein shall be entered particulars of every by-law authorizing the issue of the debentures, all debentures issued under it, and every debenture shall have written, printed or stamped on it a memorandum signed by the treasurer as to the number of the debenture, the by-law, and date of registration.

The effect of such registration is set out in ss. 307 and 304 respectively.

Section 307 provides that in case any debenture is registered in the debenture register, the same shall be valid and binding in the hands of the city, or of any *bona fide* purchaser for value, notwithstanding any defect in form or substance. The Towns Act, s. 304, is to the same effect.

A certificate by the treasurer, under seal, as to such registration is *prima facie* evidence of such registration under ss. 308 and 305 respectively.]

316.—(2) A certificate of ownership shall not be endorsed on a debenture, except by the written authority of the person last entered as the owner of it, or of his executors or administrators, or of his or their attorney, which authority shall be retained and filed by the treasurer.

[Recently part of s. 434 (2).

Alberta.—The Towns Act, s. 258.

British Columbia.—Section 138 B.

Manitoba.—The last clause of s. 429 is similar.

Saskatchewan.—The Cities Act, s. 310 (2), and the Towns Act, s. 307 (2), provide that no such entry as provided for in ss. 310 (1) and 307 (1), shall be made, except upon the written authority of an unregistered holder or the person last entered in such book as the owner, or his executors, etc., or attorney, whose authority must be duly filed by the treasurer.]

316.—(3) After a certificate of ownership has been endorsed the debenture shall be transferable only by entry by the treasurer or his deputy in the Debenture Registry Book, as and when a transfer of the debenture is authorized by the then owner of it or his executors or administrators or his or their attorney.

[Recently 434 (3).

Alberta.—The Towns Act, s. 258 (2).

British Columbia.—Section 138 C.

Manitoba.—Section 430 is to a similar effect.

New Brunswick.—Section 13 (1) is similar. By s. 13 (2) the registration may be cancelled by the debenture being transferred in the debenture register to bearer, and so endorsed, whereupon it may be transferred by delivery. By s. 13 (3), interest coupons are transferable by delivery *in all cases* whether the debentures to which they are attached are registered or not. By s. 13 (4) debentures shall be subject to successive registration, and transfers to bearer at the option of the holder.

Nova Scotia.—Section 23 corresponds to s. 13 of the New Brunswick Act.

Saskatchewan.—The Cities Act, s. 310 (3), and The Towns Act, s. 307 (3).]

317.—(1) A council, pending the sale of a debenture, or in lieu of selling it, may, by by-law or resolution authorize the head and treasurer to raise money by way of loan on such debenture and to hypothecate it for the loan.

[This section first appeared in 1904, when it was added as 434 (a).
See s. 319 and notes.
See the notes to s. 319.

SIMILAR LEGISLATION.

Alberta.—The Towns Act, s. 186 (3). Section 252 provides for by-laws to authorize temporary loans in anticipation of the issue or sale of the debentures, after a referred by-law has been finally passed. The amount which may be borrowed must not exceed 80 per cent. of the total principal sum authorized to be raised; see the notes to s. 319.

The Alberta Rural Municipalities Act, s. 225, authorizes temporary borrowing until the taxes levied to pay the then current expenditure of the municipality can be collected. The borrowing must be authorized by a resolution, giving the reeve and treasurer power to borrow. The resolution should authorize the giving of promissory notes or notes of the reeve and treasurer, under the seal of the municipality. The total amount so borrowed shall not exceed 60 per cent. of the total taxes levied by the municipality,

for municipal purposes, for the preceding year. The amount borrowed is a first charge upon, and is paid out of the taxes as collected.

By s.-s. (2) similar powers are given to borrow up to 75 per cent. of the total school taxes to anticipate the taxes levied for rural school purposes after the estimate transmitted under s. 296. Sub-section (3) requires all taxes collected and all monies borrowed for school purposes to be kept in a separate—School Taxes Trust Fund—account, and only to be paid out to the several rural school districts entitled thereto. By s.-s. 4, any person or bank lending money under this section, shall not be bound to establish the necessity for borrowing the same, nor see to the payment of the same by the municipality into the Fund, nor as to the payment out thereof. By s. 226, the temporary loan during the first year of the organization may be to an amount not exceeding one-half of the total estimated revenue of the municipality for the year.

Quebec.—Article 5789 authorizes temporary loans pending the collection of the general and special taxes, on resolution by means of notes, for the period not exceeding the then current fiscal year, to an amount not exceeding at any time one-fourth of the revenue of the municipality then due and exigible. The amount so borrowed shall never at any time exceed $25,000. The consent of the electors or the Lieutenant-Governor is expressly dispensed with, and the borrowing may be on such terms and conditions as the council may deem expedient.

Saskatchewan.—Cities Act, s. 337, Towns Act, s. 320, by s.-s. 2 of each Act the town may give as security such promissory notes, treasury bills, temporary debentures or similar forms of obligation—which are renewable (s.-s. 3).

The Villages Act, s. 173, corresponds to s. 225 (1) of The Alberta Rural Municipalities Act. By s. 174, a village organized after July first, may borrow up to $500 on the same terms (compare s. 226 of the Alberta Act). The Rural Municipalities Act, c. 87, s. 87, corresponds to ss. 173 and 174 of The Villages Act.]

317.—(2) The proceeds of every such loan shall be applied to the purposes for which the debenture was issued, but the lender shall not be bound to see to the application of the proceeds and, if the debenture is subsequently sold, the proceeds of the sale shall be applied first in repayment of the loan.

[See the notes to s. 317 (1).

Section 434 (a) (2), which validated loans theretofore (26th April, 1904), made for the purposes set out in (1) and (2), supra, was dropped in 1913.

Alberta.—The Towns Act, s. 186 (3).

Saskatchewan.—The Cities Act, s. 337 (4), and The Towns Act, s. 320 (4).]

318.—(1) [Subject to sub-section 2 a corporation shall not] make or give any bond, bill, note, debenture or other undertaking for the payment of a less amount than $50; and any such bond, bill, note, or debenture, shall be void. See 9 Geo. V. c. 46, s. 8 (1).

[Recently s. 436, which was taken from the Act of 1849 (12 V. c. 81, s. 83), re-enacted by 22 V. c. 99, s. 214, and 29-30 V. c. 51, s. 218.

Instead of the words in brackets s. 436 had the words *"Unless specially authorized so to do no council shall"* . . .

The original section prohibited municipal councils from acting as bankers or issuing any bond, bill, note, debenture or other undertaking of any kind or in any form in the nature of a bank bill or note or intended to form a circulating medium or to supply the place of specie or to pass as money. This section is expressly preserved by s. 304 of the Act of 1873 and seems to be still in force. 22 V. c. 99, s. 215, and 29-30 V. c. 51, s. 218, declared the making etc., of such bond, bill, etc., to be a misdemeanour. The Criminal Code, 1892, superseded these Acts.

The Bank Act [3-4 Geo. V. (Can.) c. 9, s. 136], provides that "every person, except a bank to which this Act applies (*i.e.*, those banks named in the Schedule: see s. 3), who issues or reissues, makes, draws, or endorses any bill, bond, note, cheque or other instrument, intended to circulate as money, or to be used as a substitute for money, for any amount whatsoever, shall incur a penalty of $400. (2) Such penalty shall be recoverable with costs, in any court of competent jurisdiction by any person who sues for the same. (3) A moiety of such penalty shall belong to the person suing for the same, and the other moiety to His Majesty for the public uses of Canada. (4) If any such instrument is made for the payment of a less sum than $20, and is payable either in form or in fact to the bearer thereof or at sight, or on demand, or at less than 30 days thereafter, or is overdue, or is in any way calculated or designed for circulation, or as a substitute for money, the intention to pass the same as money shall be presumed, unless such instrument is—

(*a*) A cheque on some chartered bank, paid by the maker directly to his immediate creditor; or

(*b*) A promissory note, bill of exchange, bond or other taking for the payment of money made or delivered by the maker thereof to his immediate creditor; and,

(*c*) Not designed to circulate as money or as a substitute for money."

Gillespie v. Municipality of Westbourne, 10 M. R. 656 (1888), was a case decided upon a section of The Manitoba Act of 1881 (c. 3, s. 81), similar to the above [s. 318 (1)], and Taylor, C.J., expressed the opinion that the statute did not apply to a coupon for interest issued as a mere incident to a debenture, and that a coupon for $30 interest might be recovered upon.]

318.—(2) A debenture heretofore or hereafter issued under the authority of any by-law, providing for pay-

ment of principal and interest together yearly so computed and apportioned that the sum of both principal and interest is an equal annual sum of not less than $50, whether the debenture is issued with or without coupons, shall be deemed to be a debenture of not less than $50 within the meaning of this section, and all debentures heretofore or hereafter so issued under such a by-law and otherwise legal shall be valid. See 9 Geo. V. c. 46, s. 8 (2).

[This section was added to s. 436 by 63 V. c. 33, s. 18. It appeared in the Act of 1903 with s.-s. (1) as one section.]

TEMPORARY LOANS.

319.—(1) A council may either before or after the passing of the by-law for imposing the rates for the current year, authorize the head and treasurer to borrow on such security, if any, as the by-law may authorize, such sums as the council may deem necessary to meet the current ordinary expenditure of the corporation, *and the sums required to be raised in the current year for High and Public School purposes* until the taxes are collected.

[The original of this section, s. 303 of the Consolidated Municipal Act of 1873 (36 Vic. c. 48), later 56 Vic. c. 35, s. 10, was recently 435 (1). It was passed for the purpose of expressly giving the power to borrow money for current expenditure, and to execute by way of security for the repayment thereof, instruments binding upon the assets of the corporation. The power to do this was formerly doubted, although the better opinion was that it existed even before it was expressly given. See Biggar (1900), p. 454. See the provisions of s. 319 (a), added in 1914, infra.

"*Such sums as the council may deem necessary.*" These words were substituted by 56 V. c. 35, s. 10, for the words "such sums as might be required," which is "an important difference." Biggar, p. 454. The amount of such sums is limited by the provisions of s.-s. (2) immediately following.

The clause in italics was new in 1913. It was formerly s. 435 (4) which was struck out in 1913 as covered by this section. See the notes to s. 289 (8) and 297.

7 Edw. VII. c. 40, s. 9 (1) added to 435 (1), a clause similar to the one in italics, but referring only to Public Schools.

See the notes to s. 317 (1), providing for borrowing by hypothecation of debentures, and for similar legislation.]

319.—(2) The amount so borrowed and outstanding shall not at any time exceed in the case of a county the amount [required to be provided for by the county rate for the current year] and in the case of a local municipality the following percentages of its ordinary expenditure for the next preceding year, *together with the amount required to be raised for High and Public School purposes for the current year;*

[Originally 60 Vic. c. 45, s. 50 part, 61 Vic. c. 23, s. 16, recently 435 (2) part.

Borrowing by Counties.—Section 435 (2), had in place of the words in brackets, the words, "to be raised and paid over to the county by the local municipalities therein for ordinary expenditure for county purposes for the then current municipal year."

Borrowing by Local Municipalities.—The clause in italics was new in 1913. See the notes to s.-s. 1 immediately preceding.

"Its Ordinary Expenditure for the Next Preceding Year.—Section 435 (1) read '80 per cent. of the amount collected as taxes to pay the ordinary current expenditure of the municipality in the preceding municipal year.'"

These words were struck out by 4 Edw. VII. c. 22, s. 15, which inserted the words "90 per cent. of the estimates for the current year."

7 Edw. VII. c. 40, s. 9 (2), amended s. 435 (2), by inserting "90 per cent. of the estimated ordinary expenditure for the preceding year, and such further sums as may be required to be paid to the treasurers of the respective public school boards, from time to time, upon the requisition of the school trustees, as provided for by the Public Schools Act."

The present wording was first used in 1913.]

319.—(2), (*a*) In the case of a town, village or township, any part of which is situate within 2 miles of a city having a population of not less than 100,000—80 per cent.;

[Recently part of 435 (2), which applied to "any municipality other than a county," and 435 (2a), which was added by 62 Vic. (2nd Session), c. 26, s. 45, and applied to a town, township or village, any portion of which is situate within 2 miles of a city of 100,000 as above. This wording was new in 1913. Section 435 (2) was amended by 1904. c. 22. s. 15, by substituting 90 per cent, for 80 per cent. Now s.-s. (b) contains the limitation of 90 per cent. See the notes to the preceding sub-section.

An amendment of 1897 (60 Vic. c. 45), first limited the borrowing to 80 per cent. of the taxes collected in the preceding year. Prior to that it was held that the lender was bound to inquire into the amount of the taxes authorized to be levied to meet current expenditure and could not lawfully lend more, although he was not bound to establish the necessity for borrowing: Fitzgerald v. Molsons Bank, 29 O. R. 105 (1898), at 109.

But an approved debenture by-law to raise money to repay an amount borrowed where the money borrowed exceeded the authorized amount, but were spent upon objects for which money lawfully obtained might be expended, was upheld: ibid. 109, 110.

See also the provisions of s.-s. 3, *post.*]

319.—(2) (b) In the case of a city and of any other town, village or township—90 per cent.

[See notes to (a), *supra*. This clause was new in 1904.]

319.—(3) If the council authorizes the borrowing of any larger sum, every member who votes therefor shall be disqualified from holding any municipal office for two years.

[Recently 435 (2) part. See notes to 319 (1), *supra*.]

319.—(4) The lender shall not be bound to establish the necessity of borrowing the sum lent.

[This clause was new in this form in 1913. Section 435 (3) part, contained a similar clause originally passed as 36 Vic. c. 35, s. 10, and see s. 435 (3a), exempting members of council elected for 1899 from disqualification under s.-s. 2, struck out, as spent, 60 Vic. c. 45, s. 50 (part).]

319*a* Where by this or any other Act power is conferred on a municipal corporation to borrow money for any purpose without the assent of the electors, it shall include not only the power to borrow money by the issue of debentures but also the power to agree with any bank or person for temporary advances to meet the expenditure incurred from time to time for such purpose.

[Added by 4 Geo. V. c. 33, s. 10.]

320. When a corporation has heretofore guaranteed or hereafter guarantees the payment of the principal or interest of any bonds or debentures and default is made in payment of the principal or interest by the person primarily liable therefor, the council of such corporation may agree with any bank or person for temporary advances to meet the amount in default in any one year pending the collection of such amount by a rate on all the rateable property in the municipality, or where the guarantee is by or on behalf of a section or portion of a township, by a rate on all the rateable property in such section or portion.

[This clause was added in 1912. 2 Geo. V. c. 40. s. 7.]

Stock Redeemable at a Prescribed Time. Issuing Stock is not Borrowing. In Edinburgh Corporation v. British Linen Bank, 1913, A. C. 133; 82 L. J. P. C. 25, H. L., the corporation was authorized to issue a new class of stock for any of their purposes "to bear any rate of dividend which the corporation may fix, and all stock of such class shall be redeemable at the option of the corporation at one and the same period to be fixed by the corporation, but not exceeding sixty years from the first issue of such stock." Under this power they issued certain stock in the following form:

"CITY AND ROYAL BURGH OF EDINBURGH.

No. , Register Folio.

"Stock created and issued to date, £750,000. The amount of stock authorized is unlimited.

"Authorised by The Edinburgh Corporation Stock Act, 1894, and the Edinburgh Improvement and Tramways Act, 1896.

"This is to certify that is the Proprietor of Pounds of Edinburgh Corporation Two and a half per Cent. Redeemable Stock, subject to the Acts of Parliament relating thereto.

"Note.— . . . Redeemable at par after Whitsunday, 1927 . . . Interest payable half-yearly on 15th May and 11th November."

The bank brought an action for a declaration that the corporation were bound to redeem the stock immediately on the expiry of May 15, 1927, but the corporation maintained that they were under no obligation to redeem the stock although they had a right to do so after that date, and this view was upheld by the House of Lords. The Lord Chancellor (Viscount Haldane), said:

"The great question which arises is as to the meaning of the word 'redeemable.' As I interpret the word, it means redeemable at the option of the corporation. . . .

"Now that so far might be simple enough, but it ceases to be simple if you proceed to import into the meaning of the words 'stock and stockholder' the relation of debtor and creditor. To my mind the fundamental fallacy of the reasoning of the court below is this—that the learned Judges have tried this question as if it could only be a question of the relation of debtor and creditor. Of course, if you get the relation of debtor and creditor, then the word 'redeemable' may come to have a very different significance from what it has here. A creditor is *prima facie* entitled at some time to get his money paid and his debt thus redeemed, but if the relation is not one of debtor and creditor the situation may well be very different.

"The mere desire to raise money does not by any means necessarily import that you resort to the establishment of the relation of debtor and creditor. In England when the usury acts were in force, it was legally impossible to borrow money at more than a certain rate of interest, consequently in order to get money impecunious persons whose credit was not good were in the habit of doing what was very extensively done—namely, selling annuities. Some times these annuities had attached to them an option of repurchase on the part of the seller of the annuity. But although this was a device for getting around the difficulty of borrowing money, it substantially avoided anything that was really in the nature of borrowing by substituting the sale of a perpetual annuity."

His Lordship then pointed out that the corporation had in the earlier days of its history resorted to this device, and that while the corporation had borrowing powers under which the relation of debtor and creditor might be created, it also had the power to issue what were strictly speaking perpetual annuities, redeemable in the sense of being repurchasable upon certain terms, and that when this was done the relation was not one of debtor and creditor, but one of seller and buyer, and he reached the conclusion that the stock in question had been issued subject to redemption merely in the sense that the corporation had an option to repurchase it, and Lord Halsbury adopted the view which was expressed in the court below as follows: "Anyone who alleges that a redeemable stock must be redeemed is bound in my opinion to show the existence of the obligation upon which he found, and this the pursuers have failed to do."

In Re Chicago and North Western Granaries, 1898, 1 Ch. 263; 67 L. J. Ch. 109, North, J., held that the word "redeemable" in a debenture *prima facie* meant an option to redeem, or liable to be redeemed, and that there was no obligation on the issuing company to redeem within the time specified.

In Re Southern Brazilian Ry., 1905, 2 Ch. 78; 74 L. J. Ch. 392, Buckley, J., held that the granting of perpetual annuities was not borrowing, but that nevertheless debenture stock issued as irredeemable was redeemable at par on the winding up of the company. He further held that the granting of perpetual annuities was *ultra vires* if done only under the authority of a power to borrow.

PART XV.

ACQUISITION OF LAND AND COMPENSATION.

Land Taken or Injuriously Affected.

321. In this Part:

(*a*) "Expropriation" shall mean taking without the consent of the owner, and "Expropriate" and "Expropriating" shall have a corresponding meaning. *New.*

(*b*) "Land" shall include a right or interest in, and an easement over, land;

(*c*) "Owner" shall include mortgagee, lessee, tenant, occupant, and a person entitled to a limited estate or interest in land, a trustee in whom land is vested, a committee of the estate of a lunatic, an executor, an administrator, and a guardian;

(*d*) "The Judge" shall mean, in the case of an arbitration as to the compensation for land expropriated, or for injuriously affecting land or where leave to enter on such land is desired under section 324, a Judge of the County or District Court of the county or district in which the land or any part of it is situate, and in the case of any other arbitration, if the corporation of one municipality only is a party to it, a Judge of the County or District Court of the county or district in which the municipality, if it is a local municipality, is situate, or, if it is a county, of that county, and if the corporations of two or more municipalities are parties to the arbitration, a Judge of the High Court; 3 & 4 Geo. V. c. 43, s. 321; 7 Geo. V. c. 42, s. 5.

Land.—See s. 2 (*g*).

A Right or Interest in Land.—See s. 2 (*g*).

Power to Acquire Land Includes Power to Expropriate.—See s. 6.

Owner includes purchaser under agreement with owner. See s. 5.

322.—(1) The council of every corporation may pass by-laws for acquiring or expropriating any land required for the purposes of the corporation, and may sell or otherwise dispose of the same when no longer so required.

(2) Where in the exercise of its powers of acquiring or expropriating land it appears to the council that it can acquire a larger quantity of land from any particular owner at a more reasonable price and on terms more advantageous than those upon which it could obtain the part immediately required for its purposes, the council may acquire or expropriate such larger quantity and may afterwards sell and dispose of so much of it as is not so required. 9 Edw. VII. c. 73, s. 17, *amended.*

(3) A by-law for entering on or expropriating land shall contain a description of the land, and, if it is proposed to expropriate an easement or other right in the nature of an easement, a statement of the nature and extent of the easement to be expropriated. *New.* 3 & 4 Geo. V. c. 43, s. 322 (1-3).

Excess Condemnation.—Under s. 322 (2) municipal corporations are now given the power to take more lands than are actually required for a particular purpose, and where such additional lands can be purchased more reasonably than part of such lands could be purchased, and power is given to sell the lands not required. The language of the section would not appear to be comprehensive enough to authorize a general scheme of town planning where lands are acquired from many different owners in the vicinity of a proposed undertaking with a view to re-subdivision of the portions not required for the undertaking and resale of the same at an enhanced price due to the completion of the undertaking. This limitation seems to follow from the language of the section which simply enables the corporation when it actually requires a part of the lands of any particular owner to buy from that particular person more than it actually requires. The section does not authorize the acquisition of lands, no part of which are actually required for the particular undertaking proposed. Many European and American cities by the exercise of the power of excess condemnation are able to defray the entire cost of improvement schemes out of the enhanced values of the excess lands taken, re-subdivided and sold.

323. The determination of a council as to the time when, the manner in which, the price for which or the person to whom any property of the corporation, which the council may lawfully sell, shall be sold, shall not be

open to question, review, or control by any Court, if the purchaser is a person who may lawfully buy, and the council acted in good faith. *New.* 3 & 4 Geo. V. c. 43, s. 323.

324. At any time after the passing of a by-law for entering on or expropriating land, the corporation, by leave of the Judge and upon payment into the High Court of a sum sufficient, in the opinion of the Judge, to satisfy the compensation, may enter upon the land, and, if any resistance or forcible opposition is made to its so doing, the Judge may issue his warrant to the Sheriff of the county or district in which the land lies to put the corporation in possession, and to put down such resistance or opposition, which the Sheriff, taking with him sufficient assistance, shall accordingly do. 3 & 4 Geo. V. c. 43, s. 324 (1).

(2) Leave of the Judge and payment into Court shall not be necessary where the land is being expropriated for or in connection with the opening, widening, protecting from the erosion of streams of water, altering or diverting of a highway unless upon application by the owner a Judge of the Supreme Court otherwise directs. 3 & 4 Geo. V. c. 43, s. 324 (2); 9 Geo. V. c. 46, s. 9.

325.—(1) Where land is expropriated for the purposes of a corporation, or is injuriously affected by the exercise of any of the powers of a corporation or of the council thereof, under the authority of this Act or under the authority of any general or special Act, unless it is otherwise expressly provided by such general or special Act, the corporation shall make due compensation to the owner for the land expropriated, or where it is injuriously affected by the exercise of such powers for the damages necessarily resulting therefrom, beyond any advantage which the *owner may derive from any work,* for the purposes of, or in connection with which the land in injuriously affected.

Where the major portion of damage arises from negligence, and it is impossible to say what portion of the damage results from the lawful exercise of the power of the corporation, the plaintiff has a right of action and full damages may be recovered, notwithstanding sec. 325 (2).

(2) The amount of the compensation, if not mutually agreed upon, shall be determined by arbitration.

(3) Where fencing or additional fencing will become necessary, owing to land having been expropriated, the cost of it shall be included in the compensation. 3 Edw. VII. c. 19, s. 437, *redrafted.*

(4) Where part only of the land of an owner is expropriated, there shall be included in the compensation a sum sufficient to compensate him for any damages directly resulting from severance. *New.* 3 & 4 Geo. V. c. 43, s. 325 (1-4).

326.—(1) Except where the person entitled to the compensation is an infant, a lunatic, or of unsound mind, a claim for compensation for damages resulting from his land being injuriously affected shall be made in writing, with particulars of the claim, within one year after the injury was sustained, or after it became known to such person, and, if not so made, the right to compensation shall be forever barred.

(2) In the case of an infant, a lunatic, or a person of unsound mind, the claim shall be so made within the same period, or within one year after he ceased to be under the disability, whichever shall be the longer, or in case of his death while under the disability within one year after his death, and, if not so made, the right to compensation shall be forever barred. 3 Edw. VII. c. 19, s. 438, *redrafted.*

(3) This section shall not apply where the expropriating by-law provides for acquiring an easement or right in the nature of an easement, and the damages arise from the exercise of such easement or right. *New.* 3 & 4 Geo. V. c. 43, s. 325 (1-3).

327.—(1) If the owner of the land is unknown, or cannot be found, or if there is no person competent to contract with the corporation for the sale to it of the land, and to convey it to the corporation, the Judge may, on the application of the corporation, appoint a person to act for the owner, and all acts done, contracts made, and

conveyances executed by such person, shall be as valid and effectual as if the same were done, made or executed by the owner, and he were of full age and competent to do the act, make the contract or execute the conveyance. 3 Edw. VII. c. 19, s. 444 (2), *redrafted.*

(2) In the cases provided for by sub-section 1, the amount of the compensation agreed upon or awarded shall be paid into the High Court, with the privity of the Accountant of the Supreme Court, subject to further order. *New.* 3 & 4 Geo. V. c. 43, s. 326 (1-2).

328. The compensation shall stand in the place of the land, and shall be subject to the limitations and charges, if any, to which the land was subject; and any claim to or incumbrance upon the land, or any part of it, as against the corporation, shall be converted into a claim upon the compensation. 3 Edw. VII. c. 19, s. 445. 3 & 4 Geo. V. c. 43, s. 328.

329.—(1) Where it is made to appear to a Judge of the High Court that for any reason it is proper that the compensation should be paid into Court, the Judge may give leave to the corporation to pay it into Court, with interest at the rate of six per cent. per annum for six months.

(2) Notice of the payment into Court, and calling upon all persons entitled to the land, or any part of it, to file their claims to the compensation, or any part of it, shall be published in such newspaper and for such time as the Judge may direct.

(3) All claims to or upon the compensation shall be determined by a Judge of the High Court or in such manner as he may direct.

(4) The costs of the proceedings, including allowances to witnesses, shall be paid by the corporation or by such person as the Judge may direct;

(5) If an order for distribution is obtained in less than three months from the payment into Court the Judge may direct a proportionate part of the interest to be returned to the corporation.

(6) The payment into Court shall discharge the corporation from all liability in respect of the compensation. 3 Edw. VII. c. 19, s. 446, *redrafted.* 3 & 4 Geo. V. c. 43, s. 329.

330. After payment into Court of the compensation, a Judge of the High Court may, upon the application of the corporation, make an order, vesting in the corporation the land in respect of which the compensation was payable, and the order shall have the same effect as a vesting order made under the provisions of *The Judicature Act. New.* 3 & 4 Geo. V. c. 43, s. 330.

331.—(1) Where the council of a city or town is desirous of entering upon any work or undertaking, for which land is required to be expropriated, or in the execution of which land may be injuriously affected, the council may file, in the office of the clerk, plans and specifications of the work or undertaking, which shall show the names of the owners of the land to be affected, the land to be expropriated, and the nature and extent of any easement, or right in the nature of an easement, to be acquired, or certified copies of such plans, and specifications.

(2) The clerk shall cause to be served upon every owner of land to be expropriated, or which may be injuriously affected, a notice of the council's intention to proceed with the work or undertaking, and to expropriate the land necessary therefor, and that such plans and specifications may be inspected at his office, and that any claim for compensation on account of the land being injuriously affected must be filed in his office, with a statement of the amount claimed, within sixty days, or, if the person served resides out of Ontario, within ninety days, from the service of the notice.

(3) If a claim is not so filed within the period mentioned in sub-section 2, it shall be forever barred, unless, upon application to a Judge of the High Court, made not later than one year from the service of the notice, and, after seven days' notice to the corporation, the Judge allows the claim to be made.

(4) Either party may appeal from the decision of the Judge to a Divisional Court of the Appellate Division of the Supreme Court. 3 Edw. VII. c. 19, ss. 439, 440, *redrafted.*

[Note.—*Old. s. 441, providing for arbitration, struck out as covered by new s. 325.*]

(5) Nothing in this section shall have the effect of barring a claim, if the plans and specifications filed do not disclose or sufficiently disclose that the injury in respect of which the claim is made will be caused by the work or undertaking. 3 Edw. VII. c. 19, s. 443, *amended.*

(6) This section shall not apply to the claim of an infant, a lunatic or a person of unsound mind, or where the expropriating by-law provides for acquiring an easement or right in the nature of an easement and the land is injuriously affected by the exercise of such easement or right. *New.* 3 & 4 Geo. V. c. 43, s. 331 (1-6).

Lands which Cannot be Expropriated.—Apparently a corporation cannot expropriate lands which belong to another public corporation or *quasi* public corporation, such as a railway where such lands have been acquired for public purposes by expropriation, but if a railway company or street railway company has purchased lands not essential to the purposes of its undertaking, there appears to be no bar to the legitimate expropriation of such by a municipal corporation. Toronto Railway Co. v. Toronto, 1906, 13 O. L. R. 532, D. C. See also In re Bronson and Ottawa, 1882, 1 O. R. 415.

In re Davis and Toronto, 1891, 21 O. R. 243, it was held that the city could not under a power to pass by-laws for entering upon, breaking up, taking or using any land for drainage purposes, pass a by-law merely to expropriate an easement for the construction of a sewer without assuming to take the land itself. See also Re Niagara Falls Park, 1887, 14 A. R. 65, where it was held that the Park Commissioners could not expropriate lands which had already been acquired for highway purposes under statutory authority.

Using Lands Acquired for One Purpose for Another Purpose.—From a consideration of s. 331, it would appear that where lands are to be expropriated for a particular work or undertaking and that other lands may be injuriously affected thereby, the council has to file plans and give notice. In such a case compensation will be based on the nature of the work or undertaking and if the lands expropriated are subsequently devoted to another purpose, it may well appear that further damage in addition to that in respect of which compensation has been paid, will accrue to owners. It would therefore, appear that the corporation might be restrained from diverting lands expropriated for one purpose to other purposes on the principle laid down by the Court of Appeal in Atty.-Gen. v. Hanwell Urban Council, 1900, 1 Ch. 51; 69 L. J. Ch. 626 where lands were expropriated for a sewage farm and part of them was afterwards used for hospital purposes. The local authority was proceeding under the Public Health Act, 1875, under which the acquisition of lands for a particular purpose, had to be specially authorized by the Local Government Board, and by s. 176 of the Act the Lands Clauses Consolidation Acts, 1845, 1860 and 1869 were incorporated under the Public Health Act, with the exception of s. 127 of the Act of 1845, which directed the peremptory sale of superfluous lands or the vesting of them in

the adjoining owners. It was urged on behalf of the local authority that its undertaking involved a number of different purposes, and that it was not like a railway which is incorporated for one purpose and one purpose only, and that if it acquired land for the purpose of its undertaking, it could use it for any one of its purposes, if it got the authority of the Local Government Board. This contention was not sustained by the Court. Lord Alverstone, M.R., in dismissing an appeal from a judgment restraining the local authority from using the lands for hospital purposes, thus dealt with the matter:—

"I think it must be taken that the appellants, or rather their predecessors, acquired the land under statutory powers and for statutory purposes—namely, for the purpose of using it for the disposal of sewage, and the question is whether what subsequently happened has altered the rights of the parties. It appears that two acres of this land were not fitted to be used for sewage purposes, and the idea occurred to the local authority that they might use these two acres not for a merely temporary purpose, nor for anything in connection with sewage, but for the purpose of establishing an isolated hospital; and for this purpose, as was very frankly stated by counsel, they took steps to borrow money to erect a permanent hospital on this land—not a mere temporary user while the land was not required for sewage purposes. It is not necessary to mention the formal steps which led up to an order of April 3rd, 1897, whereby the Local Government Board, having recited the application to them under s. 175, on the ground that the land which formed part of the land required by the local board of Hanwell for the purpose of sewage disposal was not required for such purposes, directed that the land should be retained by the council as a site for the erection of a hospital for infectious diseases, other than small-pox.

"I ought to say that in my opinion no special weight and no special authority can be given to the concluding words. It could not be nor is it suggested that by virtue of any implied or expressed authority from the Local Government Board the appellants had any power to enforce against an unwilling person or persons, who would otherwise have objected to it, the establishment of a hospital for infectious diseases; but what is said, and it is a point which gave me considerable difficulty, is that the order being made under s. 175 that the local authority may retain the land as their own, they are entitled to use it for any purposes for which they can lawfully use land which belongs to them; and if we were able to see that that was the intention of the Act of Parliament to be gathered from the sections which prescribe the way in which the land shall be compulsorily acquired and subsequently used, the point might be made good.

"In my opinion the language of s. 175 is not sufficient to enable the local authority to apply the land for a permanent purpose which is different from that for which it was originally acquired. I think the provisions of s. 176 and the scheme of the Act referring to the acquisition of land are very important. The local authority have a limited authority. They possess powers which are given to them by Act of Parliament, or by orders that the Local Government Board have made having the force of an Act of Parliament. Their power to acquire land compulsorily is to acquire it for specific purposes, and I think as long as they hold it without fresh statutory authority they can only hold it for those specific purposes, according to the doctrine and principle laid down in Atty.-Gen. v. Southampton Corporation, 29 L. J. Ch. 282; 1 Giff. 363. It was not disputed by the appellants that where the land has been acquired by the local authority under statutory powers for sewage purposes, the whole of the negotiation and contract for compensation proceeding upon that basis, the local authority hold the land subject to that restriction. I do not base my judgment upon anything in the conveyance to the local authority, because the form of conveyance which, after reciting that the land was acquired for sewage purposes, conveyed it to the local authority absolutely, has not been seriously pressed upon us, nor do

I understand that it was pressed in the Court below. I think the real rights depend upon and are governed by the statute.

"That being so, we must consider what is the effect of the order and what is the position when (setting aside the special directions about a hospital) the Local Government Board have directed that the land shall not be sold. As I ventured to point out in the course of the argument, I can imagine many reasons why it is desirable that the land should be in the hands of the local authority, even though they can only use it permanently for purposes consistent with the purposes for which they originally acquired the land. It might be very undesirable to have a third owner, or an adverse owner coming in, and building houses and getting control of or acquiring rights against some particular mode of user of the land; and I can well conceive that, quite apart from the right to use it for any purposes inconsistent with those for which they acquired the land, there might be many cases in which it would be right that the land should not be sold. But at any rate it seems to me that it is too strong to suggest that, under a provision which is merely intended to control the question of whether the land shall or shall not be sold, we can import the power of the local authority—the purchasing body—to use it for a purpose for which it was not originally acquired. In my opinion there still remains, affecting the rights of both parties, the restriction which was put upon a body with limited authority to buy under the provisions of s. 176 for certain special purposes; and we cannot say that because there has once been given a direction that they need not sell the land, that they hold it absolutely unfettered and free so that they can use it as if they had acquired it by agreement with some person who was willing to sell them land.

"My judgment must not be supposed to deal at all with the case of some temporary user of the land, either by letting or other temporary user in the hands of the defendants. I am dealing with the case before us—namely, in which it was the intention of the defendants to permanently turn two acres of this land to a purpose inconsistent with the purpose for which it was originally acquired, and to which they had no power to turn it unless this direction of the Local Government Board could confer it. To hold that it could confer it would, I think, be giving powers to the Local Government Board to affect and control the rights of parties who have never been heard, and have no statutory opportunity of being heard, on the matter, to a greater extent than ought to be given; and I think that it would require much stronger words than we find in s. 175. For these reasons I think the appeal should be dismissed with costs."

In re Bronson and Ottawa, 1882, 1 O. R. 415, power of R. R. Co. to expropriate lands held by city. Power of city to have lands expropriated for water works as right-of-way for R. R.

Using Lands Acquired for One Purpose for Another Purpose—Right to Complain.—Apparently only the Attorney-General has the right to complain where a public corporation in violation of the powers given it by the Legislature uses lands for an unauthorized purpose. In Hope v. Hamilton Park Commissioners, 1901, 1 O. L. R. 477, the plaintiffs who were residents and ratepayers of Hamilton brought an action to restrain the city from using the lands which had been purchased and set aside as a public park as a baseball grounds. The trial Judge dismissed the action on the ground that the plaintiffs had not been individually wronged and had not sustained any injury not common to the rest of the public, and this decision was confirmed by the Court of Appeal. Armour, C.J., in giving judgment of the Court, said:—

"The rule is that no person may institute proceedings with respect to wrongful acts, which if of a private nature are not wrongs to himself, and if of a public nature do not specially affect himself, and this rule applies equally to *ultra vires* transactions: Brice, 3rd ed., p. 751.

"It is unnecessary, in the view I take of this case, to determine whether in doing what they essayed to do, the board of park management were acting within the powers conferred upon them by the Legislature or within what might fairly be regarded as incidental to

or consequential upon such powers, for no one of the public has any right to complain whenever parliamentary powers, such as those conferred upon this board, have not been strictly followed or are intended to be transgressed, unless he can shew that he has an interest in preventing the doing of that which may well be called a violation of their contract with the Legislature. He must not only shew that they are committing or intend to commit a wrong, but also that the wrong complained of does occasion or will occasion loss or damage to him, that he has a special or private interest in confining them within the limits of their parliamentary powers: Mayor, etc., of Liverpool v. Chorley Waterworks Co., 1852, 2 D. M. & G. 852.

"And unless he can show this, it is only the Attorney-General who has any right in such case to complain.

"I do not think that the fact of the plaintiffs' being ratepayers of the city of Hamilton, which had purchased the park and had adopted the Public Parks Act, thereby constituting the board of park management an independent corporation, gave them a special or private interest in confining the board of park management within the limits of their parliamentary powers, or that their transgressing them, as it was alleged they were essaying to do, did or would occasion any loss or damage to them."

Sale of Expropriated Lands.—In Watson v. Toronto Harbour Commissioners, 1918, 42 O. L. R. 65, the City of Toronto expropriated certain lands for park purposes, and conveyed them to the harbour commissioners. The plaintiff claimed that he was entitled to recover possession of the lots on the ground, amongst others, that the City had entered into a dishonest scheme to utilize their powers for the purpose of vesting the land in the harbour commission for harbour purposes. The fact that the city had retained control of the land and intended to use it as part of their park system was held sufficient to justify the transaction.

Doctrine of Irrevocable Dedication.—On the other hand, the lands acquired by a municipality may be impressed with a special trust, so that what is known as the doctrine of irrevocable dedication applies. Atty.-Gen. v. Southampton Corporation, 1859, 29 L. J. Ch. 282. The doctrine was considered by Boyd, C., in Atty.-Gen. v. Toronto, 1903, 6 O. L. R. 159; 2 O. W. R. 539, where an action was brought by the Atty.-Gen. of Ontario, on the relation of certain lessees of lots upon the Island within the liberties of Toronto. The action was also brought on behalf of all the ratepayers of the city of Toronto, and by one of the lessees as a plaintiff in her own right for a declaration that the corporation could not lawfully revoke the dedication for park purposes of certain lands, part of the island. The learned Chancellor thus dealt with the matter: "This corporation acted on the belief that there was power to deal with the land designated as park land by leasing it, imposing and collecting rents and taxes, approving of the laying out of new streets on registered plans, and otherwise exercising the control of owners, though some regard for the enjoyment and benefit of the public has been always kept in view. The park scheme had not been abandoned, but the details, and the area of its occupation on the island, have been modified from time to time by successive councils. If the city has the power to exercise such control, it is not for the Court to interfere, nor can the wishes of the residents on the island control the situation as against the legislative and directory powers of the corporation. After the best consideration I can give, and in the absence of any distinct authority, my conclusion is, that the city has not exceeded its corporate or legislative powers in dealing as has been done with this Island Park. It does not appear to me that the doctrine of irrevocable dedication is applicable to the case of a park which is established by by-law out of land belonging to the corporation as owners in fee simple. The fact of corporate action being embodied in a by-law implies its revocability. Having enacted such a by-law to establish a park, the same body or its successors may repeal, alter, or amend, as is deemed proper, so long as no vested right is disturbed: R. S. O. 1897, c. 1, s. 8 (37), and c. 223, s. 326.

This right, as applied to public places "dedicated" to the public out of corporate property owned by the municipality, is recognized by the

Court, and has been based upon the reading of the statute in that behalf: R. S. O. c. 223, s. 637. In Attorney-General v. Toronto, 10 Gr. 439, VanKoughnet, C., construes the statutory word "square" as meaning not merely an open space used as a means of communication like a street, but as having the wide meaning inclusive of a park — an open or enclosed space devoted to such a use. This, though dedicated by a corporation, may be afterwards shut up or have taken from it its use and character as a park. That such was the decision is to be seen also from the observations of Mr. Justice Osler, in In re Peck and Town of Galt, 46 U. C. R. 219, where he says: "A square or park which the corporation lay out upon lands acquired by them . . . untrammelled by any trust as to its disposal, may be dealt with under the ample powers conferred upon them by s. 509" (i.e., of R. S. O. 1897, c. 174), which is an earlier appearance of the present s. 637.

The plaintiff Mrs. Smith claims under a lease made in 1874 which was renewed in 1897, though made to date back as from 1895, for which the term is for 21 years. The house originally built is occupied by her family now, and is about a quarter of a mile from the house being put up by the defendant Lemon, which is on the lot adjoining Mallon's house.

The evidence does not satisfy me that she has any such interest as gives her the right to appear as a private plaintiff. No special grievance, personal or proprietary, attaches to her, as owner on Manitou Avenue, which is injured by the erection of the Lemon house. Besides, the original lease under which she took was made in 1874, prior to the park scheme, and the renewal in 1895 or 1897 was after registration of the plans made in 1883 and 1890, shewing that the city had sanctioned the subdivision of lots 56, 57, and 59 into lesser lots for the purpose of being leased, and so incompatible with that locality possessing or being likely to possess the character of a park.

The joint information and action fails and should stand dismissed, but, as the motives of the relators and plaintiff are most commendable, I do not give costs if this ends the litigation. Should an appeal be lodged, however, then I think costs should be paid to the city as a proof of good faith in prolonging the controversy."

What Interest in Lands Entitles to Compensation.—The only persons entitled to compensation are those who have an estate or interest in lands taken or injuriously affected. The question as to what is an interest in lands, within the meaning of the Act, as distinguished from a mere license or permit is sometimes of considerable difficulty. In Edwards v. Barrington, 1901, 85 L. T. 650, the lessee of a theatre, who held under lease containing a covenant that he would not part with his lease or any estate or interest therein to any person without the license of his lessor, and by an indenture in which he was called "the landlord," granted to a company therein called "the tenants," the free and exclusive right to use certain refreshment rooms in the theatre, with the free right of access and the exclusive privilege of advertising in the theatre, and it was agreed that "the landlord" by a notice in writing, might determine the term on certain conditions, and that no rent should be payable when the theatre was closed. The indenture also contained a covenant by "the landlord" for quiet enjoyment. The owner of the theatre took possession, claiming that the lessee of the theatre had committed a breach of his covenant not to part with any estate or interest in his lease, and an action was brought by the lessee of the theatre to recover possession. Judgment was given in the plaintiff's favour, which was affirmed by the Court of Appeal and the House of Lords. Lord Halsbury thus dealt with the matter:—

> "I do not deny that the documents themselves present a beautiful confusion of thought and language by the gentlemen who have contrived them, which was calculated to create the difficulties which all the Judges who have had to deal with this matter have expressed. Those who drew up the documents have used words inappropriate to the particular thing with which they were dealing. But they are not words of art, and it is frankly and most properly conceded that we must, if we can, find out from the language of the instrument, having regard to the relations between the parties and the object which was on the face of the instrument apparent, what were the

real intentions of the parties. And really but for the extremely confused and inaccurate use of technical words from time to time in the course of these instruments the object is clear enough. The lessee of a theatre is making a bargain with a refreshment contractor, and he wants proper accommodation for those whom he invites to his theatre to be provided by some person who shall preside over and have the command and the profits of the refreshment department of the theatre. The mode in which the parties have contracted is that which really makes the difficulty. But when one looks at the whole thing there is not one word which necessarily, as a matter of art, decides the question. Then let us see what the words are that they did use. They did not say that they demise, for instance, but they say that the person with whom the contract is made is to have the use of certain parts of the premises, and—I confess that I follow the language and the reasoning of the Lord Chief Justice very much—if you look through the whole thing you see what is the object of it. No doubt both parties intended that the one should be the exclusive refreshment contractor, and that the other person who was the lessee of the theatre should have certain control and certain powers of dealing with that part of the theatre which was reserved for refreshment—the refreshment bars, cupboards, &c. If that is the real meaning of the parties, is there anything in the language which they have used which prevents that intention from being carried out? I think not. I think the instrument most unfortunately framed—framed apparently by attempting to adapt a common form of lease of land to the contract into which the parties were entering; and from time to time language is used—I think the strongest case is where you find the covenant for quiet enjoyment, and the payment of rent and so on, which is more appropriate to the ordinary transactions by way of conveyance and lease and covenants in a lease. But still, when I look at the whole and see the relations between the parties, and that which both parties were contemplating to be done respectively by one and the other, I come to the conclusion that the decision which was arrived at by the Courts below is correct, and I also come to the conclusion that there is nothing in the language of the instrument in question which prevents us from carrying out the real intention of the parties."

Edwards v. Barrington, *supra*, was followed by the Court of Appeal in a compensation case, Warr v. London County Council, 1904, 1 K. B. 713; 73 L. J. K. B. 362, in which it was held that a similar contract did not confer on the plaintiffs an interest in land which could form the subject of compensation under the Land Clauses Consolidation Act, 1845, s. 68. The argument on behalf of the plaintiffs that a license to make a profit on land by trading upon it stood on the same footing for the purpose of entitling the owner to compensation as a profit *a prendre*. Romer, L.J., thus discussed the matter:—

"As there has been a good deal of discussion during the argument with regard to the nature of a license, I should like to refer to what is said on the subject by Vaughan, C.J., in the case of Thomas v. Sorrell, 1674, Vaugh. 351, where, speaking of the general effect of a license, properly so called, he says that 'a dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful.' He then gives as instances a license to hunt in a man's park or to come into his house, and proceeds to point out that, where there is, in addition to the mere license to go on the land, leave to take something out of the land, as for instance where there is a license to hunt in a man's park and carry away the deer killed, or to cut down a tree in a man's ground, and carry it away, there is, as regards the going on the land to hunt, or cut down the tree, a mere license, but, as regards the carrying away of the deer killed, or the tree cut down, there is a grant: that is to say that in such cases there is not merely a license, properly so called, but a right in the nature of a profit *a prendre*, i.e., to take something out of the soil. Now, in the present case is there anything beyond a mere license, properly so called? The only parts of the agreement to which counsel could par-

ticularly refer, as supporting the contention that there was more than a mere license, were those which related to the use of the cellars, and the right to advertise, and let spaces for advertisements, in certain parts of the theatre. Do those parts of the agreement amount merely to a license properly so called, or to a grant of an interest in, or something arising out of, the land? To my mind it is clear that they create nothing more than a license properly so called. The agreement for use of the cellars does not necessarily involve that the possession of them is given to the plaintiffs, and therefore does not amount to the grant of an interest in the cellars. Similarly, I think the agreement for the use of parts of the premises for advertisements does not import a grant of the walls or any part of the premises. It is not necessary, in my opinion, in order to give effect to the rights conferred by this agreement, to imply any grant of any estate or interest in land, or of any profit *a prendre*. It was admitted that mere licenses, generally speaking, do not create an interest in land, but it was contended that a distinction ought to be drawn between licenses given merely for purposes of pleasure and those given to be exercised for purposes of profit. There appears to be a distinction in two respects between licenses for pleasure and licenses for profit. In the case of a license given to go on land for purposes of pleasure, there appears to be authority for saying that the license is to be construed strictly, and, in the absence of a sufficient context, must be held not to confer anything beyond a mere personal license, and not to extend to servants or agents, but that it is otherwise where the license is for the use of land or other property for the purposes of profit, in which case the license may be construed as extending, not only to the licensee himself, but also to his servants, and possibly his agents. There is also another distinction, which depends on the sense in which the word 'profit' is used. As I have already pointed out there is a distinction between a mere license to go on land, and a grant of a profit to be derived out of the land itself. But, as regards a profit to be obtained by the exercise of the license on the land, but which is not derived out of the land itself, I cannot see how, either upon principle or authority, the distinction attempted to be made for the present purpose between a license for purposes of pleasure and a license for purposes of profit can be supported. It cannot in law be the case, in my opinion, that if a man gave a license to persons to come on his field to play at cricket, and to other persons a license to come there for the purpose of supplying those engaged in the game with refreshments for profit, the one license would not confer an interest in land but the other would. These considerations appear to me to be conclusive of the case. It is hardly necessary to say in conclusion that it does not follow from the fact that an agreement of the kind which was here entered into does not create an interest in land, but only a license, and therefore will not support a claim for compensation under the Lands Clauses Consolidation Act, that such an agreement does not create contractual rights in respect of which an action will lie in the event of contravention of them."

Tenants whose terms have been determined legally by owners of lands subject to expropriation proceedings have no right to compensation for loss of profits or otherwise, even though they might have had a reasonable prospect of obtaining new leases and even though they have incurred expense in anticipation of such renewals. In Syers v. Metropolitan Board, 1877, 36 L. T. 277, the Board under compulsory powers took a house of which the plaintiff was tenant without giving him notice to treat and then exercising their right as purchasers, they gave the tenant notice under his lease, determining his tenancy. He brought an action for an injunction to restrain them from entering on the premises until he should have expropriated his interest. The Court of Appeal confirmed the judgment dismissing the plaintiffs' application. James, L.J., said:—

"I am of opinion that there is not the slightest foundation for this application. The truth is, it is contrary to the universal practice that has prevailed ever since railways have been established with statutory powers. Railway companies and other companies never do

buy the interest of short tenants whom they can get rid of by legal notice, unless they want possession before the expiration of the notice, for which special provision is made by the Act of Parliament. The company deals with the freeholder. It acquires, either under compulsory powers or by contract with the freeholder (it may be by voluntary agreement) his interest, and with that the whole of his interest. Part of that interest is the right to determine the tenant's right by giving three months' notice. They have bought the freehold; they are assignees of the freehold; they do give the tenant three months' notice, as any other assignee of the reversion might do; and at the end of the three months the tenant must give up possession or be subject to be turned out by process of law—not under any statutory power, but under the right which is incidental to the property of the company."

See also Williams v. Cornwall, 1900, 32 O. R. 255 and sec. 2 (h).

Entry on Lands Intended to be Expropriated.—Before entry can be made upon lands intended to be acquired by the corporation under its compulsory powers, the conditions precedent prescribed by the statute, must be strictly complied with. See s. 324. Corporations exercising statutory powers have been repeatedly restrained by injunction where entry has been made, but without complying with conditions laid down in the enabling statute. In Parkdale v. West, 1887, 12 A. C. 602; 56 L. J. P. C. 66, the town of Parkdale pursuant to an agreement with certain railway companies, by which the town was to take control of proposed work to abolish a dangerous level crossing, let a contract and proceeded with the work with a result that the property of West was seriously injured. The conditions precedent to entry, prescribed by the Railway Act were not observed, the Judicial Committee of the Privy Council granting an injunction stopping the work, overruling the contention that the work of a railway company should not be stopped by injunction and holding that the question was not merely one between the plaintiff and the company, but that the public had an interest in the matter, and that it would be right as a general rule to grant an injunction where the company were acting in a high-handed and oppressive manner, and as the injury committed was complete and of a permanent character, compensation was allowed to the full extent of the injury inflicted. The same principle was applied in North Shore Railway Co. v. Pion, 1889, 14 A. C. 602; 59 L. J. P. C.; Saunby v. Water Commissioners of London, 1906, A. C. 110; 75 L. J. P. C. where water commissioners were restrained by injunction and mulcted in damages for proceeding without observing the statutory requirements, reversing the Supreme Court of Canada, 34 S. C. R. 650 and restoring the judgment of the Court of Appeal for Ontario, 2 O. W. R. 763. On the other hand, where the statutory conditions precedent to the exercising of compulsory powers have been complied with and entry is made by agreement, the right of the owner if not fully determined by an agreement, must be ascertained by arbitration under the provisions of the Act. Todd v. Meaford, 1903, 6 O. L. R. 469, where the agreement merely provided for immediate entry without prejudice to the rights of the owner and he subsequently brought an action for damages, which was dismissed on the ground that the method of ascertaining compensation was restricted to the statutory proceedings which precluded a right of action in the ordinary manner. Where a corporation after complying with the statutory conditions enters upon lands without the express or tacit consent of the owner, before compensation has been settled and delays to take proceedings under the Act to settle, the owner's remedy is to proceed to compel the corporation to proceed to arbitrate.

VALUE OF LANDS USED FOR SPORTING PURPOSES.

Expropriation of Part of Golf Course.—In re Brantford Golf Club and Lake Erie and N. R. W. Co., 1914, 32 O. L. R. 141, varied. 32 D. L. R. 219, the railway company took 8.8 acres out of 76 acres laid out as a golf course, and on the construction of the railway severed 6 acres from the rest. The Appellate Division held that the club was not bound to put up with such a course as could be laid out on the lands not taken,

nor to play over the railway, and that they were only entitled to the value of the land for the purpose for which they were using it. The Court had regard to the injury done as an entire and complete golf course, the principle being that if the owner suffers throughout his whole property by its being reduced to an area too restricted to be used to the same advantage as that which the whole afforded, the taker must pay the damage to the whole and not merely to the part taken. This principle applies to race courses, rifle ranges, parks, &c., and accordingly the cost of acquiring other premises suitable and convenient were held to be a fair test of the damage.

This principle of re-instatement, however, did not meet with full approval in the Supreme Court, where Fitzpatrick, C.J., said:—

"It is the function of Courts of law to decide disputes between parties. There are, however, certain classes of cases which can be more conveniently dealt with by means of arbitration. These are commonly such as involve no legal question for their decision, but a complexity of detail taking up much time. Not only are such cases often referred to arbitration by agreement of the parties, but the Legislature has provided this means for settlement of questions between them in numerous instances. Notable amongst these are such cases as the present, where a railway company is given powers of taking compulsorily the private property of individuals, making suitable compensation. In the main, of course, the principles upon which the compensation is to be ascertained, are the same in every case of such taking all along the line of the railway. It is in each case only a matter of the particular amount to be allowed the claimant, this, of course, varying according to the particular circumstances; the amount and value of the property taken, the loss occasioned to the owner and other special considerations.

"Now the Courts retain a jurisdiction over arbitration proceedings to redress any injustice that may have been done in them, but this does not mean that where arbitrators are named by the Legislature as the appropriate tribunal for the settlement of certain questions the Courts are to take the matters out of the hands of the arbitrators by setting aside their award and substituting for it the decision of the Court. This is what, it seems to me, has been done by the Appellate Division in the present case.

"Hodgins, J., delivering the judgment of the Court, speaks in his first sentence of 'the problem in this case.' Now there is no problem in the case. The railway has taken 8.8 acres of the respondent's land, and the only question is what is the amount of the compensation which the respondent is entitled to recover? Section 209 of the Railway Act provides that any party to the arbitration may appeal from the award upon any question of law or fact. I am not sure that the appellant's notice of appeal raises any question of law or fact on which an appeal can properly be brought, and I do not think the Appeal Court gives any judgment on such points. The judgment is what the Court would have awarded if the matter had come before it in the first instance, and I do not think it was entitled to give such a judgment. Neither do I think it was equally qualified. The arbitrators had the advantage of viewing the property, and hearing the evidence and, speaking with all possible respect of the Court, I think the arbitrators were at least as well qualified to deal with the matter with expert knowledge.

"There is, to my mind, a question whether the arbitrators have sufficiently taken into account the possible difficulties of play over the railway. I feel that in their place I should have attached greater weight to this point. It must be remembered, however, not only that they have allowed a substantial sum for damages for severance, but that they have allowed generally a higher compensation by reason of the land being used as a golf links. If we were to disturb the award at all, probably it would be necessary to enter into other considerations which the arbitrators have not sufficiently appreciated; for instance, it does not appear that they have allowed for what I may call the ephemeral use of the land as a golf links, yet for such use compensation should not be allowed on the same footing as for the permanent values of land regarded for agriculture, building or other

such necessary purposes of life. The golf club may be given up in a short time, perhaps will be if the war continues and it becomes necessary to reduce the extravagant scale of our mode of life with its estates devoted to pleasures and countless other luxuries.

"I think, therefore, there is not sufficient ground on the whole for interfering with the award. I mention the above point that it may not be thought I have overlooked it.

"Personally, I am unable to appreciate the views set out by the Judge; it would be difficult as well as unnecessary to consider them in detail. He has a preference for a particular method of ascertaining the compensation which may be called that of 'reinstatement;' he cites two cases from which he says it appears that this would afford a fair test of the damage suffered by the appellants. It is rather remarkable that he goes on to say that in the first of these cases Jessel, M.R., denied that the damages were really 'reinstatement,' and that in the second case Lord Shand decided that the principle of so-called 'reinstatement' could not be applied. The Judge adds that 'that method is, of course, not the only way of arriving at the compensation to be paid.'

"I have read with the greatest care both the award and the judgment substituted for it, and I have no hesitation in saying that the former commends itself to me not only for the correctness of the principles on which it is based, but for the fair and reasonable results arrived at. I do not find anything in the judgment which would lead me to vary any part of the award, whilst I entertain a very strong opinion that parts of the judgment at any rate could not be supported. The appeal should be allowed with costs."

The Supreme Court set aside the decision of the Appellate Division but increased the arbitrators' award.

Value of Lands to the Expropriating Authority not to be Considered in Assessing Compensation.—The value which has to be assessed is the value to the old owner who parts with his property, not the value to the new owner who takes it over. If, therefore, the old owner holds the property subject to restrictions, it is a reasonable point of inquiry how far these restrictions affect the value: Corrie v. MacDermott, 1914, App. Cas. 1056, 83 L. J. P. C. 370, following Cedar Rapids v. Lacoste, 1914, App. Cas, 569, 83 L. J. P. C. 162, and In re Lucas and Chesterfield Gas and Water Board, [1909] 1 K. B. 16.

In re Cedar Rapids v. Lacoste, *supra*, the owner possessed islands situated in the rapids, water and other rights, and claimed compensation on the basis of the value of these rights as a proportional part of the realized undertaking which Cedar Rapids proposed to carry out. Lord Dunedin said:—

"For the present purpose it may be sufficient to state two brief propositions:—(1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

"When, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adaptability, as pointed out by Fletcher Moulton, L.J., in the case cited, is really rather an unfortunate expression), the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility."

Evidence of Rise or Fall in Value Caused by a Particular Scheme.—The value of lands taken is to be determined without referring to the rise or fall of value caused by the particular scheme: Cunard v. The King, 1910, 43 S. C. R. 88.

Compensation for Business Disturbance.—In Meyer and Toronto, 1914, 30 O. L. R. 426, the Court of Appeal had recently to consider the basis on which compensation should be computed in a case where a profitable restaurant, boat house and dance hall business had been carried on for several years, on lands which were expropriated by a municipal corporation. The lands were specially well situated for the purposes of a business of the kind, and there was no other property to which the business could be transferred, and in consequence of the expropriation, it had to be discontinued. It was claimed for the owners that the proper method of ascertaining the value of the land was to take the net annual profits of the business, after deducting an allowance of 6% on the cost of the buildings, and to capitalize this at 4%, and that having arrived at a value by this method, the amount so found should be doubled to allow for all potentialities. While rejecting this principle, the official arbitrator held that the fact that a business carried on at a certain locality had proved to be a highly successful one, must be a factor to be given weight in fixing compensation. He then assessed the value of the land, allowing for its potentialities and adaptability for the purposes for which it was used, and allowed a further sum of three years' estimated net profits for the business disturbance. The award was upheld by the Court of Appeal, the unanimous judgment being delivered by Hodgins, J.A., who pointed out that the principle of capitalizing the net annual revenue from property was only applied where tithes or leasehold interests based on well secured rentals were in question, and where the measure of damage was the loss of a definite and fixed income, and that the principle did not apply where the profits resulting from the use of lands were due to the application of the personal exertions and talents of the proprietor which were subject to such contingencies as death, bankruptcy and falling away of business. The judgment proceeded as follows:—

> "I think that no objection can be taken to the amount allowed for disturbance unless there is a difference between a case where the business is annihilated so that the owner cannot go elsewhere, and acquire a new goodwill, and the case where a move can be made to property which in a few years can gain as good a reputation as that which has been expropriated.
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> "On principle, I do not see much difference between the destruction of the goodwill of the business carried on in a particular property where there is no similar place to which the owner can go, and the destruction of the goodwill where the owner can move elsewhere. In both cases the goodwill attached to or affecting the value of the property in question is wholly gone, and whatever goodwill is thereafter acquired is new, and is attributable to a different property. The only goodwill which continues to exist is attributable to the reputation of the owner and goes with him to his new stand. That goodwill ceases where the owner does not resume business; but that personal goodwill is not a thing to be paid for in compensation proceedings. See per Bramwell, L.J., in Bidder v. North Staffordshire R. W. Co., 1878, 4 Q. B. D. 412, at p. 432.
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> "In Cripps on Compensation, 4th ed., p. 99, goodwill is defined as the probability of the continuance of a business connection, and its value is said to be fixed at a certain number of years' purchase, according to the nature of the particular trade or business. Examples may be found in Allan on Goodwill, at pp. 84-5, of the number of years' profits allowed; and in no case there cited has more than three years been given.
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> "In Fletcher on Valuations, p. 88, it is said that it is usual to charge two years' loss of profit for loss or injury to goodwill; and in Curtis on Valuation of Land, instances are given on pp. 203 to 215 of valuations where business property is being expropriated, and in none of them is three years' profits exceeded. At p. 209 the example allows three years' purchase in a case where no suitable premises

were obtainable close by . . . Goodwill in this case is hardly the appropriate word, because it is not sold or dealt with; but I use it as expressing the thing which the appellants lose, *i.e.*, their loss of connection in consequence of expropriation. If the official arbitrator has not allowed fully for the various heads of loss which he has included in the award, compensation for business disturbance merely on a three years' basis would hardly be reasonable. But, under the circumstances, I think it is not inadequate.

"Upon the whole, therefore, I come to the conclusion that the award has been arrived at upon a correct principle, and that under the circumstances of this case that principle has been properly applied. To deal with the case otherwise than as has been done would be to give a sum sufficient to purchase a perpetual annuity to the claimants, for the amount of the yearly profits, and there is no evidence that any hypothetical buyer would purchase on those terms."

Other cases as to goodwill or loss of profits: In Ex p. Ashby's Cobham Brewery Co., [1906] 2 K. B. 754, 75 L. J. K. B. 983, where ten years' capitalized profits were allowed on the expropriation as compensation for non-renewal of a license as against three years in Page v. Ratlifle, 1896, 76 L. T. 63 A. C.; Mayor of Dublin v. Dowling, 1880, 6 L. R. Ir. 502 at 509; Commissioners of Inland Revenue v. Glasgow and South-Western R. W. Co., 1887, 12 A. C. 315, 56 L. J. P. C. 82, where Lord Halsbury used the following language:—

"Now the language of the Legislature is this, that what the jury have to ascertain is the value of the land. In treating of that value, the value under the circumstances to the person who is compelled to sell (because the statute compels him to do so) may be naturally and properly and justly taken into account; and when such phrases as 'damages for loss of business' or 'compensation for the goodwill' taken from the person are used in a loose and general sense, they are not inaccurate for the purpose of giving verbal expression to what everybody understands as a matter of business; but in strictness the thing which is to be ascertained is the price to be paid for the land—that land with all the potentialities of it, with all the actual use of it by the person who holds it, is to be considered by those who have to assess the compensation."

Edinburgh Street Tramways Co. v. Edinburgh, [1894] A. C. 476, 63 L. J. Q. B. 769; In re Kirkleatham Local Board and Stockton and Middlesborough Water Board, [1893] 1 Q. B. 375, 62 L, J. Q. B. 180; Stockton and Middlesborough Water Board v. Kirkleatham Local Board, [1893] A. C. 444, 63 L. J. Q. B. 56.

Opinions of Experts as to Land Values.—In re Muir and Lake Erie and N. R. W. Co., 1914, 32 O. L. R. 150, Hodgins, J.A., in giving judgment of the Court, thus dealt with considerations to be borne in mind in weighing evidence of experts as to land values:—

"The evidence of these expert witnesses is, to my mind, unsatisfactory. Those called for the appellant (Muir) displayed no knowledge of actual sales and depended upon enquiries as to properties, none of which were stated to be in any way similar in position or value to the one in question. The respondent's (company's) evidence of this class is open to criticism in the same direction, and its weight is much weakened by statements such as that of Pitcher, that he had not looked over the river front to value it, and of Bullock that he placed no value on the river front and that he would not build on the property on the river because it was further away from access to the city."

In re Billings and Canadian Northern Railway Co., 1914, 31 O. L. R. 329, the same Judge, in giving judgment of the Court, thus dealt with evidence of a general character as to a rise in land values:—

"The evidence, speaking broadly, discloses that the city of Ottawa is spreading southward along and on both sides of Bank street. In consequence of this, speculation in lands has extended beyond the canal,

while the territory in which the land in question lies is described by one witness, Davis, called by the respondent, as 'the coming land of the future.' With this the general body of the evidence coincides. While much testimony was given of individual sales on and near Bank street, at considerable distances from the appellant's property, and, therefore, of no specific value, the result of it all is to establish a gradual and noticeable rise in values in the district south of the Rideau river. This is relevant evidence within the principle—if adopted—stated in the case of Levin v. New York Elevated R. R. Co., 1901, 165 N. Y., 572, in which opinion evidence of a person competent to speak on the subject, as to the general course of values of what had been shewn to be a certain class of real property in the vicinity, was admitted as not contravening the rule prohibiting proof of collateral issues as to separate properties in the neighborhood. The reasoning in that case commends itself to me. See Re National Trust Co. and Canadian Pacific R. W. Co., 1913, 29 O. L. R. 462.

"I think the arbitrators might well act upon it in arriving at a general basis of value in the locality."

The principle thus stated was rejected by the Supreme Court, and the judgment of the Appellate Division reversed, 31 D. L. R. 687, Fitzpatrick, C.J., thus dealt with the matter:—

"The evidence of the landowner is clearly based on pure hypothesis. The future possibilities of development upon which his witnesses rely as a justification for the values they give are, no doubt, elements to be considered in determining the present market value of the property, but it is the present value of those expectations that is to be considered. They are to be looked at in the light of bare possibilities and not as realized expectations. All the uncertainties of the future have also to be taken into account. The rule is, I submit, very clearly expressed on Picard, Traite General de l'Expropriation, vol. 1, p. 216:—

"The actual value is the first element of the selling value of an expropriated property. The future value is the second; it will be dealt with more fully in the following paragraph:— . . . When the question is about land in the neighborhood of a city, still at the present time being cultivated, but destined to be transformed into building lots in a more or less remote time, is the plus value, or is it only future? It may be answered that in either supposition, especially in the second, the event with which the plus value is connected is future, but that such plus value itself is actual, not with all the intensity that it will have some day, but at least in a certain proportion. It is such present element of such future plus value that the purchasers take into account and which constitutes, properly speaking, the future value, distinct as such from the actual value, which comprises what has been completely acquired and realized.

"Hodgins, J.A., who delivered the judgment of the Court of Appeal, says (19 D. L. R. at 843):—

"'While much testimony was given of individual sales on and near Bank street, at considerable distances from the appellant's property, and, therefore, of no specific value, the result of it all is to establish a gradual and noticeable rise in values in the district south of Rideau river . . . I think the arbitrators might well act upon this evidence in arriving at a general basis of value in the locality.'

"As I have already pointed out, the individual sales referred to took place within the limits of the city, and there is no evidence of any sales in or near the locality of the lands in question except the one referred to by the witness Barbour. There is undoubtedly evidence of a rise in land value in the vicinity of Ottawa, and the price fixed by the arbitrators in majority, based as it is, upon an actual sale under circumstances more favourable to the landowner, is evidence that the rise in value was very fully taken into account. The arbitrators were also obliged to bear in mind that there is an abundance of free land just as advantageously situated for building purposes as the respondent's. On the whole, I am of opinion that the principle applied by the company's arbitrator as the basis of his valuation had

the support of their Lordships of the Judicial Committee, who said, in Cedar Rapids Co. v. Lacoste, 16 D. L. R. at 171, 1914, A. C. 569, at 576:—

"'(1) The value to be paid is the value to the owner as it existed at the date of the taking, not the value to the taker; (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.'

"It seems to me possible that Hodgins, J., may have been under a misapprehension with respect to the situation of the property. It is not in the city of Ottawa; there is free land in abundance in the neighborhood; there is no building going on and there is no evidence of any actual demand for this kind of property.

"As I have said before, the possibility of an extension of the boundaries of the city in the direction of the respondent's property is an advantage to be taken into account, but it is impossible to fix as a present price a future value dependent upon that contingency."

Compensation for Severance.—In Holditch v. Canadian Northern Railway, 1916, 1 A. C. 536, a railway was constructed across a block of land which had been subdivided, for the purpose of sale, into over 500 lots, intersected by thirteen streets as shewn on registered plan; 200 lots in various parts of the subdivision has been sold. There was no building scheme in connection with the lots. The arbitrators did not allow compensation for 49 lots which they found to be injuriously affected by being severed from the lots taken, and the access thereto being made more difficult owing to the construction of the railway and the raising of the grade, and as to 40 other lots for which compensation was claimed on account of vibration, noise and smoke from trains, they refused to make any award. Lord Sumner, after giving judgment of the Judicial Committee, proceeded as follows:—

"The basis of a claim to compensation for lands injuriously affected by severance must be that the lands taken are so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance. The bare fact that before the exercise of the compulsory power to take land he was the common owner of both parcels is insufficient, for in such a case taking some of his land does no more harm to the rest than would have been done if the land taken had belonged to his neighbor. Compensation for severance therefore turns ultimately on the circumstances of the case. The appellant contended that the present case was governed by the decision in Cowper Essex v. Acton Local Board, 14 App. Cas. 153, and it was so held in the minority judgments in the Supreme Court of Canada. Their Lordships are unable to agree in this view. In that case the building owner retained such control over the development and use alike of the parcels sold and of the parcels unsold as made a real and prejudicial difference between his ability to deal with what remained to him after the compulsory taking of land and his ability to deal as a whole with both it and the land taken before such compulsory taking. In the present case the appellant's relation to the property had been definitely fixed before any notice to take land was served at all. He had parcelled out the entirety of his estate and stereotyped the scheme, parted with numerous plots in all parts of it without retaining any hold over the use to be made of them, and converted what had been one large holding into a large number of small and separate holdings with no common connection except that he owned them all. There was one owner of many holdings, but there was not one holding, nor did his unity of ownership 'conduce to the advantage or protection' of them all as one holding.

"Of the rest, the owner has a right of compensation."

Injurious Affection of Other Lands Where Some Lands Taken.—Where part of the lands of an owner are taken and by reason thereof other lands belonging to him suffer damage, he is entitled to compensation. In re Cowper Essex v. Acton Local Board, 1889, 14 App. Cas.

153 (H.L.), part of the plaintiff's lands were taken for sewage works and he claimed compensation in respect of injury to other lands. The lands taken were separated from the lands for which compensation was claimed, in part by other property of the plaintiff and in part by a railway. The House of Lords confirmed an award for damage to the other lands, holding that the damage was not too remote even though the sewage works might be so conducted as not to create an actionable nuisance, but because their presence depreciated the market value of the other lands for building purposes. This case turned on the meaning of ss. 49 and 63 of the Lands Clauses Consolidation Act, 1815. Lord Watson thus dealt with the point:

> "The 'other lands' in respect of which an owner, who is selling to promoters, can claim compensation if they are injuriously affected are indifferently described in the Act of 1845 as 'severed' from the land which is the subject of sale, or as 'held therewith.' I cannot assent to the argument that there can be no severance within the meaning of the Act unless the part taken and the parts left were in actual contiguity. I think the expression 'the severing' as it occurs in ss. 49 and 63, read in the light of the context, merely signifies that what the promoters have acquired is separated from, in the sense that it can no longer be treated by the landowner as part of, the subjects which, until its purchase, he held along with it. What lands are to be regarded as 'severed' from those taken is, in my opinion, a question which must depend upon the circumstances of each case. The fact that lands are held under the same title is not enough to establish that they are held 'with' each other, in the sense of the Act; and the fact that a line of railway runs through them is, in my opinion, as little conclusive that they are not. I shall not attempt to lay down any general rule upon this matter. But I am prepared to hold that, where several pieces of land, owned by the same person, are so near to each other, and so situated that the possession and control of each gives an enhanced value to all of them, they are lands held together within the meaning of the Act; so that if one piece is compulsorily taken, and converted to uses which depreciate the value."

Damage to Other Lands.—In Buccleuch v. Metropolitan Board of Works, 1872, L. R. 5 H. L. 418; 41 L. J. (Ex.), 137, the owner of a mansion on the Thames, with a large garden frontage, was allowed compensation for injuries resulting from making an embankment by reason of which a large strip of dry land was formed, where the river had formerly flowed up to the garden, and upon which a public road was made between this strip of land and the river. The loss of the river frontage, loss of privacy, increase of dust and noise by the creation of the embankment and road were held proper grounds on which to base an award of compensation.

Injurious Affection—No Lands Taken.—In Rickett v. The Directors, Etc., of the Metropolitan Ry. Co., L. R. 2 H. L. 175, the carriageway of the street was blocked and hoardings were erected, which permitted foot passengers a passage by steps and a temporary bridge across the street was also provided for foot passengers. The obstruction continued for twenty months, Rickett, the owner, claimed compensation under the Land Clauses and Railway Clauses Act, but was unsuccessful. Lord Cranworth said in part:—

> "Both principle and authority seem to me to shew that no case comes within the purview of the statute, unless where some damage has been occasioned to the land itself, in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be actual injury to the land itself, as by loosening the foundation of buildings on it, obstructing its light, or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration. Any other construction of the clause would open the door to claims of so wide and indefinite a character as could not have been in the contemplation of the legislature."

In Metropolitan Board of Works v. McCarthy, L. R. 7 H. L. 423, the owner's premises were 20 feet distant across a highway from the head of Whitefriar's dock and the dock was 352 feet long, so that apparently ships could approach within 20 feet of the owner's premises, and the embankment that permanently stopped up and destroyed the dock was carried along the foreshore of the Thames at or near the river end of the dock, so that the distance between the plaintiff's premises and the obstruction of the outer end of the dock rendered access to it at its head of no value even if the dock were not filled up.

Mr. Thesiger in argument gave his much quoted statement of the principle on which compensation is awarded for injurious affection which is as follows:—

> "The principle to be deducted from a consideration of all the cases is this, that where by the construction of works there is a physical interference with any right, public or private, which an owner is entitled to use in connection with his property, he is entitled to compensation if, by reason of such interference, his own property is injured. The word "physical" is here used in order to distinguish the case from cases of that class where the interference is not of a physical, but rather of a mental, nature, or of an inferential kind, such as those of a road rendered less convenient or agreeable, or a view interfered with, or the profits of a trade, by the creation of a new highway or street, diminished in the old one."

Lord Cairns in giving judgment said in part:—

> "The rule thus formulated does not apply with precision to the law of Scotland, which does not, in cases like the present, recognize that distinction between the remedies by action and indictment upon which the test is founded. But that which satisfies the test, that which gives a right of action in England, has been defined in the case of McCarthy as well as in previous decisions. When an access to private property by a public highway is interfered with, the owner can have no action of damages for any personal inconvenience which he may suffer in common with the rest of the lieges. But should the value of the property, irrespective of any particular uses which may be made of it, be so dependent upon the existence of that access as to be substantially diminished by its construction, then I conceive that the owner has, in respect of any works causing such obstruction, a right of action, if these works are unauthorized by Act of Parliament, and a title to compensation under the Railway Acts if they are constructed under statutory powers.
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> "The proper test is to consider whether the act done in carrying out the works in question is an act which would have given a right of action if the works had not been authorised by Act of Parliament. I do not pause to consider whether or not, if the question was now to be decided for the first time, it is not a test somewhat narrow. I accept that test as being the test which has been laid down and which has formed the foundation for the decision of so many cases before the present."

The leading cases Caledonian Railway Co. v. Ogilvy, 2 Macq. 229; Rickett v. Metropolitan Railway Co., L. R. 2 H. L. 175, and Metropolitan Board of Works v. McCarthy, Law Rep. 7 H. L. 243, were thus discussed by Lord Selborne in the House of Lords in Caledonian v. Walker's Trustees, where the facts were that the trustees possessed a mill a short distance from the main highway and had access to the highway on the level from both sides of the mill. The railway company cut off one access and substituted an indirect access over a bridge with steep grades and the other access was diverted and rendered inconvenient, but none of the operations were carried on in the immediate propinquity with the land and the changes compelled a detour of about 265 feet and altered the gradients of the street to 1 in 20 for 116 feet and to 1 in 34.7 for 197 feet. Damages were awarded on the ground that while the difficulties of detour and change of gradients may have been unpleasant and mischievous to the public in the neighbourhood of the works, they were specially injurious to the respondents, so as, in the result, to impose on them a large pecuniary loss. Lord Selborne said in part:—

"I think it right to say that all the three decisions of this House, to which I have referred (i.e., the cases mentioned), appear to me to be capable of being explained and justified upon consistent principles; the propositions which I regard as having been established by them, and by another judgment of your Lordships in the case of Hammersmith Railway Co. v. Brand, Law Rep. 4 H. L. 171, being these:—

"1. When a right of action, which would have existed if the work in respect of which compensation is claimed had not been authorized by Parliament, would have been merely personal, without reference to land or its incidents, compensation is not due under the Acts. 2. When damage arises, not out of the execution, but only out of the subsequent use of the work, then also there is no case for compensation. 3. Loss of trade or custom, by reason of a work not otherwise directly affecting the house or land in or upon which a trade has been carried on, or any right properly incident thereto, is not by itself a proper subject for compensation. 4. The obstruction by the execution of the work of a man's direct access to his house or land, whether such access be by a public road or by a private way, is a proper subject for compensation.

"There is, at first sight, some apparent similitude between the circumstances of Rickett's case, *supra*, and those of the present, but it disappears when the facts of that case and the exact nature of the claim made in it are rightly understood.

"In the present case, as in Chamberlain v. West End of London Railway Co., 2 B. & S. 617, and Beckett's Case, Law Rep. 3 C. P. 82, (both which were approved and followed by this House in Metropolitan Board of Works v. McCarthy, Law Rep. 7 H. L. 243, the claim was made in respect of a direct and immediate injury to the respondents' estate by cutting off their direct and immediate access to Eglinton Street. The circumstances of Chamberlain's Case, 2 B. & S. 617, closely resembled those of the present case. In Beckett's Case, Law Rep. 3 C. P. 82, the width of the public road immediately opposite the plaintiff's premises was reduced, so as to render it, not useless to those premises for the purpose of access, but less convenient than before. In McCarthy's Case, Law Rep. 7 H. L. 243, this House gave compensation for the obstruction of access to the River Thames from the plaintiff's premises through a public dock lying on the other side of a public road adjoining these premises.

"It was argued for the appellants that these authorities ought not to be extended to any case of the obstruction of access to private property by a public road, when such obstruction is not immediately *ex adverso* of the property. This limitation, however, seems to me arbitrary and unreasonable, and not warranted by the facts either of Chamberlain's, 2 B. & S. 617, or of McCarthy's Case, Law Rep. 7 H. L. 243. A right of access, by a public road to particular property must, no doubt, be proximate, and not remote or indefinite, in order to entitle the owner of that property to compensation for the loss of it; and I apprehend it to be clear that it could not be extended in a case like the present to all the streets in Glasgow through which the respondents might from time to time have occasion to pass for purposes connected with any business which they might carry on upon the property in question. But it is sufficient for the purposes of the present appeal to decide that the respondents' right of access from their premises to Eglinton Street, at a distance of no more than ninety yards, was direct and proximate, and not indirect or remote. The Court of Session has so decided, and I think your Lordships cannot, consistently with your decision in McCarthy's Case, Law Rep. 7 H. L. 243, do otherwise than affirm their judgment."

In The King v. MacArthur, 1904, 34 S. C. R. 577, the claimant's lands were affected by the closing of a main thoroughfare, one property being 190 feet from the point of obstruction the other 240 feet. After the completion of the work the properties were situated at the extreme end of a street closed up at one end forming a *cul de sac*.

Nesbitt, J., in delivering the judgment of the Supreme Court, said:—

"It was never intended that where the execution of works, authorized by Acts of Parliament, sentimentally affected values in the neighborhood, all such property owners could have a claim for damages. In most of our large cities values are continually changing by reason of necessary public improvements made, and if, although no lands are taken, everybody owning lands in the locality could, by reason of the changed character of the neighborhood or interference with certain convenient highways, claim compensation by reason of a supposed falling of the previous market value of property in the neighborhood, it would render practically impossible the obtaining of such improvements. I think the property in this case is not so dependent upon the existence of the access which was so cut off as to constitute an injurious affection within the authority of the statute. I do not think that there is substantially much difference between the various Expropriation Acts which were referred to. The real question is whether or not the claimant could have maintained a cause of action at common law for damages occasioned by the obstruction. I see no real distinction between the effect which the closing up of the nine mile road south of the canal, and the opening up of the new road across the swing bridge, had upon the value of the suppliant's land, and its effect upon all the lands in the village of Cardinal, between the two canals and the point just mentioned. The suppliant's land suffered no special damage distinguishable from that which all these special lands suffered."

Where lands of an owner have not been taken but have merely suffered an injurious affection by reason of the exercise of the statutory powers of the corporation, great difficulty will be found in particular cases in determining whether or not, the lands of the owner are within the rules laid down by the House of Lords and the Supreme Court of Canada in the leading cases mentioned above, and it is important in order to understand the general principles, to know the particular facts which led to their enunciation. Instances of the difficulties of application are as follows:—In re Tate and Toronto, 1905, 10 O. L. R., C. A., 651; 6 O. W. R. 670.

The corporation closed up Bathurst Street, and the Court of Appeal held that the plaintiff's lands were injuriously affected, Osler, J.A., saying, in part:—

"In the case before us we have two highways—it can make no difference that they happen to be highways by land—in front of the plaintiff's premises, though one of them lies alongside of or abuts upon the other, corresponding to those with which the Court was dealing in the McCarthy Case, L. R. 7 H. L. 243; 43 L. J. (C. P.) 385, viz., the way across Manning Avenue and Herrick Street, these two affording access from and to the premises by the latter street from and to highways to the east, such as Bathurst Street, and in closing that street the plaintiff was as regards his property placed in a situation similar to that in which the plaintiff in the McCarthy Case, *supra*, was placed by the closing of the dock.

"I have read the case of The King v. Macarthur, 1 App. Cas. 406, but I do not think it governs the case before us."

In Re Brown and Owen Sound, 1907, 14 O. L. R. 627.

Mabee, J., in confirming the award of damages for injurious affection, said:—

"The case is stronger for the respondent than In re Tate and City of Toronto, 10 O. L. R. 651, where it was held compensation could be allowed for closing a street, although the lot in question did not abut on the street closed.

"Reliance was placed upon The King v. MacArthur, 34 S. C. R. 570, but I do not think the case is applicable either in the facts or in the principles involved."

In Re Shragge and Winnipeg, 1910, 20 M. R. 13, the situation was as follows, Mathers, C.J.K.B., saying:—

"Upon the merits there is no comparison between this case and the MacArthur case. MacArthur's direct and easy access was closed up and a round-about way across a swing bridge substituted. I have

had an opportunity of examining the plans which were before the Supreme Court. The situation there revealed forces the conclusion that MacArthur's property was by the work much diminished in value. The Court, however, held that the diminution was common, not to the public generally, but to the group of property owners whose lands lay between the two canals, and that MacArthur was, therefore, not entitled to damage. The *ratio decidendi* of that case appears to be that the owner of land is not entitled to compensation where, by the construction of a public work, he is deprived of a mode of reaching an adjoining district and is obliged to use a substituted route which is less convenient, if the consequent depreciation in the value of his property is general to the inhabitants of the particular locality affected.

"The MacArthur case is exactly applicable to the present case. The applicant has suffered no damage which is not common to all those owners who had formerly the right to use the closed streets. Owing to the proximity of the closed streets to his property his damage would be greater in degree, but not different in kind from the more remote owners, and it would extend on a diminishing degree until it faded out entirely. It would be impossible to draw a line beyond which it could be said no damage was sustained. In my opinion he would have no right of action at common law and therefore his land is not injuriously affected within the meaning of the statute.

"Upon this ground as well as upon the ground that the combined effect of closing King and Princess streets and improving Main street was not to diminish but to increase in value the applicant's land, his appeal must be dismissed with costs."

Sterilizing Land by Initiating Scheme, but not Proceeding with it.—In Grimshaw and Toronto, 1913, 28 O. L. R. 512, the owner of certain land intended to erect a factory on it and applied for a permit. The permit was refused. Shortly after the corporation passed a by-law for the purpose of acquiring the land, which was duly registered; notice of its passing being given to the owner. Subsequently some difficulties in the original by-law having been discovered, a similar by-law was passed and registered and the original by-law was repealed. The owner took the initiative as to arbitration proceedings, but five days before the appointment for the arbitration, the corporation repealed the expropriating by-law and registered the repealing by-law. The owner thereupon brought an action for damages. Middleton, J., held that, under s. 463 (1), the expropriating by-law was merely a tentative proceeding leading up to the ascertainment of the price to be paid and that it was optional to take the property but to allow three months to elapse from the making of the award under which the by-law would be automatically repealed, following In re McColl and Toronto, 1894, 21 A. R. 256, and that the plaintiff was not entitled to damages for the sterilizing of the property with the consequent interference with his plans for improvement. The corporation, however, was ordered to do everything necessary to remove doubt and difficulty and were required to execute a reconveyance and to pay the plaintiff's costs in the expropriation proceedings and in the action.

In Montreal v. Hogan, 1900, 31 S. C. R. 1, expropriating proceedings were commenced. The plaintiff's lands were entered, works were constructed and subsequently, in virtue of a statute granting permission so to do, proceedings were abandoned, the plaintiff was awarded damages on the basis that he was entitled to have his property returned to him in the state in which it was at the time it had been taken, and that a measure of damages for the loss of the use of the lands should be interest upon the value of the property.

Although a by-law to authorize the expropriation of land authorizes entry before award of compensation, nevertheless if entry is not made and the council do not act on the award, the expropriating by-law becomes repealed under s. 347, and the owners cannot enforce the award. Re Toronto and Grosvenor, 1917, 41 O. L. R. 352, App. Div., reversing 40 O. L. R. 550.

Principles of Compensation for Lands Taken.—Lord Dunedin in giving the judgment of the Privy Council in In re Cedar Rapids v. Lacoste, *supra*, after having remarked that the law of Canada as regards the

principles upon which compensation for land taken is to be awarded is the same as the law of England, stated that nowhere had the law been explained with greater precision than in Re Lucas and Chesterfield Gas and Water Board, [1909] 1 K. B. 16, 77 L. J. K. B. 374 at 1009, where he pointed out that Vaughan Williams and Fletcher Moulton, L.JJ., dealt with the whole subject exhaustively and accurately.

The facts were as follows:—The arbitrator made an award in the form of a special case which raised the question whether the nature and adaptability of the lands taken for the construction of a reservoir was or was not a fit and proper matter for consideration of the arbitrator as an element in the value in assessing compensation, having regard to the fact that such a reservoir could not be constructed without the concurrence of the expropriating authority, unless the works of the expropriating authority were required by another local authority under compulsory powers possessed by the latter, and unless such latter authority were combined with the owner and another one in the construction of a reservoir or to concur in such construction, the arbitrator stating that he had not taken into consideration that additional Parliamentary powers might be acquired, but had merely assumed that existing powers might be exercised and had not taken into consideration the expenses which might be incurred in obtaining further Parliamentary powers. They further assumed that the expropriating authority might become a purchaser apart from his statutory powers. As the judgment has received such high endorsation, a lengthy quotation is desirable. Vaughan Williams, L.J., said as follows:—

> "The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, that is, that which they were worth to him in money. The property is, therefore, not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him. At a very early date in the history of this branch of the law there arose what is known as the question of 'special adaptability.' The phrase is not a happy one, for special adaptability for some purpose or other is the very basis of the market value of all land, except, perhaps, land that in all respects falls below the average. In agricultural land extra fertility, in town lands advantages of site, are true cases of special adaptability for farming or building purposes. These tend so directly to increase both the value and the market price of lands in the hands of a private owner that it has never been doubted that he could urge them in augmentation of the compensation which he was entitled to receive. The question has arisen only in the cases where the special adaptability is for purposes for which lands are required only when used for works of public utility, which are naturally different from the uses to which lands are put while in private hands, and which, therefore, do not necessarily influence the price which such lands command in the market. Ought the owner to be entitled to higher compensation by reason of the, to him, useless peculiarities which the lands possess? No better example of the problem could be found than that which we have in the present case. The land in question is by its position and conformation marked out as a favourable site for an impounding reservoir to collect water for the public supply of a district. The peculiarities which make it suitable for that purpose add nothing to its value as agricultural or grazing land, which I will assume to be the only alternative uses. A public authority obtains powers to take it for a reservoir—ought it to pay any higher price than is represented by its agricultural or grazing value? Is not any price in excess of this a violation of the canon that you are only to give that which represents its worth to the

seller, and that you are to disregard all questions of its worth to the buyer? The decided cases seem to me to have hit upon the correct solution of this problem. To my mind they lay down the principle that where the special value exists only for the particular purchaser who has obtained powers of compulsory purchase, it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the lands to be purchased under it. But when the special value exists also for other possible purchasers, so that there is, so to speak, a market, real though limited, in which that special value goes towards fixing the market price, the owner is entitled to have this element of value taken into consideration, just as he would be entitled to have the fertility or the aspect of a piece of land capable of being used for agricultural purposes. . . . Nor is it, in my opinion, an answer to say that the purchasers must necessarily be persons possessing Parliamentary powers, and that none such exist at the moment except the one that is actually exercising his compulsory powers. . . . In the present case the award shows on the face of it that the umpire has made a mistake in law which may have, and in my opinion probably has, influenced him in arriving at the sum awarded. I have said that the existence of competition entitled the arbitrator to take special adaptability into account in arriving at the *quantum* of compensation. But the extent and the imminence of such competition must have an important bearing on the weight to be given to it as affecting the *quantum* of compensation; and it is plain to me that the umpire has wrongly supposed that in this case at least one other possible competitor existed already equipped with the necessary Parliamentary powers for acquiring this site for reservoir purposes, namely, the rural district council. He has arrived at this conclusion by erroneously construing the provisions of s. 40, s.-s. 1 of the Chesterfield Gas and Water Board Act, 1895. The powers thereby given to the rural district council only relate to lands or works situated within its district, and the lands in question are not so situated. I cannot say that such a mistake in the construction of the statute may not have affected the amount of his award; and if I am to state my personal opinion, I think that it must have affected it. *Quantum* is a matter entirely for the arbitration tribunal, and we are not competent to remedy the consequences of this error on his part, and accordingly the award must be sent back to him for his reconsideration.

"This would suffice for the purposes of our decision, but seeing that two points of law of general importance and of direct bearing on the case have been fully argued before us, I do not think that we ought to send the case back to the umpire without expressing our opinion on them for his guidance. The first point arises from the fact that the lands in question do not include the whole of the site necessary for the proposed reservoir. Two other pieces of land must go to form the reservoir, and it is argued by the appellants that in such a case no special adaptability exists. They put the argument in the following form: If the lands necessary for a reservoir which taken as a whole possess special suitability for that purpose belong to A., B., and C., then no one of these owners can claim in respect of it, because the consent of the other two is needed to enable that special suitability to be utilised, and such consent might not be given. In my opinion this contention is wholly wrong. In actual life people as a rule act in a way which they believe will conduce most to the advancement of their own interests, and owners in such a case would thus not throw away the enhancement of value in which they would all share. In such a case an arbitrator would, in my opinion, be bound to treat the enhancement of value as something to be shared by the component pieces of land in such proportions as he thought their relative importance merited. A further contention, more ingenious than commendable, was here raised on behalf of the appellants, based upon the fact that they themselves are one of the part owners. It was said that in such a case the ordinary rule which I have enunciated would not apply, because they would be certain to refuse the consent which it assumes, since by so doing they would destroy the possibility of the land being put to its natural use as a reservoir, and thus enable themselves to get it at a lower price. See-

ing that their object in acquiring it is in fact so to use it, such an argument does not reflect very favourably on the principles upon which such a public body would act. But there is no foundation for the contention. The most direct answer to it was given by Lord Justice Buckley in the course of the argument when he pointed out that the ownership of a portion of the land by the appellants themselves rendered it an *a fortiori* case for the application of the general rule, because not only the consent of the appellants to the use of the land as a reservoir, but the obligation upon them so to use it, was the very basis of the application which they made to Parliament for their statutory powers, so that, so far as they are concerned, the consent that it should be put to that special use was obtained by anticipation. But I am content to rest my judgment upon a more general ground, namely, that the compensation for lands depends upon the nature and circumstances of those lands themselves (taken so far as necessary in connection with the nature and circumstances of other lands to be used with them), and has nothing to do with the personal view or wishes of the individuals who may chance at the moment to be owners of those lands. If two pieces of land are to be compulsorily taken to form a rifle range, the compensation payable will be the same whether one or both the portions belong to an ardent militarist or to a quaker who objects to everything of a warlike character.

"The second point is raised by the judgment of Mr. Justice Bray in the Court below. Speaking of the claim of this land to an enhanced price by reason of its situation, he says, 'I cannot doubt that land adjoining large works would, in fact, often have a special value, because the owner of the works would be likely to require additional land and would be willing to give a larger price because it adjoined his works, and why should not this land have a special value because, if the board desired to build a new reservoir, this was the most convenient site on which to build it?' There is nothing in this language of which I complain, if it is taken with its proper limitations. It undoubtedly adds to the value of land that a new customer has been introduced who is likely to offer a special price because the land is accommodation land for which he will be willing to pay more than its ordinary market value for purposes and at times not covered by his compulsory powers. But if the land still remains in the position that there is no competition for it by reason of its special position and adaptability, and that when the compensation has to be assessed there is no one (apart from the one purchaser who has obtained compulsory powers to purchase) to whom the land has a higher value than its value for ordinary purposes, I can see nothing to exclude the operation of the principle that you are to look to the value to the seller and not at the value to the purchaser. The scheme which authorises the new reservoir only entitles the owner of the land to receive as compensation the value of the land unenhanced by that scheme, and, unless its situation and peculiarities create a market for it as a reservoir site in which other possible bidders exist, I do not think that the single possible purchaser that has obtained Parliamentary powers can be made to pay a price based on special suitability, merely by reason of the fact that it was easy to foresee that the situation of the land would lead to compulsory powers being some day obtained to purchase it. No element of that which economists term 'value in use' can, in my opinion, increase compensation unless it is either a 'value in use' to the seller, or a 'value in use' to persons other than the proposed purchaser so as to introduce the element of competition as a factor in fixing price."

Possibility of Removal of Restrictions Affecting Land to be Considered When Assessing Compensation.—In re Gibson and Toronto, 1913, 28 O. L. R. 20, C. A. was an appeal from an award where the arbitrators refused to consider the fact that building restrictions imposed on the lands taken by by-law might be repealed. The award was set aside on the ground that the potential use of property even when hampered by dedication uses, which may require legislation or an order-in-council to remove, and even where the consent of the expropriating authority is essential to give substance to the anticipated use, must be taken into consideration, and the following authorities were referred to:—

In re City and South London Railway and St. Mary Woolnoth, [1903] 2 K. B. 728; [1905] A. C.; 72 L. J. K. B. 936; 74 L. J. K. B. 147 (H.L.) where the possibility of the site of a church being used for building purposes, was considered:

In Hilcoat v. Archbishop of Canterbury, 1850, 10 C. B. 327, where the compensation for church lands was assessed on the assumption that the lands might be applied to ordinary purposes, was discussed:

In Cunard v. The King, 1910, 43 S. C. R. 88, where the Exchequer Court considered the possibility that the owner of a water lot might obtain a license to build out in the harbours of the water:

In re Lucas and Chesterfield Gas and Water Board, [1908] 1 K. B. 571 at 580; 77 L. J. K. B. 374, 1069, where the possibility of getting compulsory powers from Parliament was taken into consideration, as against this view in Stebbing v. Metropolitan Board of Works, 1871, L. R. 6 Q. B. 37; 40 L. J. Q. B. 1, where the Court evidently considered a graveyard in the hands of the rector as absolutely dedicated to religious uses and allowed only a nominal compensation.

Re Gibson and Toronto, 1913, 28 O. L. R. 20, was followed in Re Billings and C. N. R., 1913, 29 O. L. R. 608, and Campbell v. Irwin, 1914, 32 O. L. R. 48.

Compensation Without Reduction for the Benefit which the Whole Scheme Confers.—In re Browne and Owen Sound, 1907, 14 O. L. R. 627, the inclusion of the closing of a street in a general scheme was held not to defeat the land owner's claim for compensation unaffected by the benefit which the whole scheme conferred upon the lands.

No Compensation for Damage Resulting from Lawful Use of Highway.—In Re Pryce and Toronto, 1892, 20 A. R. 16, the claim was for damage caused by raising the grade of the street in connection with laying of block pavement as a local improvement. The United States rule that general benefits cannot be set off, was commented on favourably, but that particular or special benefits might be set off, and that an increase in the value of the land in consequence of the improvement is an advantage which the owner derives from it even though it is shared by all other properties in the neighborhood, the distinction being that the general benefit which ought not to be deducted is that general improvement or rise in value which the property may be said to share in common with all other property in the neighborhood, and not merely with that immediately adjoining the work or improvement in consequence of its construction; while the special and peculiar benefit which is the subject of set-off is so much of the increase or rise in value as may be found to be directly attributable to the particular property over and above that of neighboring properties in consequence of the location of the work or improvement upon or adjoining it, and also of course of any other special or peculiar advantage. It does not follow that this proportion of the increase in value is to be designated as a general benefit merely because it is common in a greater or less degree to every lot upon the street on which the improvement is effected. It arises from and is caused by the improvement, and is so far direct and special and peculiar to each lot.

In R. v. Mountford, 1906, 2 K. B. 814, a tramway company was given statutory power to construct their tramways along a certain street provided the street should be widened to a specified extent and the company under compulsory powers took a portion of the owner's lands for the purpose of widening the street and then constructed a tramway, it was held that he was entitled to compensation for the injurious affection to his other land by reason of the land taken being used as part of the street but not in respect of the depreciation by the running of trams along the street.

See G. T. R. v. Fort William, 1910, 43 S. C. R. 424; Powell v. Toronto H. & B. R. Co., 1898, 25 A. R. 209; Re Devlin and Hamilton, 1875, 40 U. C. Q. B. 160. The principle is as stated below.

No compensation for injury caused by the use of authorized works, no part of the land having been taken, Hammersmith v. Brand, 1869, L. R. 4 H. L. 171.

In Re Macdonald and City of Toronto, 1912, 27 O. L. R. 179, C. A., the corporation took ten feet from the front of the lot upon which a dwelling house was situated for the purpose of widening the street. The arbi-

trators awarded the claimant: (1) a sum for the value of the land taken; (2) a sum for injuriously affecting the rest of the land, by bringing the street line nearer to the house and by reason of the destruction of a tree; and (3) another sum for injurious affection given as depreciation caused by change of the general character of the street.

The Court of Appeal held that due compensation within the meaning of s. 437 of the Act of 1903 meant a full indemnity in respect of pecuniary loss and that the only subjects of such loss were the lands taken and the injury to the remainder and held that as the arbitrator intended under the second allowance to include everything which tended to depreciate the value of the land, that the further allowance in item 3 was bad as the lands taken for a highway could be used for all highway purposes, and that no one could lawfully complain of the changing of the sidewalk, widening of the pavement or the removal of trees under civic control.

Effect of Expropriating By-law.—See In re Prittie and Toronto, 1892, 19 A. R. 503, and Re Macpherson and Toronto, 1895, 26 O. R. 558.

Jurisdiction to Send Award Back.—In Holditch v. Canadian Northern, 1914, the App. Div. Ont., referred an award back to assess compensation under a head which they had not considered. This decision was reversed by the Supreme Court of Canada, 50 S. C. R. 265, and on appeal to the Judicial Committee of the Privy Council, the decision of the Supreme Court was upheld.

Interest on Awards. See Re MacPherson and Toronto, 1895, 26 O. R. 558; Re Hislop and Stratford, 1915, 34 O. L. R. 97.

Interest cannot be allowed by an arbitrator: Leak v. Toronto, 1900, 31 S. C. R. 322.

American Cases as to Measure and Amount of Compensation.—The compensation must be the actual cash value at the date of commencement of the proceedings, which cannot be diminished: Davis v. North Western, 48 N. E. 1058, 170 Ill. 595.

The price which property would bring under special or extraordinary circumstances is not to be considered, but its fair cash market value: Phillips v. Town of Scales Mound, 63 N. E. 180, 195 Ill. 353.

Additional compensation was allowed because the land was specially adaptable and ready for railway purposes by reason of improvements: Orleans v. Jefferson & L. P. Ry., 26 S. O. 278.

The market value of land taken if unoccupied, is to be fixed by its value for the most valuable purposes to which it is adapted: Cochrane v. Commonwealth, 56 N. E. 610, 175 Mass. 299.

Market value of lands taken means the sum it is worth to persons generally, if those desiring to purchase were found, who were willing and able to pay its just and full value on ordinary terms at a private sale: Kansas City v. Bacon, 57 S. W. 1045.

Speculative values may be considered: St. Louis v. Knapp, 61 S. W. 300.

Reference should be had to the uses for which the property is suitable, having regard to existing business wants and wants of community, or such as may be reasonably expected in the immediate future: Metropolitan v. Walsh, 94 S. W. 860.

The value as building lots of a farm which has been subdivided into such lots is not established merely by the sale of a few of the lots affected by special means: In re Daly, 45 N. Y. S. 785.

The owner of contiguous lots is entitled to the value of his lots considered as one parcel, but in such a case, he is not entitled to the full value of the buildings on each lot because they would have to be destroyed to give plottage value: In re Armoury Board, 76 N. Y. S. 766.

The existing business or wants of the locality and such increase or development thereof as may reasonably be expected in the immediate future, may be considered: Gulf v. Burger, 45 S. W. 613; Sullivan v. Missouri, 68 S. W. 745.

It is the present value of the land with all its adaptations to general and special uses and not any prospective, speculative or possible value based upon future expenditures and improvements, that is to be considered: Richmond v. Seaboard, 49 S. E. 512.

In determining the value of agricultural land taken, its worth at some future time is not to be considered, but the fair market value for any purpose for which it might reasonably be used in the immediate future, and if it could be subdivided, the resulting increase in value is properly allowable: Alexian v. Oshkosk, 70 N. W. 162.

Where the situation of land is such that the natural growth of the city and the proximity of the land to it, fixes its use for suburban residences in the immediate future with such certainty as to make the land of additional value on that account at the time of the appropriation, this fact must be given weight in awarding compensation: Ohio v. Kerth, 30 N. E. 298.

Where land is taken for railway purposes, its value as the prospective location of a depot is an element to be taken into consideration: Snouffer v. Chicago, 75 N. W. 501.

The special value of a spring of water is an element to be considered: Kansas City v. Bacon, 57 S. W. 1045.

Future special uses contemplated by the owner are not elements to be considered: In re Pugh, 61 N. Y. S. 1145.

Availability of the property for use in connection with water supply for a city may be considered, but not its value to the city in view of the city's necessity for the parcel in question: In re Daly, 76 N. Y. S. 28.

In expropriating lands for water works purposes, the fact that they are specially adapted for such purposes is not an element in determining the market value: Gibson v. Norwalk, 13 Ohio Cir. Ct. R. 428, where a water company sought to condemn land, the owner was allowed to show that the property from its natural formation, was adapted to reservoir purposes: Brown v. Forest, 62 A. 1078.

Where lands earned a high rental by gambling carried on in the premises, this was held not to be an element which could be considered in assessing damages: McKinney v. Nashville, 52 S. W. 781.

Reasonable probability of extension of car line is an element to be considered: St. Louis v. Hughes, 73 S. W. 976.

Where land was available for public park and the owner put in evidence that they intended to improve it for that purpose and to use as a source of revenue in connection with an electric railway, it was held that this was too speculative, remote and conjectural to be a proper element of damage: Richmond v. Seaboard, 49 S. E. 512.

The owner should be allowed to put in evidence all facts which a vendor would adduce if he were attempting a private sale. Opposing counsel should be allowed to make every inquiry an individual about to buy, would feel it in his interest to make: Little v. Woodruff, 5 S. W. 792.

The question as to whether or not the village in which the property was situated was improving was held too indefinite: Martin v. Chicago, 77 N. E. 86.

Evidence that lands were transferred by a former owner for the purpose of speculating upon a street opening was held objectionable: In re Willis Ave., 22 N. W. 871.

Witnesses giving their opinions as to the value of land should be confined to the cash value on a sale made after reasonable notice, and not be permitted to testify as to the theoretical value: Levee Comrs. v. Hendricks, 27 So. 613.

Witnesses cannot give their opinions as to the crops that the land will yield. *Ibid.*

Declarations of the owner as to the value of land and his offer of it at a fixed price, and a sale of a portion of it, are evidence as constituting his estimate of its value: East Brandywine v. Ranck, 78 Pa. 454.

Where valuable fruit trees stand on land, their value may be shown by proving the value of the land with and without the trees: Foote v. Lorain, 21 Ohio Cir. Ct. R. 319.

The mere opinion of an expert witness as to the uses to which the land would be put in the near future was inadmissible to show value: W. Chicago v. Chicago, 50 N. E. 185.

Speculative evidence as to contemplated uses reversed, *ibid.*

Evidence that lands are subject to inundation, and photographs of the premises at the time of overflow are admissible to show value: Schuster v. Chicago, 52 N. E. 855.

PART XVI.

ARBITRATIONS.

332. The provisions of this Part shall be subject to *The Municipal Arbitrations Act. New.* 3 & 4 Geo. V. c. 43, s. 332.

Distinction between Submission to Arbitration and Agreement for Valuation.—Where land is expropriated or injuriously affected, the compensation is to be determined by arbitration, if the amount is not mutually agreed upon. It is therefore, open to the parties to have a valuation instead of an arbitration. Where it is a submission to arbitration, s. 14 of the Arbitration Act applies and the award can by leave of the Court be enforced in the same manner as a judgment. No such mode of enforcing a valuation is provided and when what has taken place is really a valuation the parties are left to their remedies by action. It becomes important then to note the distinction between a submission to arbitration and a valuation. The law with regard to the question was fully considered by the Court of Appeal in Re Carus-Wilson and Greene, 18 Q. B. D. 7; 55 L. T. 864, where the umpire under an agreement was not to settle judicially any matter in controversy between the parties, but was by the exercise of his own skill and knowledge to make a valuation, the object being to prevent disputes from arising and not to settle them after they had arisen. Williams, J., pointed out in Re Hammond and Waterton 1890, 62 L. T. 808, that the distinction depended upon whether the umpire was to decide a question on evidence produced before him or by the exercise of his own skill and knowledge, and that it was necessary to take into consideration who the umpire is. Thus, if there was a dispute respecting building and a barrister was chosen as the umpire, it would be natural to conclude that evidence should be taken and an arbitration held, but if a quantity surveyor were appointed unless the agreement provided to the contrary, one would suppose that he was to act upon his own skill and experience without evidence, and he held that the proceedings before him where a seedsman and a market gardener were to adjust the loss suffered by a nurseryman because of the termination of his lease, were valuers and not arbitrators.

Valuation or Arbitration.—The mere permission to valuers to examine witnesses does not make them arbitrators, Re Campbellford and Maine, 1914, 50 S. C. R. 409; Re Laidlaw and Campbellford, etc., 1913, 31 O. L. R. 209; Hill v. Simmonds, 1913, 14 D. L. R. 887 (N.S.).

Capacity of Municipal Corporations to Submit to Arbitration.—In Patchell v. Raikes, 1904, 7 O. L. R. 470, a council authorized the payment of a bonus and upon the company claiming payment of interest on the amount of bonus, the town and company agreed to obtain opinion of counsel who advised payment by the town. The Court of Appeal held that the payment was illegal and a breach of trust and dissented from the contention that there had been an award by an arbitrator which justified the payment, Garrow, J.A., in delivering judgment of the Court, said as follows:—

> "But it is said this was not merely an opinion but something very much more, namely, a submission to arbitration and an award by which both parties are bound. But there are overwhelming difficulties in the way of this defence. To begin with, I think it extremely doubtful whether such a question as the present could be

lawfully submitted by a municipal council to arbitration, but as the point was not argued I should, perhaps, not pass a final opinion. Municipal councils derive their authority wholly under the Municipal Act. They are given in that Act certain specified powers to arbitrate respecting certain classes of subject matters, which would not include the claim now under consideration. The well-known maxim, *Expressio unius est exclusio alterius*, might be invoked to establish the proposition that any other power to refer is excluded. It is not by any means a matter of course that trustees may submit the interests of those for whom they act to decision by arbitration. The general principle is stated in Russell on Awards, 8th ed., 1900, at p. 21, thus: 'Every one capable of making a disposition or release of his right can make a submission to an award. . . . Persons that cannot contract cannot submit to arbitration.' This seems reasonable. The capacity or power of a municipality to contract is limited by the Act under which they carry on their operations. It may be that where the question is one of fact falling within their ordinary administrative duties they may refer, as was held, apparently without much discussion, in In re Eldon and Ferguson, 1860, 6 U. C. L. J. 207, in a matter of account between a township and their treasurer. But where, as here, the question is one of law, for the facts were not at all in dispute, the determination of which in one way would show jurisdiction over the subject-matter, but in the other would show its lack, my present opinion is that there can be no lawful reference except to the regular Courts of the country. To hold otherwise would be to open wide the door to all kinds of raids upon the municipal treasury and to deprive the Courts of the very necessary and wholesome check which they have always exercised over the acts and conduct of such bodies as municipal councils."

333. Except where otherwise provided, The Arbitration Act shall apply to an arbitration under this Act. 3 Edw. VII. c. 19, s. 467, *amended*. 3 & 4 Geo. V. c. 43, s. 333.

334. In case of an arbitration as to compensation where more persons than one are interested, but have distinct interests in the land, whether or not they are all interested in the same parcel, or some or one in one part of it, and some or one in another part, the council may by the expropriating by-law or by any subsequent by-law provide that the claims of all such persons shall be determined by one and the same arbitration. 3 Edw. VII. c. 19, s. 452. 3 & 4 Geo. V. c. 43, s. 334.

Owners Entitled under Unregistered Agreements for Sale.—The provisions of the Land Registry Act, R. S. B. C. 1911, c. 127, s. 104, which declare that certain instruments shall not pass any estate until registered, were passed for the protection of purchasers and creditors of vendors and extend to corporations who have to pay compensation for lands injuriously affected, but do not operate to prevent a person claiming under such an agreement, from taking proceedings to obtain compensation. Re Jackson and North Vancouver, p. 573.

Parties to Arbitration. Joint Work.—Where a city and county jointly undertook the construction of a bridge which was under the exclusive jurisdiction of the county an arbitration to assess compensation to which the city was a party was prohibited. Re Cummings and Carleton, 1894, 26 O. R. 1, reversing 25 O. R. 607.

Lowering or Raising Street Grade.—No action lies against a corporation in respect of work lawfully done in raising or lowering a street level even if the corporation by agreement with the railway company permits the latter to raise the level. The sole remedy is arbitration. Baskerville v. Ottawa, 1892, 20 A. R. 108.

The mere absence of a by-law authorizing the raising or lowering of the grade will not necessarily give rise to an action because an imperative statutory duty such as to keep highways in repair and for the purpose to raise or lower the grade must be performed, by-law or no by-law. Pratt v. Stratford, 1889, 16 A. R. 5.

But where formalities are required their absence will expose the city to an action for an injunction and damages. New Westminster v. Brighouse, 1892, 20 S. C. R. 520; North Shore v. Pion, and Parkdale v. West.

Damages for Raising Street Grade.—Re Christie and Toronto Junction, 1895, 25 S. C. R. 551, 22 A. R. 21, 24 O. R. 443, Re Burnett and Durham, 1900, 31 O. R. 262.

Where also there is negligence the corporation is liable.

Interest.—No power exists to award interest except by statute: Green and Canadian Northern, 30 W. L. R. 572; 22 D. L. R. 15; Ketcheson v. Canadian Northern, 29 O. L. R. 339; Leak v. Toronto, 1900, 31 S. C. R. 322.

335.—(1) Subject to section 339 and to sub-section 7 of this section where an arbitration is directed or authorized by this Act, either party may appoint his arbitrator, and give notice thereof in writing to the other party, calling upon him to appoint his arbitrator. 3 Edw. VII. c. 19, s. 450 (1), *amended.*

(2) Where the arbitration is as to compensation and the notice is given by the corporation there shall be served with it a copy of the expropriating by-law, certified under the hand of the clerk and the seal of the corporation to be a true copy. 3 Edw. VII. c. 19, s. 453 (1), *redrafted.*

(3) The appointment of an arbitrator shall be in writing, and, in the case of a municipal corporation, shall be by by-law of the council, or by the head, or a member of the council, if authorized by by-law to make the appointment. 3 Edw. VII. c. 19, s. 449, *redrafted.* 3 & 4 Geo. V. c. 43, s. 335 (1-3).

Irregularities in Appointment of Arbitrator. — In re Harvey and Parkdale, 1888, 16 O. R. 372, the appointment of the arbitrator for the corporation was not under the corporate seal as required by the then Act, but the Court on motion to set aside the award refused to interfere on this ground, leaving it open in case litigation should ensue, following Re Eldon and Ferguson, 6 U. C. L. J. 207.

In re Gifford and Bury, 1888, 20 Q. B. D. 368; 57 L. J. Q. B. 181, the arbitration was held under an Act which required an arbitrator to be appointed under the corporate seal of the local authority.

(4) The party notified, except in the case provided for by sub-section 5, shall within seven days after service of the notice on him appoint his arbitrator and give notice to the other party of the appointment. *New.*

(5) In the case provided for by section 334 the persons interested shall within 21 days after service of the notice on them agree upon and appoint their arbitrator and give notice to the other party to the arbitration of the appointment. 3 Edw. VII. c. 19, s. 453 (2), *amended.*

(6) The arbitrators shall, within seven days from the appointment of the last appointed of them, appoint by writing a third arbitrator. 3 Edw. VII. c. 19, s. 450 (2).

(7) Where *more than two* municipal corporations are interested, each shall appoint an arbitrator, and, if there is an equality of arbitrators, the arbitrators so appointed shall *appoint another* arbitrator, or in default at the expiration of twenty-one days after the last of such arbitrators was appointed, the Municipal Board may, on the application of any one of the corporations interested, appoint the other arbitrator. 3 Edw. VII. c. 19, s. 450 (4), *redrafted.* 3 & 4 Geo. V. c. 43, s. 335 (4-7).

336.—(1) Except in the case provided for by subsection 7 of section 335, if an arbitrator is not appointed by the party notified within seven days, or in the case provided for by section 334, within twenty-one days after notice to appoint an arbitrator, or, if the two arbitrators appointed do not, within seven days from the appointment of the last appointed one of them, appoint a third arbitrator, the *Judge,* on the application of either party, and on notice to the other, shall appoint as arbitrator, or third arbitrator, a fit person to act for the party who has failed to appoint, or as such third arbitrator.

(2) Where the arbitration is as to compensation the arbitrator appointed by the Judge shall not be a resident of the municipality in which the land is situate. 3 Edw. VII. c. 19, s. 454, *redrafted.* 3 & 4 Geo. V. c. 43, s. 336 (1-2).

Non-Resident Arbitrator.—This provision is imperative: Smith v. Plympton, 1885, 12 O. R. 20; Turnbull v. Pipestone, 1915, 24 D. L. R. 281; 31 W. L. R. 595.

Sections 335, 336.—These sections provide a complete code for the appointment of arbitrators under the Municipal Act, and therefore, exclude the provisions of s. 9 of the Arbitration Act. S. 8 of the Arbitration Act B. C., which corresponds to s. 9 of the Ontario Act, has, however, been held to apply to municipal arbitrations: Re Jackson and North Vancouver, 1913, 19 B. C. L. R. 147.

337. The appointment of an arbitrator by a municipal corporation shall not be deemed to be an admission of any liability on its part, and all defences and objections that would be open in an action, shall be open to either party. 3 Edw. VII. c. 19, s. 455. 3 & 4 Geo. V. c. 43, s. 337.

Arbitrators Determine Amount of Compensation, not Liability to Pay Compensation.—This has been held under similar provisions in the Land Clauses Consolidation Act, Beckett v. Midland R. C. 1866, L. R. 1 C. P. 241; The Queen v. Vaughan, 1868, L. R. 4 Q. B. 190, and under the Public Health Act, Pearsall v. Brierley, 1883, 11 Q. B. D. 735; 1884, 9 App. Cas. 595 (H.L.). The latter case was followed in In re Northern Counties and Vancouver City, 1901, 8 B. C., where it was held that the jurisdiction of the arbitrators under the Act in question, was limited to the amount of compensation and that it would be a misapplication of a provision corresponding to that contained in s. 14 of the Arbitration Act that an award may be enforced in the same manner as a judgment by leave of the Court to give leave to the claimant to enforce the award when all that has been decided is the amount due and the question as to the right or title has not been determined.

In Clemons v. St. Andrews, 1896, 11 M. R. 111, Killam, J., said:—

> "In Pearsall v. The Brierley Hill Local Board, 11 Q. B. D. 735, Brett, J., suggested that there might be some course which could be taken to ascertain the liability first, and Fry, L.J., held that this might be done by application for a mandamus; but no one suggested that an action could be brought in the first instance. Cases of proceeding by mandamus are very numerous in the books, but I have seen no case warranting an action before the amount to be paid has been ascertained, where a particular method of ascertaining it is provided by statute. It is possible that, under the new practice introduced by the Queen's Bench Act, 1895, a suit could be brought, in the first instance, for a declaration of the right to indemnity (see s. 38, s.-s. 5), or that the plaintiff could sue or apply for a mandamus; but in my opinion no action would lie at common law until the amount had been ascertained."

338. No member, officer, or person in the employment of a corporation which, and no person who, is concerned or interested in an arbitration, shall be appointed or act as an arbitrator, but no person shall be disqualified by reason merely that he is a ratepayer of a municipality concerned or interested in the arbitration. 3 Edw. VII. c. 19, s. 457. 3 & 4 Geo. V. c. 43, s. 338.

339. Where the arbitration is as to compensation and the amount claimed does not exceed $1,000, the same shall be determined by the Judge or by such person as he on application to him by either the corporation or the claimant upon at least seven days notice to the other, may appoint. 3 Edw. VII. c. 19, s. 448 (1-2); 4 Edw. VII. c. 22, s. 16 (1), *redrafted,* and *see* 4 Edw. VII. c. 22, s. 16 (2). 3 & 4 Geo. V. c. 43, s. 339.

PROCEDURE.

340.—(1) Every arbitrator, before proceeding with the reference, shall take and subscribe the following oath:

"I (*A. B.*) swear (*or* affirm) that I will well and truly try the matters referred to me by the parties, and a true and impartial award make in the premises, according to the evidence and my skill and knowledge." 3 Edw. VII., c. 19, s. 458.

(2) The omission of an arbitrator to take the oath shall not affect the validity of the award, unless before the reference is begun objection is made to its being proceeded with on that account. *New.* 3 & 4 Geo. V. c. 43, s. 340 (1-2).

Necessity for oath by arbitrator: Turner v. St. John, etc., R. Co., 42 N. B. R. 557.

341.—(1) The arbitrators shall, within twenty days after the appointment of the last appointed arbitrator, meet at such place as they may agree upon, and proceed with the reference, but may adjourn from time to time.

(2) A copy of the award shall be filed with the clerk of every municipality interested. 3 Edw. VII. c. 19, s. 459. *Amended.* 3 & 4 Geo. V. c. 43, s. 341 (1-2).

342.—(1) In the case of a claim for compensation for damages for injuriously affecting land, the claimant, before the taking of evidence is begun shall deliver to the corporation, and file with the arbitrators, particulars of his claim.

(2) The arbitrators shall have the same power to amend the claim or the particulars as a Court would have in an action. 3 Edw. VII, c. 19, s. 442, *part amended.* 3 & 4 Geo. V. c. 43, s. 342 (1-2).

343. Where the arbitration is as to compensation, the arbitrators, in their discretion, may refuse to hear further evidence of a cumulative character upon any matter or question. 3 Edw. VII. c. 19, s. 442, *part amended.* 3 & 4 Geo. V. c. 43, s. 343.

344.—(1) The arbitrators may award a fixed sum for costs or may award costs on the scale of the High Court, or of the County Court, in which case they shall be taxed by the proper officer of the Court in the county or district in which the first meeting of the arbitrators was held, without any further order, and the amount shall be payable within one week after it is finally determined.

(2) The taxation except where the costs are taxed by one of the taxing officers of the Supreme Court, shall be subject to revision by one of them, upon one week's notice, and such revision shall be subject to appeal, as in the case of an appeal from a taxation of costs in an action. 3 Edw. VII. c. 19, s. 460, *redrafted.* 3 & 4 Geo. V. c. 43, s. 344 (1-2).

[*Note.—Section 461 struck out, as covered by 9 Edw. VII. c. 35, Sched. A.* (*k*).]

345.—(1) An appeal shall lie from every award in like manner as an appeal lies under *The Arbitration Act,* where the submission provides for an appeal from the award.

(2) Sub-section 1 shall not apply where the submission is in writing, and it is not agreed by the terms of it that there may be an appeal from the award. *New.*

(3) On an appeal from an award the High Court may call for and receive additional evidence to be taken in such manner as the Court directs, and may set aside the award or remit the matters referred or any of them, from time to time, for re-consideration and determination by the arbitrators, or may refer such matters or any of them to any other person, and may fix the time within which the further or new award shall be made, or may increase or diminish the amount awarded, or otherwise modify the award, as may be deemed just, and a Divisional Court of the Appellate Division of the Supreme

Court shall have the like power and authority. 3 Edw. VII. c. 19, s. 464, *redrafted*. 3 & 4 Geo. V. c. 43, s. 345 (1-3).

Jurisdiction on Appeal to Increase Award without Cross Appeal.—The rule of the Supreme Court not to increase damages where there is no cross appeal is based on the rule that it is only fair that the respondent, if he desires to object, should formulate his objection by giving notice of cross appeal, but this rule does not apply to appeals under s. 345 because the statute gives the Appellate Court full power to increase, decrease or modify. Re Christie and Toronto Junction, 1895, 24 O. R. 443, 22 A. R. 21, 25 S. C. R. 551.

Increasing or Decreasing Award on Appeal.—Re Muir and Lake Erie and N. R. W. Co., 1915, 32 D. L. R. 252, where Davies, J., in the Supreme Court, pointed out that the Appellate Division had not accepted the valuations of any of the witnesses and that it had rejected both the award of the majority of the arbitrators and the dissenting opinion and had made a new valuation which it had substituted for that made by the majority of the arbitrators, and then added:—

> "In a mere question of valuation alone where no legal principle is involved and no legal error shewn, I do not think the Court should, except in a demonstrable case of injustice, substitute their own opinion for that of the arbitrators, more especially in a case such as this where a view and inspection of the lands taken and left seems essential to enable a fair valuation to be made. The Court is to 'examine into the justice of the award given by the arbitrators on its merits and on the fact as well as the law.' Atlantic and North W. R. Co. v. Wood, [1895] A. C. 257, 263.
>
> "But this does not mean that they are entirely to supersede the arbitrators and to substitute their own valuation for those of the arbitrators in a case where, in my humble judgment not possessing the great advantage of a view of the premises, they are not as well able to form as fair and reasonable a valuation as are the arbitrators.
>
> "In short, as the Privy Council say in the case above cited, they are to 'review the judgment of the arbitrators as they would that of a subordinate Court in a case of original jurisdiction, where review is provided for."

GROUNDS FOR SETTING AWARD ASIDE.

(1) **Dealing with Matters not Referred.** — Arbitrators must confine themselves definitely to the subject in dispute or an award will be set aside: Re Green and Balfour, 1890, 63 L. T. 93, 325.

(2) **Misconduct by Arbitrator.** — Under this head are included: (a) Bias: Bangor v. Great Western Rly. Co., 1854, 5 H. L. C. 89; (b) Interest: Bristol Corporation v. Aird, 1913, A. C. 241, H. L., where the engineer of the corporation was appointed arbitrator under a building contract with the corporation which was carried on under his supervision. It was contended that the respondents could not have obtained the contract except on the condition that all matters in dispute should be submitted to the corporation's engineer, and that in the absence of misconduct, they ought not to be permitted to repudiate. Lord Atkinson said:

> "If a contractor chooses to enter into a contract binding him to submit the disputes which necessarily arise to a great extent between him and the engineer of the persons with whom he contracts, to the arbitrament of that engineer, then he must be held to his contract. Whether it be wise or unwise, prudent or the contrary, he has stipulated that a person who is a servant of the person with whom he contracts shall be the judge to decide upon matters upon which necessarily that arbitrator has himself formed opinions. But though the contractor is bound by that contract, still he has a right to demand that, notwithstanding those preformed views

of the engineer, that gentleman shall listen to argument and determine the matter submitted to him as fairly as he can as an honest man; and if it be shewn in fact that there is any reasonable prospect that he will be so biassed as to be likely not to decide fairly upon those matters, then the contractor is allowed to escape from his bargain and to have the matters in dispute tried by one of the ordinary tribunals of the land. But I think he has more than that right. If, without any fault of his own, the engineer has put himself in such a position that it is not fitting or decorous or proper that he should act as arbitrator in any one or more of those disputes, the contractor has the right to appeal to a Court of law and they are entitled to say, in answer to an application to the Court to exercise the discretion which the 4th section of the Arbitration Act vests in them: 'We are not satisfied that there is not some reason for not submitting this question to the arbitrator.' In the present case the question is, 'Has that taken place?'

"My Lords, I have listened with great attention to the able arguments which have been addressed to the House, and I am utterly unable to get rid of the notion that upon two of the most important matters, namely, this filling and the excavation between the monoliths, Mr. Squire will necessarily be at once in the position of a judge and a witness. I think he must necessarily be in that position. I cannot imagine any position more unpleasant, any position more undesirable. If he be really a witness, then he must, in effect, be examined before himself, and cross-examined before himself, and he must decide upon his own veracity or reliability. I think there could be no stronger reason to induce the Court not to exercise their discretion to stay the action than that any gentleman who has taken upon himself the duties of arbitrator should be put in such an entirely anomalous position."

In Hickman v. Roberts, 1913, A.C. 229, an architect who was arbitrator under a similar building contract wrote a letter to the contractor, saying: "Had you not better call and see my clients, because in the face of their instructions to me I cannot issue a certificate, whatever my own private opinion in the matter." This was held to disqualify the architect.

(*c*) Corruption or fraud.

(*d*) Purchasing claims.

(*e*) Accepting hospitality. This may be fatal: Re Hopper, 1867, L. R. 2 Q. B. 367; 36 L. J. Q. B. 97.

(3) **Joint Arbitrators not Acting Together.**—Under the Municipal Act, it is intended that all arbitrators shall sit and act together, not that two shall act and call in the third only if they cannot agree: Re Sturgeon and Sturgeon Falls, 1901, 2 O. L. R. 585 at 588.

(4) **Giving Audience to One Party in the Absence of the Other without Proper Notice.**—Re Greyson and Armstrong, 1894, 70 L. T. 106, where Mathew, J., said that arbitrators must observe the fundamental rules which govern judicial proceedings.

Private communications made by one party to an arbitrator should be handed over to another: Harvey v. Shelton, 7 Beav. 462.

Principles Underlying Grounds for Setting Award Aside.—In re Ossalinsky and Manchester, cited in In re Lucas and Chesterfield Gas and Water Board, *supra*, the following is taken from the judgment of Grove, J., reported in Browne and Allan's Law of Compensation, 1903, p. 660:—

"It is as well to state the general grounds upon which Courts set aside awards of arbitrators. It is merely using proverbially common language to say awards ought not to be set aside except on very strong grounds and for very strong reasons. The great advantage of an arbitration I have always considered is in the finality of the award, and I am sure at the present day one would not if one could help it, and was not legally obliged to do it, lessen the security which persons have who submit to the increased expense of arbitrations by removing the main element of value of them to litigants from their

finality. You have an arbitrator who decides the law and the facts. You have not got a series of motions and appeals, interlocutory and final—perhaps not even finally ending when there is a decision in the House of Lords, because on certain grounds a new trial may be got. I do not think it would be desirable to increase the uncertainty or the enormous expense of our legal system by opening up any new grounds for setting aside awards other than those which Courts have previously held to be good.

"Now I do not pretend to give an exhaustive catalogue of the grounds upon which awards are set aside, but they are very few. One of the grounds on which Courts have set aside awards is where the award is bad on the face of it; where it is repugnant: where it shows in itself that it has not followed the law; or for any other objection which may appear on the face of the award. Secondly, improper conduct in the arbitrator; when he has refused to hear evidence, when he hears one side in the absence of the other, or any irregularity which, although it may not amount to moral wrong, or justify one in calling the award a corrupt award, yet is substantial and is improper conduct of the case which is entrusted to him. Thirdly, awards have been set aside where there has been a mistake by the arbitrator either of fact or law which he himself admits, and when the Court has before them evidence coming from the arbitrator that he himself admits he had made a mistake; and, fourthly, when the arbitrator (and that is the only one that can apply at all to this case as far as I think)—has acted *ultra vires*—has gone beyond the powers which are conferred upon him. If that can be shown to a Court by appropriate evidence, they will set aside the award. The arbitrator has to decide upon the matters submitted to him, and not upon matters which he may think desirable to settle in relation to the parties, but which the parties agree to submit to him, which the law has not thrown upon him. I think those four, as far as I know, are all the grounds on which Courts have set aside awards. I should be very sorry ever to say that I had given an exhaustive definition, because such a thing is almost impracticable in legal matters, and in many other matters."

Power to Remit Award.—The power to remit does not exist at common law, and consequently when a common law award is set aside, the parties can resort to the Courts to enforce their rights. Where compensation is to be determined by arbitration under statutory proceedings, and the arbitrators have erred in refusing to receive evidence, the award should be remitted: Cedar Rapids v. Lacoste, 1914, A.C. 569, 83 L. J. P. C. 162, but note query by Fitzpatrick, C.J., in Canadian Northern v. Moore, 1916, 31 D. L. R. 456 (Alta.), as to whether or not arbitrators under the Dominion Railway Act having made an award are *functi officio*. At all events under the Arbitration Act (Ont.), and under the Alberta Act, they are not.

Remitting Award.—With regard to s. 10 of the Arbitration Act, 1889, 52 & 53 Vict. c. 49 (Imp.), which is to the same effect as s. 12 (1) of the Arbitration Act (Ont), Chitty, L.J., gave the following four grounds upon which a matter could be remitted to an arbitration for reconsideration:—

In In re Montgomery, Jones & Co. and Liebenthal & Co. (1898), 78 L. T. 407, Chitty, J., said: "There are four grounds upon which the matter can be remitted to an arbitrator for reconsideration. Those grounds are: (1) where the award is bad on the face of it; (2) where there has been misconduct on the part of the arbitrator; (3) where there has been an admitted mistake and the arbitrator himself asks that the matter may be remitted; and (4) where additional evidence has been discovered after the making of the award."

There is no provision in the Ontario Act which corresponds with s. 19, referred to by Chitty, L.J., which is as follows:—

"Any referee, arbitrator, or umpire, may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference."

Arbitrators should Give Their Reasons for Their Award.—James Bay R. W. Co. v. Armstrong, [1909] A. C. 624, at 631; Re Peterborough and Peterborough Electric Light Co., 1915, 8 O. W. N. 564. Information as to the grounds on which arbitrators have proceeded must be obtained in a proper way either by a statement of the case or by the delivery of written reasons for the information of the Court. These must not be obtained *ex parte*, nor can the views of one arbitrator be used unless at least all have had the opportunity of stating theirs. An arbitrator is a competent witness in an action on an award, and on an appeal if the latter involves similar questions, but he cannot be examined pending an appeal: Re Clarkson and Campbellford, Lake Ontario and Western R. W. Co., 1916, 35 O. L. R. 345; Crowley v. Boving & Co. of Canada, 1915, 33 O. L. R. 491.

A court may read the reasons for an award as part of it. Parsons v. Eastnor, 1915, 34 O. L. R. 110; Re Toronto and Grosvenor, 1917, 41 O. L. R. 352, App. Div., reversing 40 O. L. R. 550.

Calling Arbitrator as Witness.—In Buccleuch v. Metropolitan Board of Works, 1872, L. R. 5 H. L. 418; 41 L. J. (Ex.) 137, Lord Chelmsford in the House of Lords thus discussed the limits within which an arbitrator can be examined:—

> "The umpire being a competent witness, the only question is, to what extent the defendants were entitled to examine him as to the particulars of his award. They had an undoubted right to know from him whether in his estimate of the compensation he took into consideration any matters not included in the reference, and therefore not within his jurisdiction. To prevent the defendants from questioning him so far would have been to deprive them of information to which they were entitled, by shutting them off from the only source of it, in the breast of the umpire. He alone could tell what subjects he included under the general terms of his award.

Proper Questions to put to Arbitrator.—This has been explained by Lord Watson in O'Rourke v. Commissioner for Railways, 1890, 15 App. Cas. 371, at 377, as follows:—

> "Their Lordships are also of opinion that the Court below erred in authorising a general examination of the arbitrators 'with a view to the prothonotary informing himself as to the issues upon which the defendant succeeded.' The judgment of the House of Lords in Duke of Buccleuch v. Metropolitan Board of Works, 1872, L. R. 5 H. L. 418, upon which Windeyer, J., relied, is, when rightly understood, a direct authority to the contrary. The principle which was laid down by Cleasby, B., in that case (p. 433), and accepted by the House, was thus explained (p. 462), by Earl Cairns: 'He, (*i.e.*, the arbitrator or umpire) was properly asked what had been the course which the argument before him had taken—what claims were made and what claims were admitted; so that we might be put in possession of the history of the litigation before the umpire up to the time when he proceeded to make his award. But there it appears to me the right of asking questions of the umpire ceased. The award is a document which must speak for itself, and the evidence of the umpire is not admissible to explain or to aid, much less to attempt to contradict (if any such attempt should be made) what is to be found upon the face of that written instrument.' In this case it is obvious that an examination of the arbitrators would not disclose how far the defendant had succeeded, unless they were asked what sum, if any, they had awarded to the appellants under each count of the declaration—a line of examination which is plainly incompetent."

MISCELLANEOUS CASES.

Exceeding jurisdiction by dealing with matters outside agreement. Murray v. Gunn, 1916, 26 M. R. 345; 34 W. L. R. 633.

Submission to two arbitrators, death of one. Submission at an end as s. 9 of the Arbitration Act does not apply, Windebank v. C. P. R., 1915, 25 D. L. R. 225.

Provision that award might be made a rule of Court confers no right of appeal. Re York and Willson, 1880, 8 P. R. 313.

Where submission provides that the award shall be made by three arbitrators, to be valid, it must be made unanimously. Re O'Connor and Fielder, 1895, 25 O. R. 568.

Reference subject to such points of law as will properly arise, makes it imperative for arbitrators to state a case. Ross v. Bruce, 1870, 21 C. P. 41, 548.

346.—(1) Each of the arbitrators shall file with the clerk of the municipality a certificate, showing the number of hours actually occupied by him in the reference, the number of hours occupied at each sitting, and the date of and the fees charged by him for each sitting.

(2) Any party to the reference may pay to the clerk of the County or District Court of the county or district in which the first meeting of the arbitrators was held, the fees demanded by the arbitrators, together with $10 as security for the costs of the taxation of such fees, and the clerk shall give a receipt in duplicate for the same, and shall enter the payment in a book to be kept by him for the purpose, and he shall be entitled to receive to his own use from such party, when the sum paid does not exceed $50, a fee of fifty cents, and when the sum paid exceeds $50 a fee of $1, and upon production and delivery of one of the duplicates the arbitrators shall deliver the award to the person producing the duplicate. 3 Edw. VII. c. 19, s. 462 (2-3), *redrafted*. 3 & 4 Geo. V. c. 43, s. 346 (1-2).

347. Where the arbitration is as to compensation, if the expropriating by-law did not authorize or profess to authorize any entry on or use to be made of the land before the award, except for the purpose of survey, or if the by-law gave or professed to give such authority, but the arbitrators by their award find that it was not acted upon, the award shall not be binding on the corporation, unless it is adopted by by-law, within three months after the making of the award; or after the determination of any appeal therefrom, and if it is not so adopted, the expropriating by-law shall be deemed to be repealed, and the corporation shall pay the costs between solicitor and client of the reference and award, and shall also pay to the owner the damages, if any, sustained by him in con-

sequence of the passing of the by-law, and such damages if not mutually agreed upon shall be determined by arbitration, and if the by-law has been registered or a caution in respect of it has been filed the corporation shall forthwith cause a certificate signed by the mayor and clerk and sealed with the corporation's seal, stating that the by-law stands repealed, to be registered in the proper registry office or the caution to be removed as the case may be. 3 Edw. VII. c. 19, s. 463 (1), *amended.* 3 & 4 Geo. V. c. 43, s. 347.

(2) Subject to the provisions of sub-section 3, where the expropriating by-law did not authorize or profess to authorize any entry on or use to be made of the land except for the purpose of survey, or if the by-law gave or professed to give such authority but it has not been acted on, the council may at any time before the making of the award, and whether or not arbitration proceedings have been begun, repeal the by-law, and if that is done the repealing by-law shall, if the expropriating by-law has been registered, be forthwith registered by the corporation in the proper registry office or if the land is under *The Land Titles Act* and a caution has been filed, the corporation shall forthwith remove the caution and the costs and damages mentioned in sub-section 1 shall be paid by the corporation as therein provided.

(3) Sub-section 2 shall not in any way affect or apply to the rights of any person under an award heretofore made. 7 Geo. V. c. 42, s. 8.

Effect of Section 347—By-law Authorizing or Professing to Authorize.—In re City of Toronto and Grosvenor Street Presbyterian Church, 40 O. L. R. 550; reversed, 41 O. L. R. 352, the city expropriated the Church property for the purpose of widening certain highways. The Church trustees took proceedings under the Municipal Arbitrations Act, R. S. O. 1914, c. 199, before the Official Arbitrator, and obtained from him an award of compensation for the taking of such property. The expropriating by-law provided that the lands therein described "are hereby declared to form part of the said highways." The Church continued in occupation of their property, but the award did not mention this fact, although it was stated in the arbitrator's reasons for award. After the making of the award the city repealed the expropriating by-law. The Church then moved to enforce the award before Masten, J., who granted the application on the ground that the words, "and the same are hereby declared to form part of the said highways," in the expropriating by-law, professed to authorize the immediate use of the lands in question as a highway, and the arbitrator had not in his award found that it had not been acted upon, and the arbitration accordingly did not fall within the provisions of s. 347.

On appeal by the city to a Divisional Court, this judgment of Masten, J., was reversed, and it was held that the provisions of s. 347 were applicable, and that the case came within such provisions, and that the city corporation were not under any legal obligation to take or pay for the property which was the subject of the award.

Per Riddell, J., at p. 364:

> "While not without some doubt, I think the by-law, by professing to make this land at once a public highway, professed to authorize its use as such forthwith. In my view, it is wholly immaterial whether the by-law was effective for the purpose; it is enough to see what it purported to do."

Per Rose, J., at p. 365:

> "I agree with what has been said by Mr. Justice Riddell, except in one particular which does not affect the result.
>
> "With much deference, I suggest that a by-law which 'did not authorize or profess to authorize any entry on or use to be made of the land before the award,' means a by-law which did not expressly authorize or profess to authorize such entry or use. Otherwise, as it appears to me, the words quoted are almost meaningless; for s. 324 enacts that, at any time after the passing of a by-law for expropriating land, the corporation, by leave of the Judge, and upon payment of the requisite amount into Court, may enter, but that such leave and payment shall not be necessary where the land is being expropriated for or in connection with the opening, widening, altering or diverting a highway; so that, if the expression 'authorize any entry' means 'so affect the land as that the law will authorize an entry,' there is no valid expropriating by-law that does not authorize an entry. . . . I think this by-law did not authorize any entry on or use of the land, and could be repealed."

An appeal by the Church to the Supreme Court of Canada was subsequently dismissed on other grounds, and in July, 1919, the Church was refused leave to appeal by the Judicial Committee of the Privy Council.

PART XVII.

ACTIONS BY AND AGAINST MUNICIPAL CORPORATIONS.

348. Where a duty, obligation, or liability is or has been heretofore imposed by statute upon any person in favour of a municipal corporation, or the inhabitants, or some of the inhabitants of a municipality, or where a contract or agreement is or has heretofore been entered into, which imposes such a duty, obligation, or liability, the corporation shall have the right by action to enforce it, and to obtain as complete and as full relief and remedy as could be obtained in an action by the Attorney-General, as plaintiff, or as plaintiff on the relation of any person interested, or in an action by such inhabitants or one or more of them, on his or their own behalf, or on behalf of himself or themselves and of such inhabitants. 3 Edw. VII. c. 19, s. 467*a*; 5 Edw. VII. c. 22, ss. 17, 18. *Redrafted.* 3 & 4 Geo. V. c. 43, s. 348.

Duty, Obligation or Liability Arising by Statute.—Where a duty, obligation or liability is imposed by statute for the benefit of the public generally, it is not the subject of an action but of an indictment, but if particular damage ensues to some member of the public an action for damages will lie at his suit. Clerk and Lindsell, 4th ed., 28. This rule is subject to the qualification that the damage must be of the kind which the statute was intended to prevent. Gorris v. Scott, 1874, L. R. 9 Ex. 125; 43 L. J. Ex. 92. S. 348 would appear to enable a municipal corporation in cases where the statutory duty, obligation or liability is imposed in favour of the corporation or the inhabitants or some of them to maintain an action without the necessity of showing particular damage.

The London County Council was by statute vested with the control and management of gas testing and the gas company refused to permit tests on Sundays, claiming that under the statute the council had no authority to test on Sundays, and that even if so the Attorney-General was a necessary party for an action in respect of the interference. The Court of Appeal held the action was maintainable by the county council. London County Council v. South Metropolitan Gas Co., 1904, 1 Ch. 76; 73 L. J. Ch. 136.

Duty, Obligation or Liability Arising under Contract.—Where a contract is entered into between two parties for the benefit of persons or corporations not parties to the contract, the parties for whose benefit the contract is made cannot enforce it against either of the contracting parties, the only exception being where a trust is created as in the case of children provided for by a marriage settlement or the case of a partner's widow provided for in the partnership deed. See Pollock on Contracts, 7th ed., p. 222. For example, the addressee to whom a telegraph message is sent, cannot recover damages resulting from a breach of the contract between the sender and the telegraph company by which he has been damaged. Playford v. United Kingdom, etc., 1869, L. R. 4 Q. B. 706; 38 L. J. Q. B. 249. Dickson v. Reuter's 1877, 2 C. P. D. 62; 3 C. P.

D. 1; 47 L. J. C. P. 1. S. 348 provides that where a contract has been entered into which imposes a duty, obligation or liability in favour of a municipal corporation or the inhabitants or some of them, the corporation shall have the right to enforce the same by action and to obtain the same relief as can be obtained in an action by the Attorney-General. In the case of agreements of the nature mentioned to which the corporation is not a party the section confers a new right of action. In cases where the corporation is a party to the contract, it can as such party enforce the contract without the intervention of the Attorney-General and without the aid of s. 348, even in cases where the breach of contract also amounts to a nuisance. Nuneaton v. General Sewage Co., 1875, L. R. 20 Eq. 127; 44 L. J. Ch. 561, but note that at a later stage in this case the Attorney-General was made a party. See Hamilton v. Hamilton Street Railway, below. The section so far as cases arising out of contract to which the municipality is a party are concerned would appear to enable the municipality to maintain an action although not itself specially interested in the enforcement of the duty, obligation or liability, as for instance in the case last mentioned where the real persons who suffered by breach of the obligation resting on the railway company were certain inhabitants of the city, but see *infra*, p. 593.

In Hamilton v. Hamilton Street Railway Company, 1905, 10 O. L. R. 594; 39 S. C. R. 673, the city brought an action in respect of an alleged breach of a term of the statutory contract between the city and the company and the objection was raised that the Attorney-General was a necessary party. Moss, C.J.O., said:—

> "Next comes the question whether the plaintiffs are entitled to maintain this action. It is to be borne in mind that here there is an express contract between the parties which has been broken by the defendants. If the effect of the breaches was to create a public nuisance, such as an obstruction of the public highway, the Attorney-General, as representing the public, could no doubt maintain an action for its abatement, though probably the plaintiffs would be necessary parties either as relators or defendants. See Attorney-General v. Toronto Street R. W. Co., 1868, 14 Gr. 673. It is to be observed that in that case, Mowat, V.-C., expressed the opinion (p. 674), that a suit against the street railway company to enforce the agreement with the city corporation must be brought by the latter. In such a case the question of damage is not material. As pointed out in Attorney-General v. Mid-Kent R. W. Co. and South Eastern R. W. C., 1867, L. R. 3 Ch. 100, there is a manifest difference in this respect between cases depending on nuisance and those depending on contract. Sir John Rolt, L.J., said (p. 104): 'It is shewn by the case of the Rochdale Canal Co. v. The King, 1851, 2 Sim. N. S. 78, and many other authorities, that where there is a contract, the Court cannot attach the same importance to the question whether the damage is serious or not, as it does in mere cases of nuisance, but that the main point is whether the contract has been broken.'
>
> "The plaintiffs have a material interest in the contract and the proper observance of it by the defendants, and the rights of the public in the large and general sense, are not so exclusively involved as to displace the plaintiffs' right to maintain the action as parties to the contract, though the result may be to benefit certain of the public,"

and the Supreme Court affirmed the judgment adopting the reasons given above.

Acquiescence.—The following definition of acquiescence was given by Fry, J., in Willmott v. Barber, 1880, 15 Ch. D. 96; 49 L. J. Ch. 792:

> "It must be borne in mind that a person who contracts that a license by himself shall be in writing, wisely stipulates as to the evidence of his assent, and requires a writing, in order that the controversy which arises on parol evidence may not occur; and that writing is to put an end to all strife. And it would require a strong case for the Court to deprive a third person of a legal right which he has contracted for; though that such a case may arise is undoubted. It is said that it can only do so when there is conduct which amounts to fraud. That I think to be an abbreviated statement of the true principle of such cases, and that the Court will not interfere with the exercise of a legal right, such

as the defendant is seeking to exercise, unless he has so acquiesced as to render it fraudulent on his part to set up such a legal right. I will first enquire, what are the principal elements or ingredients of such fraudulent acquiescence? In the first place, the person seeking to avail himself of such acquiescence, whom I will call the plaintiff, must have made a mistake, in point of fact, as to his legal rights; for if he knew, he has no cause of complaint against anyone else. In the second place, the plaintiff must have expended money or done some act—I do not say on the land itself, but I say, on the faith of the mistaken belief; for if he has done nothing he would not be injured by the assertion of the legal right. In the next place, the defendant, who is the possessor of the legal right, must know that his own right is inconsistent with the acts of the plaintiff, and all such consent depends on conduct, coupled with knowledge of rights. In the next place, the defendant, the possessor of the legal right, must know the plaintiff's mistaken belief in his right, for if he does not, there is nothing to call upon the defendant to assert his right. And, lastly, the possessor of the legal right must encourage the person acting on the mistaken belief in laying out his money, or doing the other act, either by direct encouragement or by abstaining from asserting his legal right. Where those elements are found, there is that case of fraud which will enable a person who has acted under a mistaken belief to restrain the exercise of a legal right inconsistent with his acts; but in my judgment nothing short of the concurrence of all these elements will enable him to do so."

In Hoare v. Kingsbury Urban Council, 1912, 2 Ch. 452; 81 L. J. Ch. 666, Neville, J., in dismissing an action brought under an agreement which was not under seal as required by s. 174 of the Public Health Act, which has repeatedly been held to be imperative, said:

"The necessity of obtaining the seal of the authority in order to make a contract over a certain value enforceable being, it is to be inferred, imposed for the purpose of the protection of the ratepayers, the power of the urban authority to bind them is derived from the Statute, which requires that power to be executed in a particular way. Further in dealing with the cases cited, Wilson v. West Hartlepool, 1865, 34 L. J. Ch. 241; Crook v. Seaford Corporation, 1871, L. R. 10 Eq. 678; L. R. 6 Ch. 551; and Marshall v. Queensborough, 1 Sim. & S. 520, it is important to be satisfied that they did not turn on the equitable doctrine of acquiescence, the requirements for which are defined in the case of Willmott v. Barber, supra. No case of acquiescence is made out here, the fact that both parties acted in the belief that a binding contract existed being fatal to any such contention."

In Crook v. Seaford Corporation, supra, relief was granted on the ground of acquiescence.

A corporation is under no obligation to raise the defence that an imperative statutory requirement as to the making of a contract has not been observed. Graham v. Huddersfield Corporation, 1895, 12 T. L. R. 36, and may waive the defect.

Executed Contract not under Seal. No Statutory Requirement of Seal. Plaintiff can Recover.—The leading case in Lawford v. Billericay, 1903, 1 K. B. 772; 72 L. J. K. B. 554, C. A., which was discussed and applied in Douglas v. Rhyl, 1913, 2 Ch. 407; 82 L. J. Ch. 537.

Imperative Statutory Requirement of Seal Bars Recovery Whether Contract Executed or Not.—The leading cases are Hunt v. Wimbledon, L. B. 1878, 4 C. P. D. 48; 48 L. J. P. C. 207; Young v. Leamington Corporation, 1883, 8 App. Cas. 517 and 522; 52 L. J. Q. B. 713, H.L.

Statutory Requirements as to Seal.—

Frend v. Dennett, 1858, 4 C. B. (n.s.) 576; 23 J. P. 56; 27 L. J. C. P. 314; 4 Jur. (n.s.) 897.

Bournesmouth Commissioners v. Watts, 1884, 14 Q. B. D. 87; 49 J. P. 102; 54 L. J. Q. B. 93; 51 L. T. 823; 33 W. R. 280.

Hunt v. Wimbledon L. B., 1878, 4 C. P. D. 48; 43 L. P. 284; 48 L. J. C. P. 207; 40 L. T. 115; 27 W. R. 123.

Young v. Leamington, 1883, 8 App. Cas. 517; 47 J. P. 660; 52 L. J. Q. B. 713; 49 L. T. 1; 31 W. R. 925.

Hoare v. Kingsbury U. D. C., 1912, 2 Ch. 452; 76 J. P. 401; 81 L. J. Ch. 666; 107 L. T. 492; 56 Sol. Jo. 704; 10 L. G. R. 829.

Douglass v. Rhyl U. D. C., 1913, 2 Ch. 407; 77 J. P. 373; 82 L. J. Ch. 537; 109 L. T. 30; 57 Sol. Jo. 627; 29 T. L. R. 605; 11 L. G. R. 1162.

Brooks, Jenkins & Co. v. Torquay Corporation, 1902, 1 K. B. 601; 66 J. P. 293; 71 L. J. K. B. 109; 85 L. T. 785.

Tunbridge Wells Improvement Commissioners v. Southborough L. B., 1888, 60 L. T. 172; 5 T. L. R. 107.

Andrews v. Ryde, 1874, L. R. 9 Ex. 302; 43 L. J. Ex. 174; 23 W. R. 58.

Gray v. Hackney Borough Council, 1904, 2 L. G. R. 429.

Eaton v. Basker, 1881, 7 Q. B. D. 529; 45 J. P. 616; 50 L. J. Q. B. 444; 44 L. T. 703; 29 W. R. 597.

Wood v. East Ham U. D. C., 1907, 5 L. G. R. 403; 71 J. P. 129.

Mansbridge v. Barnet U. D. C., 1909, 73 J. P. 255.

Munro v. Mallow U. D. C., 1911, 2 I. R. 130.

Spencer & Co. v. Southall-Norwood U. D. C., 1905, 3 L. G. R. 641; 69 J. P. 308.

Mellis v. Shirley L. B., 1885, 14 Q. B. D. 911; 54 L. J. Q. B. 408; 52 L. T. 544; reversed 1885, 16 Q. B. D. 446; 50 J. P. 214; 55 L. J. Q. B. 143; 53 L. T. 810; 34 W. R. 187.

Williams v. Barmouth U. D. C., 1897, 77 L. T. 383, C. A.

Hunt v. Acton U. D. C., 1908, 72 J. P. 345; 6 L. G. R. 957.

Bell v. Bridlington Corporation, 1908, 72 J. P. 453.

Leicester v. Trollope, 1911, 75 J. P. 197.

Attorney-General v. Gaskill, 1882, 22 Ch. D. 537; 52 L. J. Ch. 163; 47 L. T. 566; 31 W. R. 135.

R. v. Norwich, 1882, 30 W. R. 752; 46 J. P. 308, n.

R. v. Prest, 1851, 16 Q. B. 32; 14 J. P. 750; 20 L. J. Q. B. 17; 15 Jur. 554.

Bozon v. Altrincham U. D. C., 1903, 1 L. G. R. 639; 67 J. P. 397; 72 L. J. K. B. 271; 51 W. R. 337; 19 T. L. R. 266.

Necessity for Contracting under Seal Where no Statutory Provisions.—

Austin v. Bethnal Green, 1874, L. R. 9 C. P. 91; 38 J. P. 248; 43 L. J. C. P. 100; 29 L. T. 807; 22 W. R. 406.

Church v. Imperial Gas Light Co., 1838, 6 A. & E. 846, at p. 861; 3 N. & P. 35; 1 W. W. & H. 137; 7 L. J. Q. B. 118.

Ludlow v. Charlton, 1840, 6 M. & W. 815, at p. 822; 10 L. J. Ex. 75; 4 Jur. 657; 8 Cas. & P. 242.

Lawford v. Billericay R. D. C., 1903, 1 K. B. 772; 67 J. P. 245; 72 J. K. B. 554; 88 L. T. 317; 51 W. R. 630.

Hodge v. Matlock Bath U. D. C., 1911, 75 J. P. 65; 27 L. R. 129; 8 L. G. R. 1127, C. A.

Bourne and Hollingsworth v. Marylebone Borough Council, 1908, W. N. 52; 72 J. P. 129, reversed 1909, W. N. 14; 72 J. P. 306; 24 T. L. R. 613; 6 L. G. R. 1141, C. A.

Paine v. Strand Union, 1846, 8 Q. B. 32*s*; 15 L. J. M. C. 89; 10 Jur. 308.

Saunders v. St. Neots Union, 1846, 8 Q. B. 810; 15 L. J. M. C. 104; 10 Jur. 566.

Lamprell v. Billericay Union, 1849, 3 Ex. 283; 18 L. J. Ex. 282.

Clarke v. Cuckfield Union, 1852, 21 L. J. Q. B. 349; 16 J. P. 257; 16 Jur. 686; 1 B. C. C. 81.

Haigh v. North Bierley Union, 1858, 28 L. J. Q. B. 62; 23 J. P. 195; 31 L. T. (o.s.) 213; 5 Jur. (n.s.) 511; 6 W. R. 679; El. B. & E 873

Nicholson v. Bradford Union, 1866, L. R. 1 Q. B. 620; 30 J. P 549; 35 L. J. Q. B. 176; 14 L. T. 830; 13 W. R. 731.

Dyte v. St. Pancras, 1872, 36 J. P. 375; 27 L. T. 342.

Start v. West Mersea School Board, 1899, 63 J. P. 440; 15 T. L. R. 442.

Smart v. West Ham Union, 1855, 10 Ex. 867; 20 J. P. 596; 25 L. J. Ex. 210; 26 L. T. (o.s.) 285; 3 C. L. R. 696.

Phelps v. Upton Snodsbury Highway Board, 1885, 49 J. P. 408.

Stevens v. Hounslow Burial Board, 1889, 54 J. P. 309; 61 L. T. 839; 38 W. R. 236.

Crook v. Seaford Corporation, 1871, L. R. 6 Ch. 551; 25 L. T. 1; 19 W. R. 938.

Wilson v. West Hartlepool Rail. Co., 1865, 2 De. G. J. & S. 475; 34 L. J. Ch. 241; 11 L. T. 692; 11 Jur. (n.s.) 124; 13 W. R. 351.

Oxford v. Crow, 1893, 3 Ch. 535; 69 L. T. 228; 42 W. R. 200; 8 R. 279.

Hoare v. Kingsbury U. D. C. 402; 1912, 2 Ch. 452; 76 J. P. 401; 81 L. J. Ch. 666; 107 L. T. 492; 56 Sol. Jo. 704; 10 L. G. R. 829.

Kellett v. Stockport Corporation, 1906, 70 J. P. 154.

Dartford Union v. Trickett & Sons, 1883, 53 J. P. 277; 59 L. T. 754; affirmed 1889, 5 T. L. R. 619, C. A.

Kidderminster v. Hardwick, 1873, L. R. 9 Ex. 13; 43 L. J. Ex. 9; 29 L. T. 611; 22 W. R. 160.

Bolton Partners v. Lambert, 1889, 41 Ch. D. 295.

Athy Guardians v. Murphy, 1896, 1 I. R. 65.

Metropolitan Asylums Board v. Kingham & Sons, 1890, 6 T. L. R. 217.

In re Portuguese Consolidated Copper Mines, Ltd., 1890, 45 Ch. D. 16; 63 L. T. 423; 39 W. R. 25; 2 Meg. 249, C. A.

Dibbins v. Dibbins 1896, 2 Ch. 348; 65 L. J. Ch. 724; 75 L. T. 137; 44 W. R. 595.

Ford v. Newth, 1901, 1 K. B. 683; 65 J. P. 391; 70 L. J. K. B. 459; 84 L. T. 354; 49 W. R. 345.

Macdonald and Deakin v. Bacup Corporation, 1911, 130 L. T. Jo. 344.

Douglass v. Rhyl U. D. C., 1913, 2 Ch. 407; 77 J. P. 373; 82 L. J. Ch. 537; 109 L. T. 30; 57 Sol. Jo. 627; 29 T. L. R. 605; 11 L. G. R. 1162.

Attorney-General v. Gaskill, 1882, 22 Ch. D. 537; 52 L. J. Ch. 163; 47 L. T. 566; 31 W. R. 135.

The Public Health Act, 1875. Provisions as to Contract.—

173. Any local authority may enter into any contracts necessary for carrying this Act into execution.

174. With respect to contracts made by an urban (a) authority under this Act (aa), the following regulations shall be observed (namely),

(1) Every contract made by an urban authority whereof the value or amount exceeds fifty pounds shall be in writing and sealed with the common seal of such authority (b):

(2) Every such contract shall specify the work, materials, matters, or things to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed (d):

(3) Before contracting for the execution of any works under the provisions of this Act, an urban authority shall obtain from their surveyor an estimate in writing, as well as the probable expense of executing the work in a substantial manner as of the annual expense of repairing the same; also a report as to the most advantageous mode of contracting, that is to say, whether by contracting only for the execution of the work, or for executing and also maintaining the same in repair during a term of years or otherwise (e):

(4) Before any contract of the value or amount of one hundred pounds or upwards is entered into by an urban authority ten days public notice at least shall be given, expressing the nature and purpose thereof and inviting tenders for the execution of the same; and such authority shall require and take sufficient security for the due performance of the same (f):

(5) Every contract entered into by an urban authority in conformity with the provisions of this section, and duly executed by the other parties thereto, shall be binding on the authority by whom the same is executed and their successors and on all other parties thereto and their executors, administrators, successors or assigns to all intents and purposes: Provided that an urban authority may compound with any contractor or other person in respect of any penalty incurred by reason

of the non-performance of any contract entered into as aforesaid, whether such penalty is mentioned in any such contract, or in any bond or otherwise, for such sums of money or other recompense as to such authority may seem proper.

School Board Cases.—In Erb v. Dresden P. S. B., 1909, 18 O. L. R. 295, an architect succeeded in recovering from the school board for plans prepared by him on a *quantum meruit*, although a by-law authorizing the construction of the building was not passed. The plans were furnished in response to an advertisement, one clause of which provided that the Board would commission the author of the plan to take charge of the work at a compensation to be agreed upon. McLaren, J.A., said:

"I am unable to agree with the trial Judge that the work done by the plaintiff at the request of the defendants was wholly within the scope and powers of the latter. As it is part of the duty of the board to provide adequate school accommodation, and for this purpose, subject to the provisions of the School Act, to build school houses, etc., I consider it not only within their powers, but a part of their duties to undertake in a proper case the necessary preliminary work; first, for their own information, and next for the information of the council or the electors, as to the cost, etc., of the proposed school building, in order to secure the passing of the necessary debenture by-law: Public Schools Act, 1 Edw. VII. c. 39, ss. 65 (3) and (4) and 76 (O.), as amended.

"To this extent the case would appear to come within the authority of those cases which decide that no seal is necessary where work is done or services rendered at the request of a corporation in respect of matters within its powers, and the benefit of the work or services is accepted by the corporation, so that a contract to pay would be implied in the case of an individual. See Lawford v. Billericay Rural Council, 1903, 1 K. B. 772; Bourne v. Marylebone Corporation, W. N. 1908, p. 52.

"It was strongly argued before us that the contract in this case was that the remuneration of the plaintiff was wholly conditional upon the passing of the necessary by-law for the issue of the debentures for the erection of the school house, and that the by-laws having been defeated by the electors, the plaintiff was not entitled to anything for the work he had done. To determine this it is necessary to look at the contract to see if there is sufficient in it to negative the presumption above referred to.

"The clause in the invitation of the defendants under which the competitive plans were sent in relating to compensation, was as follows: 'Providing a plan is decided on and approved by the proper authorities, the trustee board will commission the author of the designs selected by them in this competition to take charge of the work at a compensation to be agreed upon. The authors of the designs given second and third places shall receive ten dollars and five dollars respectively.'

"The plaintiff's plans were decided on by the board, and approved by the proper authorities under the Public Schools Act. At the request of the defendants, he made some changes in the additions to the plans and specifications. These plans were used by the board in discussing and deciding upon the question of a new school house, and in their application to the council for a debenture by-law and laying the matter before the electors. In so far as they were necessary or even useful for this purpose, I fail to see why they should not be paid for as well as any other proper expenditure in connection with the by-law. There is nothing in the conditions or the contract to suggest that the defendants were to get this benefit from the plaintiff's work without compensation.

"The contract was a divisible one, consisting of three separate parts: (1) Preparations of plans, (2) of specifications, and (3) taking charge of the work. It was beneficially performed in part and the defendants used and took the benefit of what was done, and it was through no fault of the plaintiff that it was not carried through in its entirety. I am therefore of opinion that the defendants should pay a proper sum for that portion of the work which they so used and had the benefit of, unless there is something special in the contract which relieves them and rebuts the ordinary presumption. On this point I think it falls

within the authority of such cases as Burn v. Miller, 1813, 4 Taunt. 745; Manson v. Baillie, 1855, 2 Mac. 2 H. L. 80. See also Leake on Contracts (5th ed. p. 418)."

Actions by the Attorney-General.—In all cases where a public right is infringed an action will lie by the Attorney-General and it is not necessary to prove public injury. Atty.-Gen. v. The Shrewsbury and K. Bridge Co., 1882, 21 Ch. D. 752; 51 L. J. Ch. 746. He is a necessary party in all cases which involve only public rights and interests or for the protection in any way of public interests as such and as distinct from cases where there is a distinct private injury arising from the act complained of. Atty.-Gen. v. Ashburn Recreation Co., 1903, 1 Ch. 101; 72 L. J. Ch. 67; Devonport v. Tozer, 1903, 1 Ch. 759; 72 L. J. Ch. 411 at 416, where it was held that he was a necessary party to an action to restrain the breach of a municipal by-law. See also Atty.-Gen. v. Winnipeg Electric Railway, 1912, 22 M. R. 761.

The Attorney-General may sue with or without relators. Relators come in only for the purpose of costs. He has absolute discretion to decide whether or not to allow his name to be used and no attempt to tie him down by rules will be allowed. Atty.-Gen. v. London County Council, 1901, 1 Ch. 781, 70 L. J. Ch. 367, C. A., affirmed 1902, A. C. 165, 71 L. J. Ch. 268. C. A. See also Atty.-Gen. v. Wimbledon, 1904, 2 Ch. 34; 73 L. J. Ch. 593, and Atty.-Gen. v. Birmingham, etc., 1910, 1 Ch. 48; 79 L. J. Ch. 138 C. A. He has of course to consider whether or not it is worth while in the public interest to interfere and if he does interfere an objection based on the ground that there was not sufficient public benefit shown to arise from the action to justify it will not avail. *Ibid.*

The practice where the Attorney-General sues at the relation of some person is lucidly stated by Vaughan-Williams, L.J., in Attorney-General v. Logan (1891), 2 Q. B. 100, as follows:—

> "'As I understand the practice when the Attorney-General proceeds at the relation of a private person or a corporation he takes the proceeding as representing the Crown, and the Crown through the Attorney-General is really a party to the litigation. It is quite true that, when the proceeding is taken at the relation of a subject, the practice is to insert his name in the proceedings as relator and to make him responsible for the costs, but I do not think that this practice in any sense makes the relator a party to the proceedings, although he is responsible for the costs, and more than (to take a converse case) an infant who brings an action is responsible for the costs of it. If I am right it would seem that the practice of making the relator directly responsible for the costs of the action had its origin not in the protection of the defendant but of the Crown.'"

In Attorney-General v. Cockermouth, L. R. 18 Eq., at 176, Jessel, M.R., said:—

> "Except for the purposes of costs there is no difference between an ex-officio information and an information at the relation of a private individual. In both cases the Sovereign as *parens patriae* sues by the Attorney-General."

Buckley, L.J., in Boyce v. Paddington Borough Council, 1903, 1 Ch. 109, 72 L. J. Ch. 28, 685 C. A.

> "A plaintiff can, as it seems to me, sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with—as, for example, where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the objection interferes with his private right to access from and to his premises to and from the highway, and secondly, where no private right is interfered with, but the plaintiff in respect of his public right, suffers special damage peculiar to himself from the interference with the public. The former proposition, I think, is to be deduced from Lyon v. Fishmongers' Co., 1877, 1 App. Cas. 662; 46 L. J. Ch. 68; and Fritz v. Hobson (1880), 14 Ch. D. 542; 49 L. J. Ch. 321, and was one which I had to consider

in Chaplin v. Westminster City Council (1901), 2 Ch. 329; 70 L. J. Ch. 679; while the latter is to be found in Iveson v. Moore, 1 Ld. Raym. 486; Hart v. Basset (1677), 4 Vin. Abr. 519; Benjamin v. Storr (1874), L. R. 9 C. P. 400, 43 L. J. C. P. 162; and Winterbottom v. Derby (Lord), 1867, L. R. 2 Ex. 316; 36 L. J. Ex. 194."

For examples of failure because the Attorney-General was not a party, see Wallasey v. Gracey, 1887, 36 Ch. D. 593; Tottenham Urban Council v. Williamson, 1896, 2 Q. B. 353; 56 L. J. Q. B. 591; Hope v. Hamilton Park Commissioners, 1901, 1 O. L. R. 477.

When the Attorney-General is not a necessary party but sues only to enforce the rights of a limited class of persons, as for example the *cestuis que trustent* of a charity, he is only an instrument to enforce the rights of those who are entitled to the benefit of the charity and stands in the same situation as they do with respect to those rights; and if the claimants on whose behalf he is suing are barred, he must also be barred. He has no independent title of his own; he must succeed or fail as they are entitled to succeed or fail, and if the Statute of Limitations is a bar to them, it is a bar to the Attorney-General; College of St. Mary's Magdalen v. Attorney-General, 6 H. L. C. 187, and property held for public purposes is held on charitable trusts: Atty.-Gen. v. Liverpool, 1837, 7 L. J. Ch. 51; 2 Myl. & Cr. 613. See Atty.-Gen. v. de Winton, *supra*, p. 308. See also: Atty.-Gen. v. Goderich, 1856, 5 Gr. 402; Atty.-Gen. v. Brantford, 1858, 6 Gr. 592; Atty.-Gen. v. Toronto, 1864, 10 Gr. 436; Atty.-Gen. v. Toronto Street Ry., 1868, 14 Gr. 673; Atty.-Gen. v. Hamilton Street Ry., 1897, 27 O. R. 49; 24 A. R. 170; Atty.-Gen. v. Toronto, 1903, 6 O. L. R. 159.

Ratepayers' Actions.—Where a member of a class sustains injury in common with all other members of the class, he may sue as plaintiff on behalf of himself and the other members of the class. The plaintiff, notwithstanding the representative character in which he sues, is *dominus litis*, and may discontinue or settle without reference to the other members of the class and is solely responsible for costs in the event of non-success though the other members of the class share in any benefits which may result from the action. A corporator can sue in such a class action to restrain illegal or *ultra vires* acts of the corporation which injure him and the other corporators or some of them. Thus a ratepayer may bring an action on behalf of himself and other ratepayers to restrain *ultra vires* payments made by the corporation or to recover moneys already paid out illegally and the Attorney-General is not a necessary party. As the corporators, under the Municipal Act, s. 8, are the inhabitants, it is submitted that an inhabitant can be plaintiff in such an action. The question came before the Supreme Court in MacIlreith v. Hart, 1908, 39 S. C. R. 657, on appeal from the Supreme Court of Nova Scotia. Hart, a ratepayer of Halifax, sued on behalf of all the ratepayers to recover from MacIlreith, the mayor of the city, a sum of money paid to him out of the city funds in reimbursement of his expenses in attending a convention. The plaintiff succeeded notwithstanding the small amount involved. Idington, J., said:—

"There is no English authority that conflicts with the law as upheld in Paterson v. Bowes, 1853, Gr. 170 (Bowes v. Toronto), which followed Bromley v. Smith, 1 Sim. 8, and has been in turn followed by a stream of cases for fifty years in Ontario, that a ratepayer has a right of action where moneys have been, as here, unlawfully taken, or diverted from the municipal treasury to which his taxes go, and that the Attorney-General is not a necessary party.

"As against these authorities we have three recent cases in New Brunswick and Prince Edward Island, all within the last twenty years.

"The law must be the same in all these three provinces, as well as in Nova Scotia.

"It would seem as if expediency, as well as what seems in principle good law, should drive us to follow the law as maintained in Ontario, and in this case in Nova Scotia."

Maclennan, J., said:—

"The right of the inhabitants to compel the city corporation, that is the city council, as a body, to do its duty, rests on this:—That the corporation is a trustee for the inhabitants.

"That was declared in the same case of Bowes v. City of Toronto, 1853, 4 Gr. 170, by L. J. Knight Bruce, in these words:—

"'The (city) council was, in effect and substance, a body of trustees for the inhabitants of. Toronto.'

"The only difference between that case, in its initial stage, when the question of pleading was decided, is that in that case the plaintiff sued on behalf of himself and all the other inhabitants, and not, as here, the other ratepayers.

"The city corporation is composed of all the inhabitants and not merely of the ratepayers, and I think the better form of action would be on behalf of both the inhabitants and ratepayers; but I think it good enough in its present form, as on behalf of the ratepayers, for, whether inhabitants or not, all the ratepayers are also *cestuis que trustent* of the city corporation.

"As between the ratepayers and other inhabitants, the former have the greater interest in the recovery of money of the corporation, which has been misapplied, for they must pay an equivalent sum again, unless it is recovered, while the other inhabitants are free from that obligation.

"It was said that as the statement of claim now stands the inhabitants who are not the ratepayers, and who have an important interest, ought to be but are not before the Court. But I think they are before the Court sufficiently, being represented by the city corporation, and will be bound by the judgment, whatever it may be. But, if that were doubtful, it would be proper to allow an amendment by alleging that the plaintiff sued on behalf both of the ratepayers and inhabitants.

"It was also urged that, while the plaintiff might have been a ratepayer in 1905, when the money in question was misapplied, he might have ceased to be so in 1906, when he brought this action. But it is distinctly alleged in the statement of claim, and expressly admitted in the statement of defence, that the plaintiff was a resident ratepayer when the money was misapplied and continued so to be at the time of pleading.

"I am unable to see any good reason why, on a mere question of parties, and of the form of action, there should be any distinction whatever between business corporations and those numerous bodies, small and great, other than charitable, which we have in all the provinces of Canada, and which are authorized to act as corporations.

"I express no opinion on the question whether the Attorney-General of the province could, having regard to decided cases, or could not, have sued in this case, with or without a relator."

349. An action shall not be brought for anything done under a by-law, order or resolution of a council which is invalid, in whole or in part, until one month after the by-law, order, or resolution, or so much of it as is invalid, has been quashed or repealed, and every such action shall be brought against the corporation alone, and not against any person acting under the by-law, order, or resolution. 3 Edw. VII. c. 19, s. 468. 3 & 4 Geo. V. c. 43, s. 349.

Executions against Municipal Corporations.—R. S. O. 1914, c. 80, s. 37, provided:—

(1) An execution against a municipal corporation may be indorsed with a direction to the sheriff to levy the amount thereof by rate, and the proceedings thereon shall then be the following:—

(*a*) The sheriff shall deliver a copy of the writ and indorsement to the treasurer of the municipal corporation, or leave such copy at the office or dwelling-place of that officer, with a statement in writing of the sheriff's fees and of the amount required to satisfy the execution, including the interest calculated to some day as near as is convenient to the day of the service;

(*b*) If the amount with interest thereon from the day mentioned in the statement is not paid to the sheriff within one month after the service the sheriff shall examine the assessment roll of the municipality and shall, in like manner as rates are struck for general municipal purposes, strike a rate sufficient in the dollar to cover the amount due on the execution, with such addition to the same as the sheriff deems sufficient to cover the interest up to the time when the rate will probably be available, and his own fees and poundage;

(*c*) The sheriff shall thereupon issue a precept under his hand and seal of office directed to the collector of the corporation, and shall annex to the precept the roll of such rate, and shall by the precept after reciting the writ and that the corporation has neglected to satisfy the same, and referring to the roll annexed to the precept, command the collector to levy such rate at the time and in the manner by law required in respect to the general annual rates;

(*d*) If, at the time for levying the annual rates next after the receipt of such precept, the collector has a general rate roll delivered to him for the year, he shall add a column thereto headed "Execution rate in A. B. v. The Township" (or as the case may be, adding a similar column for each execution of more than one), and shall insert therein the amount by such precept required to be levied upon each person respectively, and shall levy the amount of such execution rate as aforesaid; and shall, within the time within which he is required to make the return of the general annual rate, return to the sheriff the precept with the amount levied thereon;

(*e*) The sheriff shall, after satisfying the execution and all fees and poundage thereon, pay any surplus within ten days after receiving the same to the treasurer of the municipal corporation.

(2) The clerk, assessor, and collector of the corporation shall, for all purposes connected with carrying into effect, or permitting or assisting the sheriff to carry into effect, the provisions of this Act with respect to such execution, be deemed to be officers of the Court out of which the writ issued, and as such shall be amenable to the Court and may be proceeded against by attachment, mandamus or otherwise in order to compel them to perform the duties imposed upon them. 9 Edw. VII. c. 47, s. 35.

S. 340 of the Municipal Act of 1883, of which s. 349 is the present form, was as follows:—

In case a by-law, order or resolution is illegal in whole or in part, and in case anything has been done under it which, by reason of such illegality, gives any person a right of action, no such action shall be brought until one month has elapsed after the by-law, order or resolution has been quashed or repealed, nor until one month's notice in writing of the intention to bring such action has been given to the corporation, and every such action shall be brought against the corporation alone, and not against any person acting under the by-law, order or resolution.

In Connor v. Middagh and Hill v. Middagh, reported together, 1889, 16 A. R. 356, the facts were that Connor and Hill each owned a farm in the united counties of Stormont, Dundas and Glengarry. The united council passed a by-law to open a road and by subsequent by-law appointed Middagh a commissioner to remove obstructions from the road in question. Middagh under the authority of the two by-laws cut down

trees on both farms and also removed fences. Connor brought an action against Middagh for damages for trespass and Hill brought a similar action against Middagh and the county corporation. Judgment was given for the plaintiff in each action. The defendants appealed from both judgments and the appeals were argued together. It was contended for the plaintiffs that s. 340 given above, which was in force at the time, was not for universal application and that the true construction was to limit it to cases where there was jurisdiction to pass and where proper steps had been taken in passing the by-law and that the by-law in question could not be upheld because it was one to exempt a road and because no notices had been given. Hagarty, C.J.O., in giving reasons for dismissing the action as against Middagh, said:—

> "This protecting clause has been in our statutes since 1849, since the Act which recasts the early Act of 1841, and created the township municipalities.
>
> "The legislature was creating several hundred inferior representative bodies and endowing them with large powers of interference with private rights and properties.
>
> "Their by-laws would have to be enforced by individual officers or servants, and it was felt that the strict rules of law might be not unfrequently violated, and claims for damages incurred, both as to the council and the executors of its mandate.
>
> "In the passing and preparation of these by-laws, and in ascertaining whether all the statutable requirements and conditions precedent had been fulfilled, very great care was necessary, and, as the innumerable cases before our Courts during the last forty years can testify, it was very hard to be always free from some omission or miscarriage which Judges would be compelled to hold fatal to the legality of the whole proceeding. It would be a most unfortunate state of the law if, in actions of trespass against the municipality enacting the by-law or against those to whom its execution was committed, at the trial every objection should be open, and if the success or failure of the action were to depend on the proof of exact fulfilment of all conditions necessary to warrant the passing of the by-law.
>
> "I think our legislature recognized fully the position of persons acting like constables in carrying into effect the directions of a by-law interfering possibly with private rights, by the protection extended to them under the municipal Acts.
>
> "It would be as unreasonable as it would be unfair to require the executive officer to obtain a legal opinion as to the validity of a by-law before venturing to enforce it.
>
> "I think the defendant here is protected against this action."

And the same learned Judge gave the following reasons for dismissing the action as against the defendant municipality:

> "I think the legislature has wisely provided, as a most important element in the scheme of municipal government, essential to the working of a complex system of local legislation, that, prior to the right to seek damages for any interference with private rights, the judgment of a Court shall be sought and obtained that the local law warranting such interference is illegal and beyond the limited authority given to the enacting body."

Osler, J.A., said:

> "I fail to see the force of the argument that, as the time within which a motion to quash may be made is limited, a person may have no remedy if the by-law is not put in force until after that time. It is only the remedy for acts done under the by-law which is interfered with, and it by no means follows that the by-law becomes unimpeachable by the laches of the party. I apprehend that even after that time the corporation might be restrained from enforcing it, as was done in the case of Alexander v. Township of Howard, 14 O. R. 22."

Section 349 does not tie the hands of the person threatened with damage under any legal by-law. It only prevents him from bringing an action to recover damages for a wrong already done him until he has

quashed it. Street, J., in Rose v. West Wawanosh, 1890, 19 O. R. 294; Gesman v. Regina, 1909, 10 W. L. R. 136.

If an action is based on negligence in acting under a by-law, whether valid or not, the section is no bar to recovery against the municipality at least. McCulloch v. Caledonia, 1898, 25 A. R. 417.

The provision for one month's notice of action to the corporation which was embodied in s. 468 has been struck out. Former ss. 469 and 470, as to tender of amends and compensation, and as to costs, have been repealed as unnecessary. Section 472 providing that a ratepayer, officer or servant of the corporation shall not be incompetent as a witness, has also been repealed as obsolete.

In Toronto v. Consumers' Gas Company, 1903, 5 O. L. R. 495, an action was brought by the corporation suing on its own behalf, as well as on behalf of all other consumers of gas furnished by the defendant company and by a shareholder of the defendant company suing on behalf of all other shareholders of the company against the gas company, alleged certain breaches of the statute which forms the charter of the gas company. The right of the plaintiff corporation to sue as a municipal corporation and not as a consumer of gas furnished by the defendants was not discussed. It was suggested that the corporation although not a user of gas, could by virtue of s. 348, have maintained an action in respect of the duties, obligations and liabilities imposed by the statute which created the powers of the gas company on the ground that such powers were conferred in favour of the inhabitants of the municipality or some of them within the meaning of s. 348, and that the corporation could maintain the action to have the statutory duties imposed on the defendants performed even in a case where no particular damage was suffered or private rights infringed, so that the corporation would enforce the performance of the duties, obligations and liabilities of the defendants acting under statutory powers as fully as the Attorney-General could if proceeding as plaintiff without relators, but note Tottenham v. Williamson (1896), 2 Q. B. 353, 56 L. J. Q. B. 591, where the local authority under similar powers to those conferred by s. 348, by s. 107 of the Public Health Act, 1875 (Imp.), failed because the Attorney-General was not a party and they did not show special damage although s. 107 expressly authorizes the local authority to take any proceedings against any person in any superior Court of law or equity to enforce the abatement or prohibition of any nuisance.

In Attorney-General v. Halifax, 1903, 36 N. S. R. 177, the facts were that Andrew Carnegie offered $75,000 to the city of Halifax to erect a library, on certain conditions. The council accepted the offer by resolution and notified Mr. Carnegie, but subsequently for reasons best known to itself rescinded its action and thereupon an action was commenced by the Attorney-General on the relation of a ratepayer for an injunction to restrain the council from carrying into effect the rescinding resolution. The contention urged by the defendants was that the Attorney-General had not the right to maintain such an action against the city council, that he was attempting to interfere with internal arrangements, and that the only remedy was a political remedy. The Court held that the city had power by statute to accept the gift and that the Court had jurisdiction at the suit of the Attorney-General to restrain the council as agents or trustees of the citizens' interests from disregarding their duty to secure the $75,000 for the charity.

Hart v. McIlreith, *supra*, was a case in which the corporation refused to let its name be used as plaintiff in an action to recover the illegal payment made to the mayor.

The Dominion charter of the Bell Telephone Company authorized it to construct its lines along public highways, but provided that certain conditions should be observed in cities, towns and villages, unless the consent of the municipal council was obtained. In Toronto v. Bell Telephone Company, 1902, 3 O. L. R. 465, reversed 6 O. L. R. 335, 1905 A. C. 52, 74 L. J. P. C. 22, the corporation brought an action to restrain the company from carrying its lines along the streets of the city in a certain manner to which the corporation took exception. This was a case apparently where a duty, obligation, or liability was imposed by statute in favour of the municipality or the inhabitants thereof. The right of the city to bring the action appears to have been assumed throughout the reasons for judgment although the city failed on the merits.

PART XVIII.

RESPECTING THE ADMINISTRATION OF JUSTICE.

Municipal Acts generally provide that the official heads of municipalities and in some cases the deputy heads shall be ex officio justices of the peace and provide machinery for the establishment of a police office and a police force and in some cases for the erection and maintenance of court houses, jails, lockup houses, inebriate asylums and industrial farms. Officers of a municipality who become ex officio justices of the peace and all police officers appointed under the provisions of Municipal Acts are not while acting as such officers servants of the municipality. They are public officers or servants of the Crown and have statutory duties to perform. Although in cases of public officers they owe a duty to the corporation which appoints them, there is no ground for contending that the corporation is responsible for their negligent or illegal acts; moreover those officers who have authority over officers subordinate to them are not responsible for any negligence or default on the part of their subordinates on the principle that both are alike servants of the Crown. In a similar manner a municipality in maintaining a lockup and presumably the other institutions provided for in this part of the Act is not exercising its powers for the benefit of the inhabitants in their local and particular interests, but is performing a public service entrusted to it in the interests of general government and is not liable in connection with the negligence of constables in charge of the lockup even though appointed by the municipality.

In all the matters comprised within this part of the Municipal Acts the end or purpose may be conceived as national and the duty of the municipality is toward the whole community. In other parts of the Act where the end peculiarly concerns the inhabitants of the municipality as such a different principle applies, for example, a municipality has been held responsible for the damage resulting from the carelessness of firemen in proceeding to a fire, and its liability where it owns property and carries on business for the benefit of the inhabitants as in the case of water, electric or gas works, is the same as that of a private individual carrying on the same businesses.

The duties and powers of justices of the peace and police officers must be ascertained by reference to the criminal code, the Justices of the Peace Act, R. S. O. c. 87; the Constables Act, R. S. O. c. 94; the Constables Bail Act, R. S. O. c. 95; the Administration of Justice Expenses Act, R. S. O. c. 96, and in respect of acts done by them they are protected by the provisions of the Public Authorities Protection Act, R. S. O. c. 89. A discussion of the duties, powers and liabilities of officers concerned with the administration of justice is not within the scope of this work. The principles above mentioned will be clearly seen from an examination of the authorities given below.

One of the earliest Canadian cases is Wishart v. City of Brandon, 1887, 4 M. R. 453, a case which is unique in Canada, in which it was held that even where a municipal corporation directly appointed police officers it is not liable for their torts committed while so acting.

In Kelly v. Barton and City of Toronto, 1895, 26 O. R. 608, an attempt to hold the city responsible for the illegal acts of police officers acting under direct instructions from the mayor of the city in arresting the plaintiffs for failure to observe the provisions of a municipal by-law did not succeed. A municipal corporation may be held responsible for illegal acts of police officers if it expressly authorizes or directs the acts or if the acts have been performed for its benefit and it ratifies and adopts them, see Barns v. St. Mary Islington Guardians, 1911, 76 J. P. 11. Employing counsel to defend the alleged trespassers does not amount to such ratification as the corporation in defending may merely desire to encourage officers whose business required them to enforce police regulations and it by no means followed that the intention was to shoulder all civil liability which might result to the officers from the illegal acts. Kelly v. Barton, supra.

In like manner a municipality is not responsible for the wrongful act of a health officer appointed by it to perform administrative duties under public Acts. See Forsyth v. Canniff and the City of Toronto, 1890, 20 O. R. 178, and the recent English cases of Stanbury v. Exeter Corporation, 1906, 75 L. J. K. B. 28, where a local authority was held not to be liable for the negligent acts of an inspector appointed by the local authorities under the Diseases of Animals Act in carrying out a duty directly imposed on him by an order of the Board of Agriculture. This case was decided by a Divisional Court. Lord Alverstone said:—

"If this had been an ordinary case of delegation by the defendants of duties which they were required to perform the ordinary rule in cases of master and servant and the doctrine of respondeat superior would apply; but the present case, having regard to the position of the parties and to the

Statute and the order made under it, seems very analogous to that of police and other officers appointed by a corporation who have statutory duties to perform. Although they owe a duty to the corporation there is no ground for saying that the corporation are responsible for their negligent acts."

Mr. Justice Wills said:—

"This case is almost exactly analogous to the case of a police officer. In all boroughs the watch committee by statute has to appoint, control and remove police officers and nobody has ever heard of a corporation being made liable for the negligence of a police officer in the performance of his duties. . . . If the duties to be performed by the officers appointed are of a public nature and have no peculiar local characteristics, then they are really a breach of the public administration for purposes of general utility and security which affect the whole kingdom, and if that be the nature of the duties to be performed it does not seem unreasonable that the corporation who appoint the officer should not be responsible for the acts of negligence or misfeasance on his part.

And still more recently the Court of Appeal in England applied the same principle and held that the guardians of West Ham were not responsible to a pauper who was injured upon an unsafe scaffold erected by a permanent official of the guardians. Tozeland v. West Ham Guardians, 1907, 76 L. J. K. B. 514.

Farwell, L.J., said:—

"The guardians and their officers put the pauper to work and the pauper works under statutory compulsion not under any contractual relationship, and as in Dunbar v. Ardee Guardians, 1897, 2 Ir. R. 76, it was held that no action would lie against the guardians for neglecting to provide a guarded room and proper officers and nurses and attendants for a sick pauper because they were under no duty to the pauper so to do, but in making such provision as they did were acting ministerially and were answerable only to the Local Government Board, so here the guardians were under no duty to the pauper to find him proper work adapted to his capacity, but acted ministerially in so doing and the pauper had a right of appeal if the work was unsuited to his capacity or such as he could not perform with safety. I agree with the Court of Appeal in Ireland that the guardians are not liable for injuries to paupers arising from the negligence of officers or servants who have been properly employed under the Statute to discharge statutory duties towards the recipients of relief."

The limitations of the principle have been pointed out in the case Ching v. Surrey County Council, 1909, 78 L. J. K. B. 927. The Surrey Council as local educational authorities were held liable to a pupil injured in a playground of the school through catching his foot in a hole negligently left in the playground.

Bucknill, J., in distinguishing the case from Tozeland v. West Ham Guardians, supra, said:—

"County Councils have extensive powers in respect to public elementary education and are not in the exercise of them acting ministerially only, and in my opinion . . . they can be sued for damages resulting from negligence in the performance of those duties which as in this case I find they were bound to perform."

See also Hesketh v. City of Toronto, 1898, 25 A. R. 449, where the City of Toronto was held responsible for the negligence of firemen in going to a fire.

The liability of municipal corporations in connection with the maintenance of buildings used in connection with the administration of justice in respect of which the municipality is simply an agency of general government was much discussed in Nettleton v. Prescott, 16 O. L. R. 538 and 21 O. L. R. 561. The plaintiff in this case suffered injury while under arrest in a lockup house because the lockup house was not sufficiently heated. The constable in charge of the lockup house had been appointed by the municipality as constable and was also caretaker of the lockup. It was held that the municipality was not liable. In this case will be found a very full discussion of English and American authorities.

The same principles apply to Boards of Police Commissioners provided for by this part of the Municipal Act. In Winterbottom v. London Police Commissioners, 1901, 1 O. L. R. 549, an action was brought to recover damages sustained by reason of the plaintiff having been run over by a patrol waggon. The plaintiff failed on the ground that the constables in charge of the patrol waggon were not servants of the Board of Police Commissioners and the doctrine of respondeat superior did not apply.

The distinction between the administrative acts which a municipality performs as an instrument of good government and those acts which it performs for its own peculiar and local purposes is illustrated by the difference between a polling booth conducted for the purpose of a municipal election and one conducted for the purpose of voting on a municipal by-law. The municipality is not responsible for illegal acts of the returning officer at a municipal election, see Pickering v. James, 1873, 42 L. J. C. P. 217, but where such officer is also acting as returning officer at a voting on a municipal by-law and the polling booth is used for both purposes the municipality may be liable for injuries suffered by reason of the unsafe state of the polling booth. Garbutt v. City of Winnipeg, 78 M. R. 345.

In all cases where the municipality is carrying on administrative acts for local purposes or is engaged in business undertakings such as electric, gas or water works, the doctrine of respondeat superior applies and the municipality is responsible in the same manner as a private person doing the same acts would be. This principle has been applied in numerous cases, having been first authoritatively laid down in the House of Lords in the case of Mersey Docks v. Gibbs, 1866, 35 L. J. Ex. 225.

The following cases may also be referred to: Butler v. City of Toronto, 1907, 10 O. W. R. 878; McCleave v. City of Moncton, 1901, 35 N. B. 296; McSorley v. Mayor of St. John, 6 S. C. R. 531. See also Halsbury, vol. 23, par. 665 and 666.

JUSTICES OF THE PEACE.

350. The head of every council, the reeve of every town and every deputy reeve, after he has made the declarations of office and qualification, shall, *ex officio,* be a Justice of the Peace for the whole county, and every controller and alderman in a city, after he has made such declarations, shall be, *ex officio,* a Justice of the Peace for the city. 3 Edw. VII. c. 19, s. 473; 5 Edw. VII. c. 22, s. 19; 6 Edw. VII. c. 35, s. 32; 3 & 4 Geo. V. c. 43, s. 350.

351. A Justice of the Peace shall not be disqualified from acting in the case of a prosecution for a breach of a by-law of a council,

(*a*) By reason of his being a member of the council; or

(*b*) Because the penalty or part of it goes to the corporation of a municipality of which he is a ratepayer. 3 Edw. VII. c. 19, ss. 477 and 478, *redrafted.* 3 & 4 Geo. V. c. 43, s. 351.

Section 351.—In R. v. Fleming, 1895, 27 O. R. 122, an application to quash a conviction made by a police magistrate under a by-law where the fine was payable to the municipality, the magistrate being a ratepayer of the municipality and paid by salary, was refused, Armour, C.J., stating that he did not think the fact that the magistrate was a ratepayer of the corporation which received the fine, would disqualify him at common law, but if so any such supposed disqualification was removed by s. 419*a* of the then Act (now s. 351). The receipt of salary in the manner stated was also held not to disqualify. See also Ex parte Gorman, 1898, 34 N. B. R. 397, where the magistrates were ratepayers of and one of them received a fixed salary from the city of Moncton, which received the fines imposed. The full Court held they were not disqualified, citing R. v. Fleming, *supra.* There was no section corresponding to s. 351. R. v. Rand, *infra,* was followed, also Ex parte Driscoll, 1889, 27 N. B. R. 216.

Disqualification of Justice by Pecuniary Interest or Bias.—In R. v. Rand, 1866, L. R. 1 Q. B. 230, 35 L. J. M. C. 158, certain justices were trustees, one of a friendly society and one of a hospital, both of which had purchased bonds of a municipal corporation. The justices, as members of a board acting judicially, granted a certificate which had the effect of increasing the borough fund and thereby improving the securities of the *cestuis que trust.* The Queen's Bench Division refused a *certiorari* to quash the certificate, Blackburn, J., saying:—

> "There is no doubt that the slightest pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter; and if by any possibility these gentlemen, though mere trustees, could have been liable to costs or to other pecuniary loss or gain in consequence of their being so, we should think the question different from what it is, for that might be held an interest. But the only way in which the facts could affect their impartiality, would be that they might have a tendency to favor those for whom they were trustees; and that is an objection not in the nature of interest but of a challenge to the favor. Wherever there is

a likelihood that the Judge would from kindred or any other cause, have a bias in favor of one of the parties, it would be wrong for him to act, and we are not to be understood to say that where there is a real bias of this sort this Court would not interfere."

In R. v. Meyer, 1 Q. B. D. 173, H. had a contract to take sewage from a local authority and he allowed it to pollute a river. In consequence of this, legal proceedings were commenced by a second local authority against the first. H. was summoned and fined for allowing the escape of the sewage by a bench on which the chairmen of both local authorities sat. It was held that the chairmen were substantially interested and that there was a real bias and the conviction was quashed, Blackburn, J., pointing out that the mere possibility of bias was not sufficient to avoid, though pecuniary interest, however small, was.

In R. v. Sutherland Justices, 1901, 2 K. B. 357, 70 L. J. K. B. 946, C. A., the justices were members of a local authority and had, as members of such local authority, negotiated a contract under which the local authority was to receive a sum of money if a certain license were granted. The justices then formed part of a bench which granted the license. The Court of Appeal quashed their action. Vaughan Williams, L.J., after pointing out that the whole of the law on the subject was found in R. v. Rand and R. v. Meyer, said:—

"Taking those decisions, when is a Judge or a justice disqualified from acting on the ground of bias? In the first place if he has a pecuniary interest or an interest which is capable of being measured pecuniarily, that is sufficient because the law raises a presumption that he is biased. The law, for reasons of policy which need not be explained, presumes bias from the very fact of pecuniary interest and will not consider whether he acted impartially or not. This is not a case in which the justices have personally any pecuniary interest at all; the most that can be said is that they had a pecuniary interest for the ratepayers, but I do not think such an interest would be sufficient of itself to raise the legal presumption of bias. . . . The Judge or justice must have a substantial interest in the proceedings in order to have a real bias. To my mind one must judge of these things as a reasonable man would judge of them in the conduct of his own business; and such a man would, as a matter of business, draw the inference that these justices who negotiated the agreement would have a real bias in favor of granting the license."

See also Dimes v. Grand Junction, 1852, 3 H. L. C. 759; Leeds Corporation v. Ryder (1907) A. C. 420, 76 L. J. K. B. 1032 (H.L.)

If parties knowing a justice is interested, proceed, the objection is waived and if waived cannot be raised afterwards: Wakefield v. West Riding, 1865, L. R. 1 Q. B. 84; Leeds v. Ryder, *supra*.

Police Office in Cities and Towns.

352. The council of every city and town shall establish and maintain therein a Police Office. 3 Edw. VII. c. 19, s. 479 (1), *part*. 3 & 4 Geo. V. c. 43, s. 352.

353.—(1) The Police Magistrate, or, if he is absent or ill, or if there is a vacancy in the office, the Deputy Police Magistrate, shall attend at the Police Office daily, for such period as may be necessary for the disposal of the business to be done.

(2) In a town for which there is not a Police Magistrate, the Mayor shall attend at the Police Office daily,

or at such time, and for such period as may be necessary for the disposal of the business that may be brought before him as a Justice of the Peace.

(3) In a city or town for which there is a Police Magistrate, if he is absent or ill, and there is no Deputy Police Magistrate, or if the Deputy Police Magistrate is also absent or ill, the Mayor shall attend in the place of the Police Magistrate, but shall have only the powers of a Justice of the Peace. 3 & 4 Geo. V. c. 43, s. 353 (1-3).

Absence or Illness of Magistrate.—Once a magistrate has become seized of a case no other magistrate has any right to take part in the trial unless at the request of the magistrate before whom the proceedings are taken: R. v. McRae, 1897, 28 O. R. 569. When a magistrate asks other magistrates to sit with him the whole bench becomes seized of the complaint: R. v. Milne, 1875, 25 C. P. 94. A magistrate once he has taken a case has no power to discharge himself save in case of illness or absence. A magistrate may not be bound to act, but if he does he must continue to the end: Re Holman and Rea, 1912, 27 O. L. R. 432, following R. v. Gordon, 1888, 16 O. L. R. 64, but see the Police Magistrate Act, R. S. O. 1914, c. 88, s. 18.

(4) A Justice of the Peace having jurisdiction in a city or town may, at the *request* of the Mayor, act in his stead. 3 Edw. VII. c. 19, s. 479 (1), *part redrafted.* 3 & 4 Geo. V. c. 43, s. 353 (4).

Magistrates Acting by Request.—See R. v. Holmes, 1907, 14 O. L. R. 124; R. v. Farrell, 1907, 15 O. L. R. 100; R. v. Ackers, 1910, 21 O. L. R. 187, D.C.

(5) The council shall provide all necessary and proper accommodation, fuel, light, stationery and furniture for the Police Office, and for the officers connected with it. 3 Edw. VII. c. 19, s. 479 (2).

(6) The clerk of the council of the city or town, or such other person as the council appoints for that purpose, shall be the clerk of the Police Office, and shall perform the same duties and receive the same fees and emoluments as a clerk of a Justice of the Peace.

(7) Where the clerk of the council is paid by a salary, the fees and emoluments shall be paid over by him and belong to the corporation.

(8) Where there is a Police Magistrate, the clerk of the Police Office shall be under his control. 3 Edw. VII. c. 19, s. 480, *redrafted.* 3 & 4 Geo. V. c. 43, s. 353 (5-8).

Origin and History, Police Office Legislation.—In Mitchell v. Pembroke, 1899, 31 O. R. 348, a police magistrate brought an action to compel the town of Pembroke to furnish him with a police office and to

supply necessary stationery. He was also a justice of the peace for the adjoining county. Boyd, C., gave a valuable account of the origin and history of the legislation in connection with police offices which is as follows:—

"In the development of municipal institutions in this province, provision was first made for the systematic 'policing' of villages, towns and cities, by the general Act of 1849 (12 Vict. c. 81). Section 69 enacts that 'There shall be in . . . towns a police office, at which it shall be the duty of the police magistrate for such town, or in his absence from sickness or other causes, or when there shall be no police magistrate for such town, then it shall be the duty of the mayor thereof to attend daily, or at such times and for such period as shall be necessary for the disposal of the business to be brought before him as a justice of the peace for such town; provided always, firstly, that no such attendance shall be required on Sunday, Christmas Day or Good Friday, or on any day appointed by proclamation for a public fast or thanksgiving, unless in cases of urgent necessity; and provided also, secondly, that it shall and may be lawful for any justice of the peace having jurisdiction within such town, at the request of the mayor thereof, to sit for such mayor at such police office, in every of which cases the required attendance of the said mayor at such police office shall be dispensed with.'

"Other sections (*e.g.*, 71 and 72), point out his duties as a justice and conservator of the peace: see Regina v. Richardson (1865), 8 O. R. at p. 657. Section 73 declares that the clerks of the town council shall be clerks of the police offices of such town, and perform the same duties and receive the same emoluments as now appertain to clerks and justices of the peace in Upper Canada, unless by act of the town councils of such town another officer be appointed for such purpose.

"Section 81 confers power upon the town council to make by-laws 'for establishing and regulating a police for such town.' (From the context this would seem to include some kind of building).

"By the Act township councils have power to erect and maintain town halls (s. 31 (2)), and counties to erect and maintain shire halls (ss. 36 and 41 (2)), and Court houses. The town has the right to use the Court house (s. 68). Cities are authorized to erect city halls and Court houses (s. 107 (1)).

"This early law was in force till 1858, when was passed the Act respecting the Municipal Institutions of Upper Canada, which practically brought the law into its present formal shape. Thus section 347 reads, 'The council of every town and city shall establish therein a police office, and the police magistrate shall attend at such police office daily, or at such times and for such period as may be necessary for the disposal of the business brought before him as a justice of the peace,' etc.: 22 Vict. c. 99.

"By this Act of 1858, s. 242, towns were empowered to pass by-laws for obtaining land and for erecting and maintaining a hall and other houses and buildings required by the corporation.

"Cities and towns might also provide for establishing, regulating and maintaining a police; but subject to the other provisions of the Act on that head: s. 290, s. s. 7.

"Both expressions 'there shall be in each town a police office,' and the council of every town 'shall establish a police office,' come to the same thing, *i.e.*, it is contemplated that there shall be some fixed place, room or building, where local justice shall be administered, and where the magistrate shall be found at stated times, to meet complainants, to hear grievances, and to dispose of business brought before him as a justice of the peace.

"The familiar phrase 'police officer' was somewhat of a novelty in 1849. It was borrowed from English legislation, where it first appears in 1800, in the preamble to 39 & 40 Geo. III. c. 87, 'Whereas for the more effectual prevention of depredations . . . in the River Thames, it may be expedient to establish . . . near the said river a publick office of the nature of the several offices commonly called police offices' (instituted under 32 Geo. III. c. 53).

"Thereby was established a public office under the name of the Thames Police Office, where three justices of the peace were to sit and act for the hearing and determining of complaints of offences committed on the River Thames.

"Here we find then the first 'police office' so expressly called, and it is noteworthy that it was established as a 'public office.' There is also given besides other phraseology found in our statutes, *e.g.*, the magistrates are directed to attend at the said office during stated hours.

"Not till 1829 did the name 'police office' become naturalized in legislative expression, when by 10 Geo. IV. c. 44, a new and more efficient system of police was established in the city of Westminster, and an office of police constituted, and it was enacted that a new police office should be there established: see preamble and s. 1, and compare 42 Geo. III. c. 76.

"Before this police offices were described in the statutes as 'public offices established' at such and such centres of population, and the intent was that there might be a due and regular attendance of fit and able magistrates at certain known places and at stated times: see 32 Geo. III. c. 53 (1792) preamble.

"The place of meeting for petty sessions or magistrate's courts was originally where it pleased the justices to sit in their own houses, at inns or elsewhere, and the place was often called 'the justice room': see Daubney v. Cooper (1829), 10 B. & C. 237, and 5 M. & Ry. 314, but this was superseded after 1829 by 'police office' (wherever the new system obtained). (Note: The Petty Sessions remained an ambulatory Court in England till 1879, when by the Summary Jurisdiction Act, s. 20, it was required to meet at a stated place), to indicate the place for adjudication: see Collier v. Hicks (1931), 2 B. & Ad. 663.

"These established 'public offices' at various parishes as so called in 42 Geo. III. c. 76, are continued under the name of 'police offices' in 2 & 3 Vict. c. 71, s. 1 (1839). Section 12 of this Act, 2 & 3 Vict. c. 71, has suggested much of the phraseology of the first proviso of section 69 of our original Act, 12 Vict. c. 81.

"By the English Municipal Corporations Act of 1835 (5 & 6 Wm. IV. c. 76), it is said that the council of every borough to which a separate commission of the peace has been granted shall be required to provide and furnish one or more fit and suitable office or offices to be called 'the police office' or 'offices' of the borough, for the purpose of transacting the business of the justice of the borough, and to pay such sums as may be necessary for providing, upholding and furnishing, and for the necessary expenses of such police office or offices: section 100.

"This statute does not seem to have been regarded or followed in the framing of the Canadian enactments as to the police.

"The provisions now in force which fall to be considered in this action are as follows:

"The council of every town and city shall establish therein a police office; and the police magistrate . . . shall attend at such public office daily or at such times and for such period as may be necessary for the disposal of the business brought before him as a justice of the peace: R. S. O. c. 223, s. 479 (1).

"The council shall from time to time provide all necessary and proper accommodation, fuel, light, stationery, and furniture for the police office, and for all offices connected therewith, *ib.*, s. 479 (2). (This was first introduced in 1896 by 59 Vict. c. 51, s. 35).

"The clerk of the council of every city or town . . . shall be the clerk of the police office thereof, and shall perform the same duties and receive the same emoluments as clerks of justices of the peace . . . and such clerk shall be the officer of and under the police magistrate: *ib.*, s. 480.

"In like connection is to be read the provisions of R. S. O. c. 87, s. 35: 'No police magistrate need act in any case arising outside of the limits of the city, town or place, for which he is police magistrate, unless he sees fit so to do,' and section 38: 'Except in cases of urgent necessity no attendance of the police magistrate shall be required at the police office on Sunday or other holidays,' etc.

"Also to be considered is c. 87, s. 28: 'Every police magistrate shall, whenever he deems that there is occasion therefor, have the right to use any Court room or town hall belonging to the county or to any municipality therein (which has no police magistrate of its own) for the hearing of cases brought before him: provided the magistrate . . . shall not interfere with the ordinary use of the Court rooms for the other Courts, or with the use of the town hall for the purposes for which the same was built.'

"The last section provides (looking at the case now in controversy) that a police magistrate may occupy the town hall of any municipality (in the county) which has no police magistrate of its own. But the town of Pembroke is a municipality forming part of the county of Renfrew and has a police magistrate of its own—to wit—the plaintiff.

"He has no right to occupy the town hall of Pembroke under this section, and no other has been pointed out conferring this as a privilege or a right. Nor has this point been thus held in Daly v. Napanee, for there the plaintiff was police magistrate of the county as well as of the town forming part of it, and so it is on the facts distinguishable.

"Personally I am inclined to think that this section is to be construed with reference to its original, 48 Vict. c. 17, s. 4 (O.); 50 Vict. c. 11, s. 5 (O.), and to be read as applying to every police magistrate for a county or union of counties or district or part of a district in which the Canada Temperance Act is in force.

"It does not seem to have been rightly interpreted in what is said in *obiter* in Regina v. Lee (1887), 15 O. R. at p. 359, for in that case the defendant was police magistrate of Brant, exclusive of Brantford, and Brantford had a separate police magistrate of its own (see p. 357), so that the parenthesis would shut out the defendant from having a right to use the 'Court room' in the city.

"I cannot doubt, looking at the history of legislation and the actual words used, that the legislature calls for only one public place or station in order to satisfy the statute that a 'police office' shall be established. It is not needful that this be a separate building; the allocation of a suitable room or chamber in any building belonging to the municipality will suffice.

"The fact that the town clerk is made the statutory clerk of the police office points to a situation in or near the building where town officers are congregated. Such a place is the town hall or the Court house, and it is customary to have some portion of these set apart for the purposes of the police Court.

"The evidence before me greatly preponderates as to the propriety and suitability of the site being at the town hall and in that part of it called 'the council chamber.' This is lighted and heated and furnished and has been so adjusted that it may reasonably suit the meetings of the reduced body of councillors as well as the daily session of the police magistrate.

"It may be, if the plaintiff chooses to dispense with his private office at his place of business, and confine himself more strictly to the council chamber, that he should be provided with a desk, a safe and a bookcase, with lock and key. There is a safe or vault in connection with the town clerk's office, and as he is made by law the clerk of the police magistrate that would be an appropriate place for the preservation of the more important documents. The town clerk is indeed the proper custodian of all papers connected with the police office: see Regina v. Mason (1872), 22 C. P. at p. 252, and Peterborough v. Hatton (1879), 30 C. P. at p. 460.

"I do not see any reason to hold (especially as to a place like Pembroke) that the police magistrate has a right to claim a private office in addition to a public one. There can be no difficulty in so ordering the business that it can be efficiently discharged in one room like the council chamber.

"By way of illustration let me refer to the methods employed in the English Courts of like jurisdiction. 'The magistrate takes his seat in Court, and, before it is opened to the general public, persons wishing to make applications to him are admitted to do so. These

applications are chiefly for a warrant or summons in respect of offences, . . . but it has been usual for the poor to ask and have advice of the magistrate in matters which, when stated, frequently prove to be beyond his jurisdiction. If he grants process, the applicant goes into an office (*e.g.*, the clerk's office) where particulars of the complaint are entered, and the fee is paid for the warrant or summons. This fee is receivable by the clerk (see R. S. O. c. 95 schedule).

"The Court . . . is then opened to the general public, and the charges which have been entered in the magistrate's register are heard. The lighter charges of drunkenness and disorderly conduct, which involve the attendance of many constables as witnesses . . . are first disposed of. Charges of violent assault, for which the accused has been apprehended, come . . . next in order and then indictable crimes. . . . Cases arising on summons are generally heard in the afternoon, the defendants being summoned to attend at 2 p.m.: see Ency. of the Laws of England, vol. 10, pp. 153, 154.

"Some such routine as this may be adopted by the presiding magistrate, who has ample power by force of law, and by aid of constables to enforce order and regulate proceedings, according as he sits judicially in open Court or ministerially or quasi-judicially in private and preliminary matters: see Criminal Code, ss. 586 (d), 849 and 908.

"Much purely administrative or ministerial work may be delegated to the clerk, if matters proper for the magistrate himself are likely to occupy a fair day's work.

"The defendants were not called upon to furnish facilities for the transaction of business not strictly appertaining to the office of police magistrate for the town, such as troubles arising in the county but outside of the town limits.

"Then the case is reduced to a matter of stationery: for this there is a valid claim from 7th April, 1896, by 59 Vict. c. 51, s. 35, as interpreted in the light of Newsome v. The County of Oxford (1895), 28 O. R. 442; a decision accepted by the legislature in the amendment afterwards made, R. S. O. c. 223, s. 479, s.-s. 2, by the insertion of the word 'stationery.'

"It is difficult in cases like this, when so much depends upon the generous agreement of the local authorities, legal and municipal, to deal out the precise measure of justice to which the parties are entitled. For example, the Court room may not be so furnished or arranged as meets the wishes of the plaintiff, it may be that more should be done to suit his convenience than has been indicated.

"I hope that nothing has occurred in this litigation which will hamper the town authorities in exercising some discretion beyond the strict legal obligation, if thereby the more harmonious working of town affairs may be promoted and the public convenience served.

"The money measure of the stationery is $36 (to April, 1899). This should be paid the plaintiff, but it is not a case of costs.

Boards of Commissioners of Police and Police Force in Cities and Towns.

354.—(1) Notwithstanding the provisions of any special Act, there shall be for every city, and there may be constituted by the council thereof for every town having a Police Magistrate, a Board of Commissioners of Police.

(2) The Board shall consist of the Mayor, a Judge of the County or District Court of the county or district in which the city or town is situate, and the Police Magistrate. 3 Edw. VII. c. 19, s. 481 (1), *first part redrafted.*

(3) If there are two or more Judges for the county or district, the Lieutenant-Governor in Council shall designate the Judge who is to be a member of the Board. *New.*

(4) If the Police Magistrate is absent from Ontario, the Deputy Police Magistrate shall Act in his stead during his absence.

(5) If the office of Judge or that of Police Magistrate is vacant, the council shall fill the vacancy on the Board by appointing a resident of the municipality to act during the vacancy.

(6) In case of the illness or absence from Ontario of the Mayor, or of the office being vacant, the person appointed as presiding officer of the council shall act instead of the Mayor.

(7) The council of a city may provide for the payment of a reasonable remuneration for his services as a member of the Board to the Judge or the Police Magistrate or to any person appointed to fill the vacancy while the office of Judge or Police Magistrate is vacant. 3 Edw. VII. c. 19, s. 481, *last part redrafted.*

(8) The by-law of the council of a town may at any time be repealed, and, if repealed, the Board shall, on the first day of January next after the passing of the repealing by-law, be dissolved.

(9) Sub-section 8 shall also apply to a Board constituted before the 24th day of March, 1874, and existing on that day. 3 & 4 Geo. V. c. 43, s. 354 (1-9). 7 Geo. V. c. 42, s. 9.

(*Note.—The following section numbered* 354*a, for convenience only, was enacted by section 24 of the Statute Law Amendment Act, 1914. Although not enacted as an amendment to any particular Act, The Municipal Act would seem to be the proper place for it.*)

354*a*.—(1) The council of every county having a police magistrate may by by-law constitute a board of commissioners of police consisting of the warden, a judge of the county court and a police magistrate.

(2) If there are two or more judges for the county or two or more police magistrates, the Lieutenant-Governor in Council shall designate which judge or police magistrate is to be a member of the board.

(3) If any person named as a member of the board is ill or absent from Ontario or if the office is vacant, the council may fill the vacancy on the board by appointing a resident of the municipality to act during the vacancy.

(4) The by-law may at any time be repealed, and if repealed the board shall on the first day of January next after the passing of the repealing by-law be dissolved.

(5) Sections 355, 356, 357, 360, 361, 362 and 363 of *The Municipal Act* shall apply *mutatis mutandis* to the board, and the board shall have the powers which are by said sections conferred on boards of commissioners of police in cities and towns. 4 Geo. V. c. 21, s. 24.

Paramount Authority of Board of Police Commissioners.—A city cannot order an investigation into the conduct of police commissioners under s. 248. Re Berlin and County Judge of Waterloo, 1914, 33 O. L. R. 73. For full discussion see notes to s. 248.

Relation between Boards of Police Commissioners and Policemen.—In Winterbottom v. London Police Commissioners, 1901, 1 O. L. R. 549, affirmed 2 O. L. R. 105, an action was brought by the plaintiff for damages sustained by reason of being knocked down and run over by a patrol wagon. The jury assessed the damages at $1,000, but on motion the action was dismissed. Robertson, J., after referring to sections 481, 489 and 490 (now 354, 360 and 361), quoted with approval the following discussion from Beven's Negligence in Law, 2nd ed.:

> "The liability of municipal corporations for the negligence of officers charged with carrying out duties of general public concern—such as policemen—has been largely considered in America although not even mooted in England. These officers stand in a very different position from that of servants of the corporation acting within the scope of their duties and subject therein to specific direction from the corporate authorities. With regard to these latter we have seen that a corporation is liable to the same extent as a private person. Taking the police as representative of the class now being considered, a moment's reflection shews that they occupy a distinctly different position. 'If,' says an interesting New York case, 'the corporation appoints or elects them, and can control them in the discharge of their duties, and continue or remove them, and can hold them responsible for the manner in which they discharge their trust; and if those duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation and its local and special interests, they may be justly regarded as its servants or agents, and the maxim of respondeat superior applies. But if, on the other hand, they are elected or appointed by the corporation in obedience to the statute, to perform a public service not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of government, if they are independent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation, for whose acts it is impliedly liable, but as public or state officers, with such powers and duties as the statute confers upon them, and the doctrine of respondeat superior is not applicable.'

"Further where the police are under the control of commissioners, not only are the city authorities not liable, but neither are the police commissioners, for the negligence of any member of the force. This freedom from liability may be placed on either of two grounds. First, the commissioners are appointed 'to perform a public service not peculiarly local or corporate,' within the meaning of the principle just stated. This is the ground apparently preferred by the American Courts. Secondly, because there is no more relation of master and servant in the case under consideration than between an officer and the men of his regiment; or, than, at common law, there is between the managing director of a railway and the ratepayers or pointsmen engaged on it. This ground seems preferable in the English Courts: see, also, Dargain v. Mayor, etc., of Mobile (1858) 31 Ala. 469.

"In Buttrick v. City of Lowell (1861), 1 Allen (Mass.) at p. 173, Bigelow, C.J., says: 'Police officers can in no sense be regarded as agents or servants of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government; but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are entrusted, are derived from the law, and not from the city or town under which they hold their appointment. For the mode in which they exercise their powers and duties the city or town cannot be held liable.'"

His Lordship then added:

"The same reasoning is applicable to the case now under consideration, only with more force. 'The duties of policemen, like all other constables, are of a public nature,' and their appointment by the board of commissioners is required by the legislature as a convenient mode of exercising a function of government. Besides all this the board is not their paymasters; the city provides the funds to pay them, over which the board has no control whatever. . . .

"As the police commissioners have only power to direct the city council to appropriate and pay remuneration for the members of the police force and for offices, watch houses, watch boxes, arms, accoutrements, clothing and other necessaries and necessary expenses, as the board may deem requisite for the payment, accommodation, use and maintenance of the force, there are no funds out of which the police commissioners, who are appointed by statute, and who are compelled by law to perform the duties appertaining to their offices, just as a Judge is, can pay any damages or costs.

"On the whole case, therefore, and on the authorities referred to above, I cannot see how it is possible to hold these defendants liable for an act of one of the policemen, although appointed by them, while in the discharge of his duty, although negligently and carelessly performed. The fact of the board having established a patrol wagon for the better carrying out the duties of the policemen can make no difference. . . .

"The establishing of a patrol wagon for the use of the police in a city by the board of police commissioners is not, in my judgment, a factor which will make that board responsible for the negligent use of it by a policeman while in the discharge of his duty, and I must, therefore, order that judgment be entered for the defendants, dismissing the action with costs."

See also Pon Yin v. Edmonton, 1915, 31 W. L. R. 402.

A police officer may also be a servant of a municipal corporation, and when he is negligent in the latter character the corporation may be responsible. McAvoy v. Rannie, 25 O. W. R. 667.

By-laws of Boards of Police Commissioners.—See ss. 412, 413, 416, 417, 418, 419, 420, 421 and 422. As to penalties for breach of such by-laws see ss. 497 and 498.

There is no jurisdiction to quash a by-law passed by police commissioners. See Part XI., s. 283, and Re Major Hill Taxicab Co., 1915, 33 O. L. R. 243.

Power of Council to Fix License Fees under By-laws of Board of Police Commissioners.—See s. 253 (2).

Discretion to Grant or Refuse Licenses.—See s. 253 (4).

362 **355.**—(1) The Board shall have the same power to summon and examine witnesses on oath as to any matter connected with the execution of its duties, to enforce their attendance, and to compel them to give evidence, as is vested in any Court of law in civil cases.

363 (2) It shall be the duty of every person served with a notice to attend before the Board, signed by a member of it, to attend pursuant to the notice, and the notice shall have the same effect as a subpœna. 3 Edw. VII. c. 19, s. 482 (1), *amended.* 3 & 4 Geo. V. c. 43, s. 355 (1-2).

Enforcing Attendance of Witnesses, etc.—See notes to s. 248.

360 **356.**—(1) The Board shall, in each year, at its first meeting held after the Mayor has made the declarations of office and qualification, elect a chairman.

(2) A majority of the members of the Board shall constitute a quorum.

(3) The meetings of the Board shall be open to the public, unless otherwise directed by the Board. 3 Edw VII. c. 19, s. 483, *amended.* 3 & 4 Geo. V. c. 43, s. 356 (1-3).

361 **357.**—(1) A by-law of the Board shall be sufficiently authenticated, if signed by its chairman or acting chairman, and a by-law purporting to be so signed shall be received in evidence in all Courts, without proof of the signature.

(2) A copy of a by-law purporting to be certified by a member of the Board to be a true copy, shall be received in evidence in all Courts, without proof of the signature. 3 Edw. VII. c. 19, s. 485, *redrafted.* 3 & 4 Geo. V. c. 43, s. 357 (1-2).

Authentication of By-laws.—See s. 258.

When Board of Police Commissioners Acquires Power, By-laws by Council Lapse.—By-laws passed by councils of towns, by s. 32, remain in force after the erection of a town into a city, until repealed by the council of the city. This cannot apply to by-laws which, after the erection of a city, can only be passed by Boards of Public Commissioners. The effect of the change is to render such by-laws of no effect: R. v. Hiscox, 1879, 44 U. C. R. 214.

High Bailiff and Police Force.

358. The council of every city shall appoint a high bailiff but may provide that the offices of high bailiff and chief constable shall be held by the same person. 3 Edw. VII. c. 19, s. 487. 3 & 4 Geo. V. c. 43, s. 358.

High Bailiff.—If the council provides that the offices of the high bailiff and chief constable shall be held by one person then the appointment must be made by the Board of Commissioners of Police, under s. 360.

359. The police force in cities and in towns having a Board of Commissioners of Police shall consist of a chief constable and as many constables and other officers and assistants as the council may deem necessary, but, in cities, not less than the Board reports to be absolutely required. 3 Edw. VII. c. 19, s. 488. 3 & 4 Geo. V. c. 43, s. 359.

360. The members of the police force shall be appointed by and hold office during the pleasure of the Board, and shall take and subscribe an oath similar to that set out in section 20 of The Constables Act. 3 Edw. VII. c. 19, s. 489, *amended*.

The oath prescribed by s. 7 of the Constables Act is as follows:—

"I, , having been appointed constable for , do swear that I will truly, faithfully and impartially perform the duties appertaining to the said office, according to the best of my skill and ability. So help me God.

"Sworn, etc. A. B."

3 & 4 Geo. V. c. 43, s. 360.

361. The Board may make regulations for the government of the police force, for preventing neglect or abuse, and for rendering it efficient in the discharge of its duties. 3 Edw. VII. c. 19, s. 490. 3 & 4 Geo. V. c. 43, s. 361.

362. The members of the police force shall be subject to the government of the Board, and shall obey its lawful directions. 3 Edw. VII. c. 19, s. 491, *first part*. 3 & 4 Geo. V. c. 43, s. 362.

363.—(1) The council shall appropriate for and pay such remuneration to the members of the police force as the Board may determine, and shall provide and pay for all such offices, watch-houses, watch-boxes, arms, accoutrements, clothing, and other things as the Board may deem requisite and require for the accommodation, use, and maintenance of the force.

(2) The council may pay any sum required for the protection, defence, or indemnification of any member of the police force, where an action or prosecution is brought against him, and costs are necessarily incurred or damages are recovered, if the Board certifies that the case is a proper one for such payment or indemnity. 3 Edw. VII. c. 19, s. 492, *amended*. 3 & 4 Geo. V. c. 43, s. 363 (1-2).

Estimates of Boards of Police Commissioners.—By s. 213 (6) these must be furnished to the Board of Control on or before the first day of March in each year. The council has no power to reduce such estimates unless amounts are included which the Board of Police Commissioners have no jurisdiction to expend. See notes to s. 213 (16).

Indemnifying Police Officers, s. 363 (2).—The payment is only authorized if the Board certifies it. The sub-section apparently refers only to cities having a public force under the control of a Board. In other municipalities such indemnity may be given if the council thinks fit. An indemnity to a mayor was upheld in Heffernan v. Walkerton, 1903, 6 O. L. R. 79, A.C. *Contra*, see Pease v. Moosomin, 1901, 5 Terr. L. R. 207.

Ratification of Illegal Acts of Police Officers may Render Corporation Liable.—In Kelly v. Barton, 1895, 26 O. R. 608, 22 A. R. 522, constables arrested the plaintiff when proceeding to church in a cab which was being run without a license. The public officers acted under the orders of the mayor and the council had previously passed a resolution that Mr. Meredith, the city solicitor, be requested to take charge of and to prosecute in any cases of breaches of the city by-laws and to defend all city officials in the discharge of their duties. The plaintiff sued the constables and the city for illegal arrest. The claim against the city was thus dealt with by Boyd, C., in the Divisional Court:—

> "So far as the city is concerned, other considerations arise, as to which I now turn. This much evidence affecting the city as defendants was received by the trial Judge without objection; that the mayor called a special meeting of the executive committee of the city council for the 6th August, 1894; that he then stated to that committee that he had given the defendants instructions to stop all 'busses on the following Sunday," and that on these instructions the plaintiff and his family were arrested, and that he wanted the committee to protect the police by having a lawyer authorized to defend the action; and that it was then ordered by the executive committee—which has charge of the legal department—that the city solicitor be instructed to defend the present actions on behalf of Archibald and Barton. It is not suggested or pretended that any further evidence in substance could be given of what was said by the mayor in the presence of the executive committee, and I do not think the case should be remitted for further evidence if upon this now given the case was rightly withdrawn from the jury in so far as the city was concerned.
>
> "The plaintiffs must rest their claim upon ratification by the city of the alleged illegal act of the police officers, for these latter are

not officers or agents of the corporation, but are independently appointed by the Board of Police Commissioners, as an agency of good government, for the benefit of the municipality. Now, the only act of ratification is the resolution to defend, and this, in my judgment, falls far short of what would be needed to implicate the city as pecuniarily responsible for the alleged misconduct of the police officers. These officers were acting in assumed vindication of the city by-laws, and it may be under the direction of the mayor who was also one of the Board of Police Commissioners; but there is nothing to shew any adoption of the act of the officers by the city council, so as to fix the corporation with the consequences of that act. As the mayor directed and the officers acted, the executive committee may have been willing to undertake the expense of litigation (whether legitimately or not is not now under consideration), but something more is needed to shew ratification of the transaction as a whole. Nor should it be left, in my opinion, to the jury in such a case as this to infer from the circumstances such as we find them, whether or not there was an adoption of the whole transaction by the municipal corporation.

"In Perley v. Inhabitants of Georgetown, 7 Gray 464, it was held that a town does not ratify a collector's illegal acts though it makes payments connected with those illegal acts, because their intervention was doubtless made for a very different purpose than that of ratifying or justifying the acts of the collector. That was followed and applied in Buttrick v. City of Lowell, 1 Allen 174, to a case like the present of employing counsel to defend the alleged trespasser.

"In this case the corporation had no interest in the enforcement of the by-law other than that which was common to the whole community. Their desire in defending cannot be carried higher, upon the evidence before us, than that they desired to encourage officers whose business required them to enforce police regulations. But it by no means follows in the case of governmental bodies such as municipal corporations that the intention was to shoulder all civil liability which might result to the officer from illegal or violent acts: see Sheldon v. Village of Kalamazoo, 24 Mich. 384; Trammel v. Town of Russellville, 34 Ark. 105; Mackay v. Buffalo, 9 Hun. 407; and Eastern Counties R. W. Co. v. Broom, 6 Ex. 314; Roe v. Birkenhead, etc., R. W. Co., 7 Ex. 36.

"I agree in the result arrived at by the trial Judge on this branch of the case, that the action fails as to the city, and as to that defendant judgment is affirmed.

"The action is dismissed with costs as to the city."

In cases where constables are employed and paid by and take their orders direct from councils without the intervention of Boards of Police Commissioners, the ruling of the Court of Appeal in Lambert v. Great Eastern, 1909, 2 K. B. 776, 79 L. J. K. B. 32, should be borne in mind, where special constables employed by a railway company, arrested the plaintiff without reasonable grounds, and the company was held responsible for damages, Cozens-Hardy, M.R., saying:—

"What is the position of these constables? The county authorities who have to do with the ordinary police force are expressly exempted and excluded from all jurisdiction in the matter. They cannot either appoint or remove. They do not pay. It is the railway company who employ; it is the railway company who pay; it is the railway company who dismiss; and in these circumstances it seems to me these are men bound to obey the orders of the railway company, and bound to obey no other orders of any sort or kind, and that in the acts which they did they acted as servants of the company. No doubt they are servants who are given a special immunity and protection, and they have the peculiar protection which other constables have, namely, that they are not liable if they have reasonable ground for believing that a felony has been committed, and that the person whom they have arrested was guilty of a felony. If they had such reasonable grounds, their employers, I take it, would not be liable their acts, but if they had not reasonable grounds, then it seems to me that their employers must be liable."

Note that in Thomas v. Canadian Pacific Railway Company, 1906, 14 O. L. R. 55, the Divisional Court Ontario reached a different conclusion in a similar case. See also Woodforde v. Chatham, 1904, 37 N. B. R. 21, and cases cited, and Wilson v. Winnipeg, 4 M. R. 193.

It has been suggested that a municipal corporation, if it does not select competent police officers, may be liable to persons injured: McKenzie v. Chilliwack, 1912, A. C. 886, 82 L. J. C.P. 22.

364. The council of every town not having a Board shall and the council of every village may, appoint one chief constable and one or more constables. 3 Edw. VII. c. 19, s. 493, *amended;* 3 & 4 Geo. V. c. 43, s. 364.

365. The council of a county and of a township may appoint one or more constables. In the case of a township, the remuneration of such constable or constables may, if the council deems proper, be paid by a general rate levied on any defined section or area of the township. 3 & 4 Geo. V. c. 43, s. 365; 7 Geo. V. c. 42, s. 10.

366.—(1) The members of a police force, the high bailiffs and the constables appointed under the authority of this Part shall have the same powers and privileges, be subject to the same liability, perform the same duties, be subject to suspension in the same manner, and may act within the same limits, as a constable appointed by the Court of General Sessions of the Peace. 3 Edw. VII. c. 19, s. 495, *amended.*

(2) The provisions of sub-section 1, as to suspension, shall not apply to a member of the police force of a city or town which has a Board of Commissioners of Police. *New.* 3 & 4 Geo. V. c. 43, s. 366 (1-2).

367. The members of a police force, a high bailiff, a chief constable and the constables appointed under this Part, shall be charged with the duty of preserving the peace, preventing robberies, and other crimes and offences, including offences against the by-laws of the municipality, and of apprehending offenders, and laying information before the proper tribunal, and prosecuting and aiding in the prosecution of offenders. 3 Edw. VII. c. 19, s. 491, *last part;* 7 Edw. VII. c. 40, s. 10, *amended.* 3 & 4 Geo. V. c. 43, s. 367.

[*As to appointment of High Constable by county, see The Constables Act. R. S. O. 1914, c. 94, s. 8.*]

368.—(1) The council by which a high bailiff, chief constable or a constable is appointed under the authority of this Part may provide for the payment to him of such salary or remuneration as the council may determine. *New.*

(2) The council may agree with a salaried constable appointed either by the council or by the Board of Commissioners of Police that he shall keep for his own use the fees of his office, or may require them to be paid to the treasurer for the use of the corporation. 3 Edw. VII. c. 19, s. 496, *amended.* 3 & 4 Geo. V. c. 43, s. 368.

Dismissal of Constable at Pleasure Though Under Yearly Contract.—Vernon v. Smith's Falls, 1891, 21 O. R. 331. See notes below s. 246.

Section 366—Personal Liability of Peace Officers.—Peace officers are within the protection of the Public Authorities Protection Act, R. S. O. 1914, c. 89, which is in part as follows.—

"12.—(1) No action shall be brought against a constable, Division Court bailiff or other officer, or against any person acting by his order and in his aid, for anything done in obedience to a warrant issued by a Justice of the Peace or clerk of a Division Court until demand has been made or left at his usual place of abode by the person intending to bring such action or by his solicitor or agent in writing, signed by the person demanding the same, of the perusal and copy of such warrant and the same has been refused and neglected for six days after such demand.

(2) If, after such demand and compliance therewith by showing the warrant to and permitting a copy thereof to be taken by the person demanding the same, an action is brought against such constable, bailiff or officer, or such person so acting, for any cause without making the justice or clerk who issued the warrant a defendant, on the production and proof of the warrant at the trial of the action judgment shall be given for the defendant notwithstanding any defect of jurisdiction in such justice or clerk.

(3) If the action is brought jointly against such justice or clerk and such constable or bailiff or other officer or person so acting, on proof of such warrant judgment shall be given for such constable or bailiff or other officer and for such person so acting notwithstanding such defect in jurisdiction.

(4) If the judgment is given against the justice or clerk the plaintiff shall, in addition to any costs awarded to him, be entitled to recover such costs as he is liable to pay to the defendant for whom judgment is given. 2 Geo. V. c. 17, s. 20 (1).

"13.—(1) No action, prosecution, or other proceeding shall lie or be instituted against any person for an act done in pursuance or execution or intended execution of any statute, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such statute, duty or authority, unless it is commenced within six months next after the act, neglect or default complained of, or, in case of continuance of injury or damage, within six months after the ceasing thereof.

"(2) Where in any such action costs are awarded to the defendant the Court may direct that they be taxed as between solicitor and client.

"(3) If, in the opinion of the Court, the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the proceeding, the Court may award to the defendant costs to be taxed as between solicitor and client."

Peace officers acting under illegal warrants or under the authority of *ultra vires* statutes are protected as if their authority were lawful. Sections 11 (3) and 15, and by s. 16, public officers are entitled in certain cases to security for costs.

In Kelly v. Barton, 1895, 26 O. R. 608, 22 A. R. 522, the Mayor of Toronto instructed certain constables to stop all busses on the following Sunday which should be operated in breach of a by-law of the police commissioners requiring licenses to be taken out. The constables arrested the plaintiff, and those with her, as she was proceeding to church, and took them to the police station where they were detained fifteen minutes.

An action was thereupon commenced against the constables and the city of Toronto for damages for illegal arrest. Ferguson, J., dismissed the action against the defendants on the ground as against the constables that they were within the protection of s. 1, now repealed, of R. S. O. 1897, c. 88 (now c. 89, R. S. O. 1914), which provided that in every action brought against a public officer, it should be expressly alleged in the statement of claim that the act was done maliciously and without reasonable and probable cause, and that if at the trial of the action the plaintiff failed to prove such allegation she should be non-suited or a verdict given for the defendant. And that it was necessary for the plaintiff to allege and prove that the defendants acted maliciously and without reasonable and probable cause and that the second notice of action, which was the one relied on, did not state that the act was done maliciously and without reasonable and probable cause, and therefore did not state the cause of action which the 14th section required should be clearly and explicitly stated in the notice.

On appeal to a Divisional Court the judgment was set aside and the action sent back for trial, so far as the constables were concerned, Boyd, C., saying:—

"The great object of the statute is to give protection to all those who are fulfilling a public duty, that is, who are performing acts which they are bound or required to perform by reason of their public functions or character: per A. Wilson, J., in Hodgins v. Corporation, etc., of Huron and Bruce, 3 E. & A. 169, 190. See Bryson v. Russell, 14 Q. B. D. 720.

"In the present case the officer was not bound or required as a matter of duty to arrest the plaintiff, although he was violating the provisions of a city by-law in that he was driving an omnibus without having a license so to do. That conduct was merely the infraction of a police regulation which falls far short of being a crime. There was no state of law or of facts which did exist that could justify this summary arrest though the officer may have *bona fide* believed that he had such a legal right, and that such was his official duty.

"The first section of our Act seems to me to provide that if the officer in discharge of a public duty acts irregularly or erroneously he is entitled to the qualified protection of the statute; but if he volunteers or assumes to do something which is not imposed upon him as an official duty, then he is outside of this section: see Rowcliffe v. Murray, C. & M. 513, 515.

"A peace officer is protected in all his round of duty as a public officer, but if he acts without authority or jurisdiction he is liable as a trespasser: Acting, however, within the bounds of his duty, the cause of action rests upon corruptness of motive, and the complainant must prove that the act was malicious: see per Erle, J., in Taylor v. Nesfield, 3 E. & B. 724.

"I have not found anywhere a more lucid exposition of the law of notice as regards constables than is given by Lord Kenyon in Alcock v. Andrews, 2 Esp. 542, note. He said the defendant, who justified as constable, was acting *colore officii* and not *virtute officii;* it had often been held that a constable acting *colore officii* was not protected by the statute (24 Geo. II. c. 44, s. 8), where the act committed is of such a nature that the office gives him no authority to do it; in the doing of that act he is not to be considered as an officer;

but where a man doing an act within the limits of his official authority, exercises that authority improperly, or abuses the discretion placed in him, to such case the statute extends. The distinction is between the extent and the abuse of the authority.

"To the same extent is the language of Cockburn, C.J., in Griffith v. Taylor, 2 C. .P. D. 201, that in order to entitle a party to notice he must have acted under the *bona fide* belief in the existence of circumstances which, if they had really existed, would have amounted to a justification (1876) : see Cod v. Cabe, 45 L. J. N. S. M. C. 101, 102.

"My conclusion on this part of the appeal is that the action should not have been stopped because of the want of notice of action imputing malice, and that the cause will have to be remitted for trial as to the two officers."

Kelly v. Barton, *supra*, was followed in Moriarity v. Harris, 1905, 10 O. L. R. 610, C. A., reversing a Divisional Court which held there was justification for the act, 8 O. L. R. 251. The facts were as follows:—

"The plaintiff was a civic employee under the street watering department. He was not in any way subject to the control or bound to obey the orders of the market clerk, who, as superintendent of the market, had, under the by-law, a limited control over those who resorted to it for the ordinary purposes of buying and selling. The plaintiff was engaged in the discharge of his duty, and for that purpose had proceeded to the market garden, which it was his duty to water. He was met there, while in the discharge of his duty, by a crowd of sightseers intent upon witnessing the bicycle performance—a performance for which, as the jury has found, the market was not intended. Owing to the unusual crown a jam was threatened, and the market clerk, to avoid the jam with its consequent dangers, told the defendant to move the waggons on out of the way, the watering cart in particular. The defendant, accordingly, although in no way bound to obey the orders of the market clerk, ordered the plaintiff to move on, and he did so, but, it is said, turned on the water for the purpose apparently of performing his duty, and, after some altercation, the defendant got up upon the cart and laid violent hands on the plaintiff for the purpose, not of arresting him, but simply in order to obtain possession of the lines. The plaintiff very naturally resisted, and in the tussel was, in consequence of the defendant's violence, forced or fell from his seat to the ground and was severely injured."'

Garrow, J.A., in giving the opinion of the Court, said:—

"A constable has no right or immunity as such to commit a trespass. Certain statutory advantages in defending himself have been given to him, such as notice of action, special venue, special limitation, and the opportunity to tender amends before action. But when the plaintiff has complied with the statutory provisions in launching his action, the trespassing constable is upon the same footing as any other trespasser unless his case falls within the protection of the before-quoted s. 1 of R. S. O. 1897, c. 88. And he may be liable as a trespasser if he acts excessively, as has in the present case been found by the jury to be the fact: Gordon v. Denison (1895), 22 A. R. 315; Wright v. Court (1895), 4 B. & C. 596; Hamilton v. Massie (1889), 18 O. R. 585. And the excess may and usually will make him liable as a trespasser *ab initio:* Hoover v. Craig (1885), 12 A. R. 72; Jones v. Grace (1889), 17 O. R. 681;"

and then added:—

"All of the learned Judges (of the Divisional Court) apparently proceeded upon the common ground that the defendant was entitled to the protection afforded by s. 1, s.-s. 1, of R. S. O. 1897, s. 88, and that the plaintiff having failed to prove malice the action failed.

"I am, with deference, quite unable to agree with that view. In my opinion the defendant, if he intended to act, as possibly he did, in his office of constable, did so voluntarily and without authority or any reason to think that he had, officially, authority to do what he did, and is therefore not entitled to the protection which he claims.

"The claim is not, I think, supported by the cases referred to, and apparently relied upon in the judgments."

His Lordship then discussed: Chamberlain v. King (1871), L. R. 6 C. P. 474; Griffith v. Taylor (1876), 2 C. P. D. 194; Gosden v. Elphick (1849), 4 Ex. 445; Parton v. Williams, 3 B. & Ald. 330; Staight v. McGee (1818), 2 Stark. 445; Theobold v. Crichmore (1818), 1 B. & Ald. 227; Atkins v. Kilby (1840), 11 A. & E. 777; Kelly v. Barton, 26 O. R. 608, 22 A. R. 522.

See also Robinson v. Morris, 1909, 19 O. L. R. 633.

369. Where any person complains to the chief constable or a constable of a city or town that a breach of the peace has been committed, and that officer has reason to believe that it has been committed, though not in his presence, and that there is good reason to apprehend that the arrest of the person charged with committing it is necessary to prevent his escape, or a renewal of the breach of the peace, or immediate violence to person or property, if the person complaining gives satisfactory security to the officer that he will, without delay, appear and prosecute the charge, the officer may, without warrant, arrest or cause to be arrested the person charged, in order to his being brought as soon as conveniently may be before the police magistrate or a justice of the peace to be dealt with according to law. 3 Edw. VII. c. 19, s. 497, *amended.* 3 & 4 Geo. V. c. 43, s. 369.

370.—(1) If there is no Board of Commissioners of Police for a town, the Mayor or the Police Magistrate may suspend from office, for any period in his discretion, the chief constable or any constable of the town, and may appoint some other person to the office during such period; and, if he considers the suspended officer deserving of dismissal, he shall, immediately after suspending him, so report to the council, and the council may dismiss such officer, or may direct him to be restored to his office after the period of suspension has expired. 3 Edw. VII. c. 19, s. 498.

(2) During suspension, the officer shall not act except with the written permission of the Mayor or Police Magistrate who suspended him, or be entitled to any salary or remuneration. 3 Edw. VII. c. 19, s. 499, *amended.* 3 & 4 Geo. V. c. 43, s. 370 (1-2).

County Constables.—As to appointment of Chief High Constable by county councils, see the Constables Act, R. S. O. 1914, c. 94, s. 8. Every constable appointed under the Constables Act is a county constable. All must make returns, s. 14. But this provision does not apply to a city or town having a board of Police Commissioners.

COURT HOUSES, GAOLS, ETC.

Establishment.

371. Until otherwise provided by law the existing county and district towns shall continue to be the county and district towns of the counties and districts in which they are respectively situate. *New.* 3 & 4 Geo. V. c. 43, s. 321.

372.—(1) The corporation of every county shall provide and maintain a county court house and a county gaol.

(2) The court house and the gaol shall be sufficient for the purposes of every city and separated town, which forms part of the county for judicial purposes as well as for the purposes of the county.

(3) The gaol shall be provided and maintained in conformity with the provisions of The Gaols Act, and to the satisfaction of the Lieutenant-Governor in Council.

(4) Sub-section 2 shall not apply to the court house if the city has a court house of its own, or to the gaol if the city has a gaol of its own. *New.* 3 & 4 Geo. V. c. 43, s. 372 (1-4).

373.—(1) The council of a county or of a city may pass by-laws for erecting, enlarging or improving a court house, or gaol, and shall keep the same in repair and provide the food, fuel, and other supplies required therefor. 3 Edw. VII. c. 19, s. 500, *amended.*

(2) The corporation of a county may acquire land within a city or separated town, which is the county town for the purpose of erecting and may erect thereon a court house, a gaol, and buildings for use as a county hall and for offices for the county officials. 3 Edw. VII. c. 19, s. 501, *redrafted.* 3 & 4 Geo. V. c. 43, s. 373 (1-2).

374. The court house and gaol of the county in which a city or separated town is situate, shall, except where the city has provided one for itself, be the court house or gaol, as the case may be, of the city or town, and the sheriff and gaoler shall receive and safely keep, until

duly discharged, all persons committed to the gaol by any competent authority of the city or town. 3 Edw. VII. c. 19, s. 502, *amended*. 3 & 4 Geo. V. c. 43, s. 374.

Care of Court Houses and Gaols.

375.—(1) The sheriff shall have the care of the county gaol, gaol offices and yard, and gaoler's apartments, and the appointment of the gaoler and officers of the gaol, whose salaries shall be fixed by the county council, subject to the revision or requirement of the Inspector of Prisons and Public Charities.

(2) The appointment or dismissal of a gaoler shall be subject to the approval of the Lieutenant-Governor in Council. 3 Edw. VII. c. 19, s. 504. 3 & 4 Geo. V. c. 43, s. 375 (1-2).

Section 375.—County gaols are in charge of the sheriff, and all gaolers and officers are appointed by him subject to approval as required by s. 375 (2). The county is therefore in no way responsible for injuries suffered by prisoners through the negligence of gaolers or other officers, as they are officers of general government. Nettleton v. Prescott, 1908, 16 O. L. R. 538, 1910, 21 O. L. R. 561, C. A. As to lock-up houses see s. 386.

As to injuries received for faulty construction by municipal corporations of buildings for public purposes such as courts and gaols as distinguished from buildings used for municipal purposes, see s. 386.

376. A gaoler or an officer of the gaol shall not demand or receive any fee, perquisite, or other payment from any prisoner. 3 Edw. VII. c. 19, s. 505, *amended*. 3 & 4 Geo. V. c. 43, s. 376.

An indictment will lie for an offence against s. 376. See R. v. Mehan, *supra*.

377.—(1) The county council shall have the care of the court house and of all offices, rooms and grounds connected therewith, whether the court house is a separate building or is connected with the gaol, and the appointment of the caretakers thereof, and shall, from time to time, provide all necessary and proper accommodation, fuel, light, stationery, and furniture for the Provincial Courts of Justice, other than the Division Courts, and for the library of the Law Association of the county, such last mentioned accommodation to be provided in the court house, and proper offices, together with fuel,

light, stationery, and furniture, and, when certified by the Attorney-General to be necessary, with typewriting machines, for all officers connected with such Provincial Courts, other than the Crown Attorney of the City of Toronto. (*As to Division Courts, see R. S. O. 1914 c. 63, s. 13 (1).*

(2) The council of the Corporation of the City of Toronto shall provide proper offices, with fuel, light, stationery, and furniture for the Crown Attorney of the city. 3 Edw. VII. c. 19, s. 506, *redrafted.*

(3) A corporation shall not be liable to pay for furniture, unless it has been ordered by the council or by some person authorized by it so to do. 3 Edw. VII. c. 19, s. 513, *amended.* 3 & 4 Geo. V. c. 43, s. 377 (1-3).

Section 377.—In Rodd v. Essex, 1909, 19 O. L. R. 659, C.A., the plaintiff, a crown attorney, asked for a mandamus to compel the county under s. 506, now s. 377, to establish an office for him in Windsor, the county town being Sandwich, on the ground that it would be for the public convenience. Osler, J.A., said:—

"The duty of the county council is prescribed by s. 506 (1) of the Consolidated Municipal Act, 1903, by which they are bound, subject to certain exceptions, to provide proper offices, together with fuel, light, stationery, and furniture, for all offices connected with the Courts of Justice. The Crown Attorney is an officer, within the meaning of this section, for whom the county council is bound to provide offices and accommodation: Lees v. County of Carleton, 33 U. C. R. 409. Nothing in the section expressly says where the offices are to be provided, and the Crown Attorneys Act is equally silent on the subject. The court house must be in the county town, and the Courts are held and housed there, and offices and rooms connected with the court house are spoken of as offices of which the county council is to have the care.

"It may appear from s. 10 of the Jurors' Act, 9 Edw. VII. c. 34 (R. S. O. c. 61, s. 13), that the office of the Clerk of the Peace is not necessarily in the court house, but may be elsewhere in the county town, and it must be manifest to every one that in ordinary circumstances the county town, and *prima facie* the court house there, is the natural and reasonable seat for all offices connected with the Courts and the administration of justice, other than Division Courts, considering the duties which the holders of such offices have to perform.

"I see no authority for saying that the Crown Attorney or any other officer connected with the Courts of Justice can compel the county council to provide offices in Windsor. Any inference to be drawn from legislation is opposed to such a contention. The Clerk of the County Court, the Deputy Clerk of the Crown, and the Registrar of the Surrogate Court, in each county, is required by law to keep, or hold, his office in the court house or at some convenient place in the county town, but in the case of the county of Essex it is further provided that, subject to such arrangements as the county council assent to and to the approval of the Lieutenant-Governor in Council, each of the before-mentioned officers may keep 'an' office at some convenient place in the City of Windsor: R. S. O. 1897, c. 51, s. 55, s. 156; c. 55, s. 7; and c. 59, s. 13 (1). There is no such provision in the case of the Crown Attorney; and, though there is also no positive requirement that the office shall be kept in the court house or in the county town, the only consequence is that, in the absence of authority to the county council to acquire property in the City of Windsor, or to

assent to arrangements by the holder of the office to maintain or keep 'an' office there, the control rests in the discretion of the council, who may provide the proper office in the court house, the natural place for it under ordinary conditions—and the Legislature has not, in the case of this particular office, contemplated extraordinary ones—or elsewhere in the county town. I do not see what power the Courts have to declare that the office shall be established or arrangements made for it in Windsor, simply because the tide of business life has flowed away from Sandwich, where the county buildings are and in which in other counties this and other offices are provided for. If in this respect the discretion of the council is to be subject to control, it is matter for legislation, not for the Courts.

"Whether or not the county council has power to acquire land or property for an office in the City of Windsor is a question not now necessary to be considered."

What must be Furnished by Council.—In Re Local Offices of the High Court, 1906, 12 O. L. R. 16, was an application to compel the county council of Carleton to furnish the office of the local master with a certain legal work. Boyd, C., thus discussed the duty of the council under s. 506, now 377:—

"By the Municipal Act, 3 Edw. VII. c. 19, s. 506 (O.), the county council is to provide proper offices (together with fuel, light, stationery, and furniture) for all offices connected with courts of justice. Under this class will fall the office of the local Master in Chancery.

"The question is raised whether under this clause of the statute there is any obligation resting on the municipality to provide for the use of the Master and as part of the furnishing of his office a copy of Holmested and Langton's Judicature Act and Rules. It is intended, I suppose, that the last edition should be furnished, and it is put on the ground that this book of reference is a 'practical necessity,' in connection with the administration of justice, for the local officer.

"It does not fall within the words of the Act; but some latitude of construction is invoked, such as appears in Newsome v. County of Oxford (1895), 28 O. R. 442. I had occasion to refer to that case in Mitchell v. Corporation of Pembroke (1899), 31 O. R. 348, 357. The word 'furniture' was held to cover writing and blotting paper, envelopes, printed forms and other articles of stationery. These are, no doubt, required physically for the use of the office and the discharge of business therein.

"But I have difficulty in extending any of the terms used to law books or text books. Whatever may be said in favor of supplying the current statutes and Rules of Court to the Master's offices, as to volumes of commentaries on them, that is another question. The same reason for supplying annotated treatises to the Master's office would carry the necessity to the supply of the reports also which are referred to in the notes, and would therefore practically include a 'law library' in the furniture of the office.

"Books, no doubt, are for the furnishing and entertainment of the mind, but are thus contrasted with the furniture of an office, which is for use, though it may not be for ornament. And this distinction has obtained in the cases under wills and other instruments between books and furniture: see Bridgman v. Dove (1744), 3 Atk. 201, followed in Kelly v. Powlett (1762), Amb. 605. If, besides the word 'furniture' the word 'effects' is used, it has been held that books might be included: Cole v. Fitzgerald (1827), 3 Russ. 301, 303. See Cremorne v. Antrobus (1828), 5 Russ. 312 at p. 321, last paragraph."

378. The care of the gaol or court house of a city shall be regulated by by-law of its council. 3 Edw. VII. c. 19, s. 507, *redrafted.*

Costs and Expenses of Court Houses and Gaols.

379.—(1) A city or a separated town shall, as part of the county for judicial purposes, so long as the county court house or gaol is also that of the city or separated town, bear and pay its just share or proportion of all charges and expenses from time to time incurred for the purposes mentioned in section 23 of The Registry Act, and in erecting, enlarging, improving, repairing or maintaining such court house, gaol, or house of correction, and of their proper lighting, cleaning, and heating; of drafting, selecting, enrolling and paying jurors; in providing the accommodation and other matters mentioned in sub-section 1 of section 377, and of all other charges relating to the administration of justice, except such as the county is entitled to be repaid by the province and except charges connected with coroners' inquests and constables' fees and disbursements. R. S. O. 1897, c. 61, s. 156-158; 3 Edw. VII. c. 19, s. 509 (1); 8 Edw. VII. c. 48, s. 7, *redrafted.*

(2) The use of the court house for the sittings of a Division Court of a division which comprises the whole or a part of a city or separated town, may be taken into account in determining the amount to be paid by the city or town for the maintenance of the court house. 8 Edw. VII. c. 33, s. 49, *redrafted.*

(3) If the council of the city or separated town and the council of the county are unable to agree as to the amount to be paid by the city or town, the same shall be determined by arbitration. 3 Edw. VII. c. 19, s. 509 (2), *redrafted.* 3 & 4 Geo. V. c. 43, s. 379 (1-3).

Payment by City United to County for Judicial Purposes for use of Court House.—In York v. Toronto, 22 C. P. 514, it was held that the city was not liable to pay the county any compensation for the use of the court house, the city being at the time united to the county for judicial purposes. In re Carleton and Ottawa, 1897, 24 A. R. 409; 27 S. C. R. 606, Osler, J.A., said:—

> "The user of the court house is something very different from that of the gaol, and speaking still of court houses erected before 1873, the Legislature, notwithstanding the decision in York v. Toronto, 21 C. P. 95, have made no provision for ascertaining how in the case of cities not judicially separated from their counties they can be said to make any user of them *qua* city, other than as they may happen to do so by holding some city court therein.
>
> "I can see nothing in the Act which would warrant the arbitrators in making a charge for user based upon cost of site, erection of buildings, and so on."

Reference to Arbitration must be by By-law.—A reference to be properly constituted must be by by-law appointing an arbitrator and defining the scope of the reference. Where an arbitration is between municipal corporations, as for example under ss. 379 (3) or 382, the by-laws should in identical terms define the scope of the reference. Re Carleton and Ottawa, 1897, 24 A. R. 409; 27 S. C. R. 606.

Maintenance of Prisoners.—Wentworth v. Hamilton, 1874, 34 U. C. R. 585. Re St. Catharines and Lincoln, 46 U. C. R. 425.

Action by County to Recover from City its Share of Expenses.—Apparently an action will lie though the means of making it exigible at the time at least are wanting. This would be in case the amount was settled, otherwise arbitration would be necessary. Wentworth v. Hamilton, 1874, 34 U. C. R. 585; McDougall v. Windsor, 1900, 27 A. R. 566 at 578.

379.—(4) The council of a county and of a city or separated town situate in the county may agree:

(*a*) To acquire land within the county town for the purpose of erecting thereon buildings for the joint use of the county and city or town, for municipal and judicial purposes;

(*b*) For the erection, maintenance, use, management, and control of such buildings;

(*c*) For fixing the amount which each corporation shall pay or contribute for such purposes;

(*d*) For the subsequent disposition of such land and buildings, and of any insurance or other money that may be received in respect thereof;

and may pass all such by-laws as may from time to time be necessary for acquiring the land, and carrying out the agreement. 3 Edw. VII. c. 19, s. 509 (3) *amended.* 3 & 4 Geo. V. c. 43, s. 379 (4).

[*Note.—First part of section 510 struck out as being covered by section 379. Last part covered by section 38 (6).*]

[*Note.—As to payment of expenses of shorthand writer and interpreter, see The County Judges Act, R. S. O. 1914, c. 58, ss. 18, 19.*]

As to payment by city or separated town of proportion of certain expenses under The Registry Act, see that Act. R. S. O. 1914, c. 124, s. 8.

380. Where the court house, gaol or registry office was erected before the city or town ceased to be part of

the county for municipal purposes the arbitrators shall take into account in determining the amount to be paid by the city or town the value of the respective interests of the county and of the city or town in such building and the extent of the use of it by them respectively. *New.* 3 & 4 Geo. V. c. 43, s. 380; 9 Geo. V. c. 46, s. 11.

381. The corporation of a county, city, or separated town, shall have, respectively, from time to time, insurable interests in the county court house and gaol in the proportions of the aggregate amounts which they shall have contributed, respectively, to the costs, charges and expenses of erecting, enlarging, improving and repairing said buildings, and in the contents and furniture of the county court house and gaol in the proportions of the aggregate amounts which they shall have contributed respectively, to the costs, charges and expenses of providing said contents and furniture. 8 Geo. V. c. 32, s. 5.

382. Where a city is required to contribute to the cost of erecting, enlarging or improving a county court house or gaol, such city shall not be bound to pay for any part of the expenditure, unless it has been concurred in by its council, or, if the council does not concur, the propriety and the amount of the expenditure has been determined by arbitration. 3 Edw. VII. c. 19, s. 515, *part.* 3 & 4 Geo. V. c. 43, s. 382.

383. The site of the court house or gaol shall be determined by arbitration, unless the councils of the county and city agree as to the site. 3 Edw. VII. c. 19, s. 515, *part, redrafted.* 3 & 4 Geo. V. c. 43, s. 383.

384.—(1) A city which uses the county court house or gaol, and a separated town shall pay to the county such compensation therefor, and for the care and maintenance of prisoners, as may be mutually agreed upon, or determined by arbitration.

(2) In determining the compensation to be paid for the care and maintenance of prisoners, the arbitrators

shall, so far as they deem the same just and reasonable, take into consideration the original cost of the site and erection of the gaol and gaol buildings and of repairs and insurance, so far as they have been borne by one or other of the municipalities, and the cost of maintaining and supporting the prisoners, as well as the salaries of all officers and servants connected therewith. 3 Edw. VII. c. 19, s. 516, *amended.* 3 & 4 Geo. V. c. 43, s. 384 (1-2).

385. After five years from the time when the amount of the compensation was agreed upon or determined by arbitration, either under section 379 or after a direction by the Lieutenant-Governor in Council under the authority of this section, the Lieutenant-Governor in Council, upon the application of either corporation may direct that the existing arrangement shall cease after a day to be named and that the compensation to be paid from that day shall be settled by agreement or be determined by arbitration. 3 Edw. VII. c. 19, s. 517, *redrafted.* 3 & 4 Geo. V. c. 43, s. 385.

386.—(1) The council of every local municipality may establish, maintain, and regulate lock-up houses for the detention and imprisonment of persons sentenced to imprisonment therein for not more than ten days, and of persons detained for examination on a charge of having committed any offence, or for transfer to any common gaol for trial, or in the execution of any sentence; and such persons may be lawfully received and so detained in the lock-up.

(2) Two or more local municipalities may unite in establishing, maintaining and regulating a lock-up house, and such lock-up house shall be deemed to be the lock-up house of each of them. 3 Edw. VII. c. 19, s. 520, *amended.*

(3) Every lock-up house shall be placed in the charge of a constable appointed for that purpose.

(4) The council may provide for and pay the salary or other remuneration of the constable in charge of a lock-up. *New.* 3 & 4 Geo. V. c. 43, s. 386 (1-4).

Duty to Maintain and Repair County Court Houses and Gaols.—Section 372 (1) and (3) impose an imperative statutory duty on county councils to maintain county court houses and gaols. Maintain has the same meaning as repair. See s. 460. Councils of local municipalities under s. 386 (1) may establish and maintain lock-up houses. There is no statutory action given to persons who suffer injury by reason of default in the performance of their duties. The liability of the corporation in cases of mere non-feasance will therefore depend on general principles. The non-liability apart from statute, for non-feasance in highway cases, is an exception. The rule which is to be applied has been stated by Duff, J., in McPhalen v. Vancouver, 1911, 45 S. C. R. 194, as follows:—

> "Where a municipal corporation acting under powers conferred by the statute creating it, constructs a work for use of the public, and invites the public to use it, the corporation having the ownership of and full authority to control the work, and to regulate the use of it by the public; and the statute creating the corporation in express terms imposes upon it the legal duty and at the same time gives it full authority to take all the necessary measures to prevent that work becoming a danger to the public making use of it in the exercise of their right, and owing to the unreasonable neglect of the corporation to perform this duty the work does become a public nuisance, then, in order to resist successfully a claim for reparation by one of the public who has suffered a personal injury in consequence of the existence of the nuisance (while properly using the work in the exercise of the public right), the corporation must shew something in the statute indicating an intention on the part of the legislature that the remedy by action shall not be available in such circumstances."
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> But see Hawkeshaw v. Dalhousie, 7 U. C. R. 590.

Liability of Municipalities to Persons confined in Lock-up houses.—Local municipalities may establish lock-up houses and appoint constables to take charge of them. It frequently happens that the constable in charge, besides being in that capacity a public officer to whom the doctrine *respondeat superior* does not apply, is in another capacity merely a servant of the municipality acting as caretaker of the town hall, pound-keeper, pathmaster or otherwise. When a person confined in a lock-up is injured by reason of the negligence of a person holding such a dual position, the question of the responsibility of the municipality to pay damages presents difficulty. Nettleton v. Prescott, 1907, 16 O. L. R. 538; 1910, 21 O. L. R. 561, C. A., was such a case. The action was for damages sustained by the plaintiff while confined in a lock-up established under s. 520 of the then Act, caused by the negligence of the corporation or its servants, in omitting to keep the lock-up reasonably warm. The Divisional Court, Mabee, J., dissenting, held that there was no liability on the ground that Lee, the constable in charge, was a public officer notwithstanding the fact that he was caretaker of the building as well as constable, and this was upheld by the Court of Appeal. Mabee, J., did not proceed on a different view of the law but on the view that the corporation was responsible for the conduct of Lee as janitor of the building in which the lock-up was situated. Garrow, J.A., thus dealt with the difficulty:—

> "What creates the difficulty, the only one, I think, in this case, is the circumstance that Lee, in addition to being janitor, was also a constable, and appears to have acted as the deputy of the chief constable, Mooney, who was the keeper of the lock-up.
>
> "In the statement of claim Mooney and Lee are bracketed together, the one as chief constable, the other as assistant constable, and both as servants of the defendants. It was Lee who first told the plaintiff that Mooney had a warrant for his arrest, and Lee, according to the plaintiff's evidence, had a key of the part of the prison in which the plaintiff was confined, and 'came down once or twice to see me, to see how I was getting on,' which was no part of his duty, or even, one would think, of his opportunities, if he was acting merely as janitor or caretaker. Under these circumstances, the plaintiff cannot complain if he is held to the language of his pleading, and Lee treated, as indeed he seems to have been, not merely as the janitor of the building,

but the deputy of Mooney, the keeper of the lock-up. At the same time I am of the opinion that the result should not be otherwise even if Lee is to be regarded solely in his other character, as mere caretaker. The defendants did not cause the imprisonment. They had supplied a proper enough prison, with appliances to heat it sufficiently. No one disputes that. And it was the duty of the keeper of the prison to see that these appliances were, if necessary, used. Mooney visited the prisoner as late as midnight of the night in question, and was, therefore, in a position to see and to know whether the prison was or was not sufficiently heated, having regard to the temperature of the night. And, if he failed in his duty, the result cannot, under the circumstances, be made to fall upon the defendants."

In McKenzie v. Chilliwack, 1912, A. C. 886, 82 L. J. P. C. 22, the facts were:—

"Chilliwack is a small rural municipality. The lock-up which the respondents provided or used was a wooden cell, part of the Courthouse buildings, which were situate about the centre of the little town. In May, 1906, the respondents appointed one Calbeck to be 'chief of police, sanitary inspector, pathmaster, and pound-keeper.' He was the only constable in the municipality. As constable he arrested the deceased man on October 27th, 1906, for being drunk and disorderly, and placed him in the cell about 6 o'clock p.m. He searched him and took away the matches found upon him. About an hour later he arrested another man; he also searched him and deprived him of matches and placed him in the same cell. Calbeck was then in the town attending to some of his humble but useful duties; but he came on the scene of the fire before the fire company arrived. Between the time of the arrest of the deceased, about 6 o'clock, and a quarter-past 9 o'clock, when he went to the fire, Calbeck appears to have been at the cell 4 times, and he was able to attend there and to look round within about half an hour of the occurrence of the fire.

"The evidence went to shew that the fire originated in the cell in which the arrested men were. There was no stove, or fire or furnace alight in or near the cell."

Sir Samuel Evans in delivering the opinion of the Judicial Committee, said:—

"Counsel for the plaintiffs, who argued at the Bar before their Lordships, and who also conducted the case in the British Columbian Courts, did not contend that the defendants' servant had been guilty of any negligence. His case was that the defendants were directly guilty because they employed the person who arrested the deceased and who was in charge of the cell to perform other duties also, which made it impossible for him to be in constant attendance at the lock-up. Their Lordships are willing to assume for the purposes of this appeal (but without pronouncing any decision on the point) that the respondents are responsible for the appointment of the gaoler for the lock-up, and that if the appointment was not fitly or carefully made they would be liable for any reasonably probable consequence."

His Lordship then stated the facts as given above, and applying Wakelin v. London and South-Western Railway, 1886, 12 A. C. 41; 56 L. J. Q. B. 229, held that the plaintiff had not established negligence and then added:—

"It was not unreasonable, in their Lordships' view, for the respondents in the small rural municipality of Chilliwack to allot to Calbeck the other duties to some of which he attended on the evening of the fire; nor was it the duty of the respondents in the circumstances to keep Calbeck or any other person constantly at the lock-up. No breach of duty on their part caused or contributed to the death of the deceased. Upon the facts proved at the trial there was no evidence whatsoever of negligence on the respondents' part fit to be left to the jury."

387.—(1) If a county town has not a lock-up house, approved by the Inspector of Prisons and Public Charities, the county gaol may be used for the purposes of a lock-up house, and if so used the corporation of the county town shall pay yearly to the county treasurer for the use of the county a reasonable sum for the use of the gaol as a lock-up house, and for the expenses incurred by such use; and, in case of disagreement, the amount to be paid to the county shall be determined by arbitration.

(2) This section shall not apply to cities or separated town. 3 Edw. VII. c. 19, s. 521, *amended.* 3 & 4 Geo. V. c. 43, s. 387 (1-2).

388. The cost of conveying a prisoner to, and of keeping him in a lock-up house, shall be defrayed in the same manner as the expense of conveying a prisoner to and keeping him in a common gaol of the county. 3 Edw. VII. c. 19, s. 523. 3 & 4 Geo. V. c. 43, s. 388.

Section 409 of 29-30 V. c. 51 (See 36 V. c. 48, s. 367, R. S. O. 1877, c. 174, s. 449, 46 V. c. 18, s. 476 and R. S. C. 1896, Sched. B.), which is not repealed, is as follows:—

"409. Any Justice of the Peace of the county may direct by warrant in writing under his hand and seal, the confinement in a lock-up house within his county, for a period not exceeding two days, of any person charged on oath with a criminal offence, whom it may be necessary to detain until examined, and either dismissed or fully committed for trial to the common gaol, and until such person may be conveyed to such gaol; also the confinement in such lock-up house, not exceeding twenty-four hours, of any person found in a public street or highway in a state of intoxication or any person convicted of desecrating the Sabbath; and generally may commit to a lock-up house instead of the common gaol or other house of correction, any person convicted on view of the justice, or summarily convicted before any justice or justices of the peace of any offence cognizable by him or them, and liable to imprisonment therefor under any statute or municipal by-law. 29-30 V. c. 51, s. 409.

Inebriate Asylums.

389.—(1) The council of a city having a population of not less than 50,000 may:

(*a*) Establish, erect and maintain within the city an institution for the reclamation and cure of habitual drunkards;

(*b*) Provide that the Mayor, Police Magistrate, or any Justice of the Peace having jurisdiction in the municipality, may send or commit to such institution an habitual drunkard, with or without hard labour.

(2) Sections 62 to 70 of The Private Sanitarium Act shall apply to such institution. 3 Edw. VII. c. 19, s. 529, *redrafted*. 3 & 4 Geo. V. c. 43, s. 389 (1-2).

The Private Sanitarium Act.—R. S. O. 1914, c. 296, ss. 62 to 70, provides for the admission of alcoholic habituates voluntarily or by a Judge on the petition of friends, and for their discharge by the medical superintendent.

Committal to Industrial Farm.

390. Where a person is convicted of being found drunk or disorderly in a *public place* contrary to a municipal by-law, within three months after a prior conviction for a like offence, he may be committed by the Police Magistrate or Justice of the Peace before whom he is convicted, to an Industrial Farm of the locality in which the order for committal is made, for an indeterminate period not exceeding two years. 2 Geo. V. c. 17, s. 34 (2). 3 & 4 Geo. V. c. 43, s. 390.

Public Place.—An hotel is not a public place: R. v. Cooke, 1912, 27 O. L. R. 406. R. v. Keenan, 1913, 28 O. L. R. 441, was an unsucessful attempt to get a person committed under s. 390, discharged. See also R. v. Riddell, 1912, 22 O. W. R. 847, 3 O. W. N. 1628.

PART XIX.

POLLING SUBDIVISIONS AND POLLING PLACES.

391. By-laws may be passed by the councils of local municipalities for dividing the wards of the city or town or the village or township into two or more convenient polling subdivisions, and for establishing polling places therein. 3 Edw. VII. c. 19, s. 535.

(*a*) Except in cities, every polling subdivision shall have well-defined boundaries, such as streets, sidelines, concession lines or the like, and shall be formed in the most convenient manner, and so that the number of electors in each polling subdivision shall be as nearly as possible equal.

(*b*) Such polling subdivisions shall be made or varied whenever the number of the electors in any polling subdivision in a city having a population of not less than 100,000 exceeds 200, and in any other municipality 300, in such manner that the number in any polling subdivision shall not exceed 300. 3 Edw. VII. c. 19, s. 536 (1); 5 Edw. VII. c. 22, s. 20.

(*c*) Where a municipality embraces parts of two or more electoral districts, a polling subdivision shall include territory in one electoral district only.

(*d*) Subject to clause (*f*), any alteration of polling subdivisions, or creation of new polling subdivisions, shall be made before the publication of the voters' lists.

(*e*) Whenever the clerk finds that the number of electors in a polling subdivision exceeds 200 in a city having a population of not less than 100,000, or 300 in any other municipality, he shall notify the council of the fact.

(*f*) Where such alterations have not been made before the publication of the voters' lists, they shall be made forthwith thereafter, but shall not take effect until the next voters' lists are being prepared.

(*g*) Whenever the council is of the opinion that the convenience of the electors will be thereby promoted the council may make a redivision into polling subdivisions, and such redivision shall be made in conformity with this section.

(*h*) The number of electors shall be determined by the last revised assessment roll of the municipality.

(*i*) The polling subdivisions shall be numbered consecutively, and a copy of the by-law, by which they are established, certified under the seal of the corporation and the hand of the clerk to be a true copy, shall forthwith after the passing thereof, be filed by the clerk in the office of the Clerk of the Peace of the county or district in which the municipality is situate.

(*j*) Any 5 electors may at any time within two months after such filing appeal in respect of any polling subdivision to the Judge of the county or district Court of the county or district, who shall have power to amend the by-law so as to make it conform with the provisions of this section, and the procedure on the appeal shall be the same as on a motion to quash a by-law, except that no recognizance or deposit shall be required.

(*k*) An election shall not be irregular or void or voidable for the reason that a polling subdivision which contains more than the prescribed number of electors has not been divided, if in the case of a city having a population of not less than 100,000 it does not contain more than 300, or in the case of any other municipality more than 400 electors. 3 Edw. VII. c. 19, s. 536 (2-10, 12), *redrafted.*

(*l*) Where a polling subdivision in a city, having a population of not less than 100,000, contains more than 300 electors, or a polling subdivision in any other local municipality contains more than 400 electors, or where a local municipality is not subdivided into polling subdivisions the council shall for the purpose of an election about to be held or a vote about to be taken subdivide it into as many subdivisions as may be necessary to provide in the case of such a city one for every 200 electors, and in the case of any other local municipality one for every 300 electors. *New.* 3 & 4 Geo. V. c. 43, s. 391.

392. By-laws may be passed by the councils of urban municipalities for uniting for the purpose of any municipal election, including the election of school trustees, or the voting on a by-law or on a question submitted to the electors, any two adjoining polling subdivisions with one polling place therefor. 3 Edw. VII. c. 19, s. 536 (10), *part amended.* 3 & 4 Geo. V. c. 43, s. 392.

393. By-laws may be passed by the councils of cities for providing that a public school house or a public building belonging to or controlled by the corporation in, or conveniently near to a polling subdivision, shall be used as the polling place of such subdivision. 3 Edw. VII. c. 19, s. 536 (13); 8 Edw. VII. c. 48, s. 8.

(*a*) Where a school house is so used the council shall forthwith pay to the Board of Education a sum sufficient to cover any damage done to it and any expense for cleaning or otherwise caused by such use.

(*b*) No school house shall be so used without the consent of the Board of Education.

(*c*) The board of commissioners of police or the chief constable shall cause a constable to attend at each polling place in a school house or public building in which an election is being held, there to perform the duties required by this Act of a constable appointed by the returning officer. 3

Edw. VII. c. 19, s. 536 (1416), *amended.* 3 & 4 Geo. V. c. 43, s. 393, *amended.* 7 Geo. V. c. 42, s. 11.

394. Where a polling place has been appointed for holding an election, or for taking a vote in a local municipality, and it is afterwards found that the building cannot be obtained, or is unsuitable for the purpose, the clerk may select in lieu of it the nearest suitable building which is available, and he shall post up and keep posted up a notice on the building named in the by-law, and in two other conspicuous places near by, directing the voters to the place so selected. 3 Edw. VII. c. 19, s. 536 (11), *amended.* 3 & 4 Geo. V. c. 43, s. 394.

In re Huson and South Norwich, 1892, 19 A. R. 343, the by-law fixing the polling places described one as being at or near the village of Hawtrey, and another as being at or near Spencer's Mills, lot 29, concession 11, South Norwich. The village of Hawtrey was a very small place, and the poll was held in the village at a place quite close to the place at which the poll in the next preceding municipal election had been held, the house itself at which the poll had been held having been since that time removed and the polling place at Spencer's Mills was in the 10th concession and not the 11th. All proceedings had been taken in good faith, and there was no proof that any person had been misled by the irregularities. The Court of Appeal in the exercise of its discretionary power refused to quash the by-law. See also Salter v. Beckwith, 1902, 4 O. L. R. 51.

In re Duncan and Midland, 1907, 16 O. L. R. 132, C. A., the voters' list for one sub-division contained more than 300, but not more than 400 names, and it was argued that under ss. 535 and 536 (now as amended 391), that this was a fatal error. Riddell, J., in the Divisional Court, considered that s. 536 (12), now 391 (*k*), got over the difficulty, and at the worst s. 204, now 150, was applicable and the by-law was upheld.

In re Hickey v. Orillia, 1908, 17 O. L. R. 317, an application was made to quash a local option by-law, and among other objections it was shown that the corporation was divided into three wards and that in each of these wards there were the names of more than 400 voters upon the list contrary to the provisions of the Act. Meredith, C.J.C.P., after referring to ss. 535 and 536, now as amended 391, pointed out that 535 was not one of the sections contained in the part which deals with municipal elections, although it does deal with municipal elections and enables the council to make provision therefor. He pointed out that as the council were under an imperative duty to submit the by-law, their failure to have previously established polling sub-divisions as required by the Act, would make it impossible for the directions of the statute as to the submitting of local option by-laws to be complied with, and he therefore held that the section was not applicable and refused to quash the by-law. The Divisional Court reversed this decision and quashed the by-law on other grounds. Anglin and Riddell, JJ., agreed with the views of the Chief Justice as to the applicability of the sections under the circumstances.

In re Sturmer and Beaverton, 1911, 25 O. L. R. 566, a motion to quash a local option by-law was based upon the ground with others, that the by-law dividing the municipality was not filed as required by then s. 536 (9), now s. 391 (*i*). Middleton, J., disposed of this ground as follows:—

> "There was a *de facto* division. The by-law was operative as soon as passed, and cannot be attacked in this collateral way.
>
> "Those charged with the preparation of voters' lists must assume things to be *de jure* as they are *de facto*, and cannot constitute themselves a general inquest to determine the validity of all municipal or

official acts leading up to the elections. They cannot ascertain the facts, and may not know the law; and only confusion could arise if they were not allowed to assume the validity of all official acts not directly attacked."

In Carr v. North Bay, 1913, 28 O. L. R. 623, the plaintiff brought an action on behalf of himself and other electors for a declaration that a local option by-law had not been legally submitted and voted on and that the vote thereon was not a bar to proceeding with the submission of a similar by-law. One objection taken was that the council had not complied with the requirements of s. 536, now s. 391. Boyd, C., in giving reasons for dismissing the action, dealt with the objection in question as follows:—

"The next objection on the record is, that the corporation defendant failed to provide a sufficient number of polling sub-divisions, as required by 536 of the Municipal Act, and that about half the area of the town had not been included or erected into one or more polling sub-divisions, as so required. And a further objection in the same line, that only five polling sub-divisions had been constituted at the date of polling, and that for the purposes of the election the town did, by by-law 347, name and constitute eleven polling places without in any way, 'by by-law or otherwise,' making known the territory or area for which each of the said polling stations was constituted.

"The reference in the pleadings to 'half the area of the town' refers to an accession of two pieces of adjoining land, consisting of 1,214 acres and 92 acres, which, by public proclamation of the 23rd April, 1910, were annexed by the Government to the municipality of North Bay. Before that time the town had been divided by by-law of the 5th February, 1905, into five polling subdivisions, embracing the whole of the existing area.

"When the addition of territory came in 1910, no action was taken formally by the council to constitute another subdivision of this new area. But the matter was solved practically in this way. The publication of the places of voting, eleven in number, made known to the electors where to cast their votes, and these places were allocated by the reference to the then well-known existing polling subdivisions (five in number), thus: Polling subdivision I. had polling places 1 and 2; polling subdivision II. had numbers 3 and 4; polling subdivision III. had numbers 5 and 6; polling subdivision IV. had number 7; polling subdivision V. had numbers 8 and 9. That is, up to this point, nine polling places had been provided for the area as it existed before the new parts were added. The by-law provides for the new part of the last two places, numbers 10 and 11. The voters' list for the year 1911, which was published to the voters, as required by statute, specifies the area of each of the five duly constituted subdivisions, and then, at p. 83, deals with the new part thus: 'Polling subdivision number VI., comprising that portion of the township of Widdifield recently annexed to the town of North Bay.'

"Putting all this information together, it cannot be doubted that the electors were well advised of where they could vote—the particular locality was designated, so that no mistakes are or were proved. There is no evidence that any voter was misled or in ignorance of where he could vote, and the counter-evidence is, that an unusually large vote was polled—relatively as many in the new area as in the older portions of the town. And the town clerk swears that he considers the voting accommodation quite sufficient for the whole place, including both parts of the annex. The new subdivision was not, it is true, defined by by-law; but, when the voters' list for 1911 was prepared by the clerk, including this new area as subdivision VI (whatever his authority was), it was acted on by all concerned or interested, Judge, officials and voters, without objection. The main object of all the sections is to provide sufficient and well-defined accommodation for all voters, and that has been accomplished in this election, so that no possible better result could have been obtained though all the directions of the statute had been complied with *au pied de la lettre*. Much absence of form may be forgiven when the essentials are right."

PART XX.

Powers of Municipal Councils.

Bonuses.

[Dillon, in his work on Municipal Corporations, devotes considerable space to a discussion of the many demerits the system of granting aid to manufactures and railways undoubtedly possesses. Reference should be made particularly to sections 313, *et seq.;* 900, *et seq.,* and 1367, *et seq.* The Municipal Amendment Act, 1892 (Ont.), repealed the following section—[479 (10) of R. S. O. 1887, c. 184]—based on 34 V. c. 30. s. 6:—

"The council of every county, township, city, town or village may pass by-laws:—

(5) For granting aid by way of bonus for the promotion of manufactures within its limits, by granting such sum or sums of money to such person or body corporate and in respect of such branch of industry as the said municipality may determine upon; and to pay such sum, either in one sum or in an annual or other periodical payments, with or without interest, and subject to such terms, conditions and restrictions as the said municipality may deem expedient, and may take security therefor: provided, however, that no such by-law shall be passed until the assent of the electors has been obtained, in conformity with the provisions of this Act in respect of by-laws for creating debts. Any municipality granting such aid, may take and receive of and from such person or body corporate that may receive any such aid, security for the compliance with the terms and conditions upon which such aid may be given."

Biggar, in his Municipal Manual published in 1900, said of this repeal that it had been "discovered (after nearly twenty years of experience) that attempts to nourish manufacturing industries by means of the artificial stimulus of bonuses taken from the pockets of the local taxpayers usually produce an unhealthy condition of the body politic, and end in disappointment and loss."

This repeal, however, still left many bonus sections in the Act as will appear by the notes to the following sections. See particularly for example the sections set out in the notes to s. 396, p. 657, *post.*

And a provision similar to the above section was again passed in 1900. See now s. 395 (*a*).

For practical purposes the state of affairs is described by Anglin, J., in In re Inglis and the Corporation of the City of Toronto (1905), 9 O. L. R. 562, at p. 568 (and see p. 646, *post*).

And see the remarks of Idington, J., in the Stamford case, noted on p. 654, *post*.

It should be observed here that there are in some provinces (see p. 663) express statutory prohibitions of bonusing.

What is a Bonus?—This is defined in s. 395 following, and reference may also be made to the case of Keay v. Regina (1912), 22 W. L. R. 185, in which Wetmore, J., said:—"I am of the opinion that in attempting to pass the by-law in question, the city council were proceeding to deal with the property in question without authority of law, and by that I mean without taking the steps provided by the 'City Act' in such cases, that they were in effect seeking to bonus a company for the purpose of inducing it to construct an hotel on the land in question. It seems to me quite clear that a bonus may be given just as well by transfer of land, either without consideration or for a totally inadequate consideration, as by payment of a specified sum of money or by exemption from taxation. The question of the propriety of a municipal corporation bonusing in respect to the introduction of commercial or industrial undertakings has always been one upon which the minds of people are very much divided. The Legislature, therefore, I assume influenced to some extent at any rate by that fact, enacted by s. 185 of the 'City Act,' c. 84, R. S. S." [See now s. 234, p. 665.]

See also United Building Co. v. Vancouver, p. 638, *post;* Real Estate Investment Co. v. Richmond (1903), 23 Que. S. C. 151.

How the Courts Supervise Bonusing Powers.—The general rules as to the powers of municipal councils under these statutes, and the attitude of the Courts as to the exercise of such powers, are found in the cases immediately following:—

In Parsons v. City of London (1912), 25 O. L. R. 172, Middleton, J., said, at p. 179:—"Municipal councils are now recognized as now occupying a far more important position. They now have important legislative as well as administrative functions, and the trend of decision is to recognize the supremacy of the council, both in the legislative and in the administrative field, so long as the act done is within the ambit of its jurisdiction, and not *ultra vires*. If the 'powers above' to which the municipal council is to answer are the civil Courts, then the Courts have been steadily abdicating their jurisdiction and declining to sit as an upper chamber of the municipal council, and to interfere with the action of people

through their elective representatives, unless fraud is shewn. If the council seeks to go beyond the limited authority given by the supreme legislature of the province, it is then the duty of the Courts to confine its action to the limits of the delegated authority;" and see the remarks of Falconbridge, C.J.K.B., *ib.* p. 443. [Reference to Bowes v. City of Toronto (1858), 11 Moo. P. C. 463, and to Phillips v. City of Belleville (1905), 9 O. L. R. 732.]

This case was referred to in the case of Norfolk v. Roberts (1913), 28 O. L. R. 593, where it was laid down: "In the case of a corporation 'the broad rule is that, with the exception of *ultra vires* transactions, whatever concerns a corporation as such can be dealt with by the majority of the corporators, or the governing body if they have vested in them the capacity to exercise the powers of the corporation:' Brice on Ultra Vires, 3rd Ed., p. 731. To this rule there are exceptions, but none of them applies to such a case as is put forward by the respondent in the case at bar."

"The trend of modern judicial decisions is to depart from the practice of former times of applying to bodies of a public representative character, entrusted by parliament with delegated authority, the rules which were applied in the case of trading corporations, and to recognize the right of such bodies, while acting *bona fide* and within the limit of the powers conferred upon them by the legislature, to transact their business without interference by the Courts: Slattery v. Naylor, 13 App. Cas. 446 (1888); Kruse v. Johnson (1898), 2 Q. B. 91; Taylor v. Sutters (1900), 1 Ch. 10."

"It is, in my judgment, erroneous to treat either the corporation or its council as trustees for the ratepayers They are, no doubt, in the sense in which the Sovereign is spoken of as a trustee for the people, trustees for the inhabitants of the municipality; but they are, in my opinion, in no other sense trustees, but a branch of the civil government of the province; and, within the limits of the powers committed to them by the legislature, at all events in the absence of fraud, should be free from interference by the Courts.

"I entirely agree with what was said by Middleton, J., in Parsons v. City of London, 25 O. L. R. 172 (1912), and by the learned Chief Justice of the King's Bench in delivering the judgment of the Divisional Court, 1912, *ib.* 442, as to the powers of municipal councils."

"It would be an intolerable state of things if, whenever a council, acting in good faith, has determined that it ought not to enforce a claim which technically it may have against some one alleged to be indebted to it, a ratepayer may bring the corporation and the alleged debtor into Court in order that it may be declared that the indebtedness exists, and that the corporation wrongfully refrains from collecting it; and what good would result from such a declaration being made? . . . The possession of such a power by the Courts would mean practically that the body which has been entrusted by the legislature with the management of the affairs of the municipality is to be subject, at the instance of a single ratepayer, to be brought into Court to answer as to why this debt or that debt due to the corporation is not collected, and to have its discretion as to the justice of enforcing payment of money technically due to it overruled by the Court."

" . . . According to the findings of the learned trial Judge, the appellants expended of their own money nearly $1,000 in putting down mains for supplying to their greenhouses the water for which the rates in question have been charged, and these mains have been used by the corporation for supplying water to others whose houses are on the line of the mains.

" There can be no manner of doubt, I think, that it was intended by the council, as well as by the appellants, that an allowance for this expenditure should be made to the appellants, by the reduction of the water rates for which they would be liable.

" Difficulty occurred in carrying out this arrangement owing to objections by the Mayor of 1904. He appears to have ruled that it would be illegal to fix the water rates at $200 per annum, as the water, fire and light committee had recommended.

" The learned trial Judge (Latchford, J.), appears to have thought that the Mayor's objection was that to fix a lower rate than that payable according to the tariff would be the granting of a bonus of the amount of the difference between the two rates, contrary to the bonus provisions of the Municipal Act.

" I can find nothing in the evidence to support that view, and the circumstances point to the conclusion that that was not the ground of the objection. . . . .

" This reduction in the water rates was in no sense a bonus. It was made for valuable consideration; and, whatever technical difficulties there might have been in compelling the corporation to implement its agreement because it was not authorized by by-law passed with the assent of the electors, I should be sorry, indeed, if the Court were bound to prevent the corporation from doing

justice by refraining from collecting the full rates which would have been payable by the appellants, according to the tariff.

"In my view, the Court is not bound to compel the corporation to exact 'the pound of flesh.'" Per Meredith, C.J.O., at pp. 602 to 605.

Similar views are expressed in In re United Buildings Ltd. and City of Vancouver (1913), 3 W. W. R. 908, where it was argued that a by-law which closed a portion of a lane and provided for the leasing to a certain company at a nominal rental of the portion so closed was a bonus by-law. Clement, J., said, at p. 909. "Under our system of municipal government it is the opinion of the city council which governs, and if I agreed entirely that the action of the city in this case was unwise and prejudicial to the public interest, I have no right to sit in judgment upon their opposite view. Jurisdiction conceded and honest action, that is an end of the matter so far as the Courts are concerned. The latest case I have seen on this subject is City of Montreal v. Beauvais (1909), 42 S. C. R. 211. . . . If I were to accede to this argument (that the by-law was a bonus by-law), every by-law, the enactment of which enured to the particular advantage of some individual over and above any general advantage to the public, would be a bonus by-law. A by-law for the purchase of any property by the city would be a bonus by-law in the eye of a willing vendor. In short, I can see no principle to prevent the city from making bargains and exercising their corporate powers to carry out such bargains, even if in the opinion of some people the city is not benefiting to as great an extent as the other party to the bargain. If they get what they honestly think is a good *quid pro quo* this Court has no right to call the other party's *quid pro quo* a bonus."

On appeal from Clement, J. (1913), 24 W. L. R. 825, and 25 W. L. R. 403, the Court, Macdonald, C.J.A., Irving, Martin and Galliher, JJ.A., was equally divided, Irving and Martin, JJ.A., being in favour of the by-law.

Macdonald, C.J.A., who would quash the by-law said, at p. 828, "The city cannot use its powers to compel one property-owner to submit to the invasion of his rights by another because it thinks the proposed change not unreasonable: In re Morton and City of St. Thomas, 6 A. R. 323 (1881); In re Peck and Town of Galt, 46 U. C. R. 211 (1881); Re Waterous and City of Brantford, 2 O. W. R. 897, 4 O. W. R. 355 (1903-4); Re Weir and City of Calgary, 7 W. L. R. 45 (1907); In re Inglis and City of Toronto, 9 O. L. R. 562 (1905)."

Irving, J., at p. 830, based his decision on a consideration of the rules laid down in Brice on Ultra Vires, 3rd Ed., p. 371, and Slattery v. Naylor, 13 App. Cas. 446 (1888), and referred to Haggerty v. City of Victoria, 4 B. C. R. 163 (1895).

Martin, J.A., whose judgment was affirmed by the Privy Council, discusses the above cases and Pells v. Boswell (1885), 9 O. R. 680; Scott v. Corporation of Tilsonburg (1886), 13 A. R. 233, 237, 249; In re Campbell and Village of Lanark (1893), 20 A. R. 372; Re Loiselle and Town of Red Deer (1907), 7 W. L. R. 42, and Attorney-General v. City of Toronto (1864), 10 Gr. 436.

The Privy Council upheld the views of Clement, J., and Irving, and Martin, JJ.A., and Lord Sumner reading the judgment of the Board—(1914) 28 W. L. R. 787; [19 D. L. R. 97—[1915] A. C. p. 345], said, at p. 793: "Where the competent legislature had imposed on a municipal corporation such a condition, either precedent or subsequent, to the exercise of its powers, as the sanction of a vote of the ratepayers, it is essential that no elastic construction should be placed upon a sub-section which would enable the local authority to evade the restrictions of the statute. (See In re Barclay and Township of Darlington, 12 U. C. R. 86, 92 (1854); per Sir J. B. Robinson, and Scott v. Corporation of Tilsonburg, 13 A. R. 233, 237 (1886-7), per Hagarty, C.J.) But, though the operation of a by-law benefits one or more persons more than others, it does not follow that by enacting it a corporation must be taken to "give any bonus," within the Municipal Act, 1906, s. 194; nor can a by-law be said to be outside the powers conferred by s. 125 of the Vancouver Act, 1900, merely because steps taken in the public interest are accompanied by benefit specifically accruing to private persons: (In re Inglis and City of Toronto, 9 O. L. R. 562, 1905). If no one could benefit by this by-law but the Hudson's Bay Company and the whole advantage to the public at large or to other members of the public, was to be found in the consideration moving from the Hudson's Bay Company to the corporation, the matter might well be otherwise. Here, however, the by-law was supported by a majority of property owners affected, who are not shown to have had any interest but that which consisted in the alteration of the lane itself, and there is uncontradicted evidence of a belief on the part of those or some of those enacting the by-law that the alteration in the lane was a public, though a local improvement, in facilitating the access of light. This last fact alone is enough to distinguish the cases of In re Peck and Town of Galt, 46 U.

C. R. 211 (1880); In re Morton and City of St. Thomas, 6 A. R. 323 (1880-1); Pells v. Boswell, 8 O. R. 680 (1885); and Re Waterous and City of Brantford, 2 O. W. R. 897 (1903), 4 O. W. R. 355 (1904) which are in some respects similar."

The Proper Procedure to Attack a Bonus By-law.—In City of London v. Town of Newmarket (1912). 3 O. W. N. 565, Middleton, J., held that an injunction should not be granted to restrain the passing of a (bonus) by-law, saying, p. 566, "I do not think that the Court has any right to interfere with the action of the municipal council at this stage." [It was argued that after the third reading the council were bound to pass it. See Canada Atlantic Railway Co. v. City of Ottawa, 12 S. C. R. 365 (1885), aliter: but see Re Dewar and Township of East Williams (1905), 10 O. L. R. 463]. "An injunction is an extraordinary remedy, and ought not to be resorted to where there is an appropriate remedy in a motion to quash. No doubt an injunction can be obtained to prevent acting under an invalid by-law, but this is very different from what is now sought." Reference to Helm v. Town of Port Hope, 22 Gr. 273 (1875); Vichers v. Municipality of Shuniah, *ib.* 410 (1875); Darby v. City of Toronto, 17 O. R. 554 (1889); King v. City of Toronto, 5 O. L. R. 163 (1903); Little v. McCartney, 9 W. L. R. 448, 18 Man. L. R. 323 (1908), and Re Sawyer, 124 U. S. 200 (1887). And see Re Fitzbridges at p. 661, *post.*

In this case it was not denied that the bonus was illegal under 591 (12) (*e*), because it was to an industry already established in London.

The Advantage of a Bonus is not Capable of being Transferred.—In City of Woodstock v. Woodstock Auto Manufacturing Co. (1913), 5 O. W. N. 540, the following facts appeared:—

By by-law the plaintiff agreed to lend to the defendant company a certain sum to be secured by a mortgage upon the company's lands. The mortgage was given in pursuance of an agreement by the company to commence business in Woodstock and employ a certain number of men for a period of seven years. If this was done the mortgage was to be void, but if before it was done the company assigned, went into liquidation, or discontinued business, the property was to revert to the mortgagee. Within a year the company assigned for the benefit of its creditors to R., who shortly afterwards conveyed the property to the C. F. M. Co. subject to

the mortgage. The C. M. F. Co. had a factory already in operation in Woodstock and was ready to employ men in the factory in question. The plaintiffs were not content to accept this as a compliance with the terms of the mortgage, and the mortgagor being hopelessly insolvent brought action to enforce the security.

Middleton, J., said, p. 542: "I do not think that the plaintiffs are bound to accept the employment of men by the furniture company as a compliance with the proviso in the mortgage. The bonus was a bonus to a specific industry. This is what is authorized by the Municipal Act, and it was not contemplated by the parties that the advantage of the bonus should be capable of being transferred. What was sought was the establishment of a new industry in the city. This cannot, against the will of the municipality, be converted into a bonus already existing. The furniture company is already established, and even if the enlargement of its premises involves the employment of the additional number of men, it does not follow that the municipality would receive the kind of benefit contemplated by the by-law. It is also obvious that the employment of the number of men contemplated, in this building, may simply mean the transfer of these men from some other factory building already in operation in the town."

The effect of such a mortgage was considered.

Bonusing Agreements as Contracts.—Apart from the obvious intention of the Municipal Act and the by-law passed under it authorizing a bonus, the considerations suggested in Tolhurst v. Associated Portland Cement Manufacturers, [1903] A. C. 414, indicate that in this case, regarded as a contract, the contract was not intended to be capable of assignment. Woodstock v. Woodstock, *supra*. See also Levis v. King, p. 657, *post*.

It would also seem that such a by-law (if founded upon a good consideration) after its terms have been accepted and acted upon by the person in whose favour the exemption has been created, cannot be repealed without his consent. See per Rose, J., in Alexander v. Village of Huntsville, 24 O. R. 665 (1894), at p. 667, and per Street, J., in Reg. ex rel. Harding v. Bennett, 27 O. R. 314 (1896); East Saginaw Manufacturing Co. v. East Saginaw, 2 Am. Rep. 82; People ex rel. Cunningham v. Rober, 35 N. Y. 629. But as to the effect of s. 33 on such a by-law, see note (a) to that section, and Stuart v. City of Montreal, Q. R. 6 Q. B. 555 (1897). In Great Western R. W. Co. v. Township of North Cayuga, 23 C. P. 28 (1873); Wright v. Incorporated Synod of Huron, 29 Grant 348 (1881), 11 S. C. R. 95 (1885), and Water

Commissioners of Windsor v. Canada Southern Railway Company, 20 A. R. 388 (1893). the by-laws were held to be repealable under the circumstances of the cases respectively.

The Exemption Given to an Industry Ceases when it Ceases to Operate.—In Polson v. Owen Sound (1899), 3 O. R. 6, it was held that s. 366 of R. S. O. 1897, c. 184, did not authorize an exemption to continue when the establishment exempted ceases to carry on business through going into liquidation, and an exempting by-law would become inoperative in such an event.

Recovery of the Bonus in such Cases.—Chambly (Village) v. Canadian Aluminum Works Ltd., 35 Que. S C. 517 (1909).

A municipal corporation may recover by suit from a company to which it has made a loan—to be refunded by so many annual instalments, the company also undertaking to employ so many workmen—the amount so advanced, in case the company becomes insolvent and makes default in carrying out its undertaking. Reference to The Town of St. John v. Molleur, 40 S. C. R. 629 (1908); The Commercial Rubber Co. Ltd. v. The Corporation of St. Jerome, C. R. [1908] A. C. 444; 17 Q. R. K. B. 274. See New Hamburg v. New Hamburg, p. 657, *post.*

Action against the Municipality. — Lariviere v. Richmond (1902), 21 Que. S. C. 37, was an action brought against a municipality to recover a bonus, voted for the construction of an aqueduct. It was held that in such action the municipality could not plead matters which it had already invoked and which have been pronounced against it in an action which has been finally dismissed by the Supreme Court of Canada and which was instituted by such corporation to set aside the contract in pursuance of which the bonus was voted.

Interpretation.

395.—"Bonus" where it occurs in ss. 278, 288, 396 and 397 shall include:—

(*a*) A grant of money as a gift or a loan, either conditionally or unconditionally.

[This section first appeared in its present form in 1900 when it was added by the Municipal Amendment Act, 63 V. c. 33, s. 10. The power to bonus by granting sums of money was first given by 34 V. c. 30, s. 6, later 1873, 36 V. c. 48, s. 372 (5); R. S. O. (1877), c. 174, s. 454 (5); 46 V. c. 18, s. 482 (10) and R. S. O. (1887), c. 184, s. 479 (10), but repealed by the Municipal Amendment Act, 1892 (55 V. c. 43), s. 28, as pointed out at p. 634, *ante.*

Section 278 (*ante* p. 391), deals with the requisites of bonus by-laws as to the votes necessary.

Section 288 deals with requisites of the by-law itself.

The following cases should be considered in connection with this provision, and see also the notes to s. 396:

Patchell v. Raikes (1904), 7 O. L. R. 470.

An agreement was entered into by which the town of Midland agreed to bonus a certain iron smelting works by a grant of $50,000, the company agreeing to erect a certain sized plant and to employ a certain number of men. A by-law was duly passed and confirmed by a special Act. The works were commenced but a change in the process resulted in a reduction of the size of the plant and the number of men employed. The works were otherwise completed and the bonus otherwise earned by the 24th January, 1901. The company applied for payment and the council passed a resolution to the effect that the bonus had been earned and should be paid when authorized by a special Act, which was duly passed. On May 18th, 1901, the bonus was paid over. The money was raised from the sale of debentures dated prior to the passing of the second Act. The company demanded interest from January 24th, and the council, after consulting a solicitor — who was not given all the facts—paid the interest. The Court of Appeal held that the interest was not payable and that the council had no right to pay it: [Reference to Attorney-General v. Compton (1842), 1 Y. & C. C. C. 417; Attorney-General v. Belfast Corporation (1855), 4 Ir. Ch. 119; Attorney-General v. Wilson (1837), 9 Sim. 30; Bowes v. Toronto (1856), 6 Gr. 1 (1858), 11 Moo. P. C. 463; that the opinion of counsel was no defence to a claim for breach of trust; and that there had been no submission to arbitration in referring the matter to the independent solicitor. Judgment of Meredith, J., reversed.

See Norfolk v. Roberts at p. 636, *ante;* Re United Buildings Ltd. and Vancouver, p. 638 *ante,* and Woodstock v. Woodstock, at p. 640 *ante,* and the cases there referred to.

British Columbia.—See p. 663, *post.*]

395.—(*b*) The guaranteeing of the repayment of money loaned [to or the payment of a debt contracted by the person to whom the bonus is granted] and [the] interest [thereon.]

[This sub-section was first introduced in 1900, 63 V. c. 33, s. 10, later
591 (*a*) (*b*), which omitted the words in brackets. See the notes to the

preceding sub-section. See also Re Holmested and Town of Seaforth at p. 657, *post*, and Pointe Gatineau v. Hanson, 10 Que. K. B. 346 (1901).

British Columbia.—See p. 663, *post*.

395.—(*c*) The gift or the leasing [A] at a nominal rent of land owned by the corporation or the purchase of land as a site for buildings or works or as a means of access or for any other purpose connected with the manufacturing business to be aided.

[Originally 63 Vic. c. 33, ss. 10 (*c*), later 591 (*a*) (*g*). See the notes to s.-s. (*a*) p. 642, *ante*.

This section, when first passed, had at [A] the words "either freely or." These words were construed in Lamb v. City of Ottawa (1904), 4 O. W. R. 408.

The corporation passed a by-law authorizing a lease to M. and others of premises formerly used as a public market.

Anglin, J., held that although the application of the lessees was for the market building only, and the report of the finance committee, adopted by council, recommended a lease merely of the building, the lease ratified by the by-law included lands not covered by the market building, and therefore used as an open public place, the extra lands were not "leased freely" within the meaning of s. 591a (c). He said, page 409, ". . . The lands included in the lease . . . had formed part of the market premises, and might well be regarded as intended to be included as part and parcel thereof in an application for a lease of the market building. They cannot be regarded as 'leased freely' but may fairly be deemed part of the premises for which the $500 rental is to be paid."

He also held that inasmuch as the by-law granted an exemption from municipal taxation for a term of years that it was a bonus "by-law" under s. 591 (*a*) (*g*). He said, at p. 409, that it was "ingeniously contended that, if the lessees had been required to pay taxes, their rental would have been reduced by the estimated amount of such taxes, and that, therefore, their rental must be deemed to include the taxes which the municipality would otherwise receive from the lessees. The door would be thrown wide open to evasions of the statute were effect to be given to this specious argument. The difference is not one of form or name merely; it is, I think, of substance. Money payable as rent may be dealt with in a manner entirely different from money received

for taxes: Canadian Pacific R. W. Co. v. City of Winnipeg, 30 S. C. R. 558, supports the contention that the exemption from taxation here granted includes exemption from taxation for school purposes—something clearly *ultra vires:* Sec. 591 (*a*), clause (*g*).

In Newell v. Richmond (1905), 28 Que. S. C. 406, it was held that a by-law to authorize a town corporation to lease, for a nominal rent, premises which the lessee undertakes to repair at a cost of $7,000, to be reimbursed by the corporation, is a by-law for a loan.]

395.—(*d*) The stopping up, opening, widening, paving or improving of [a highway or] public place or the undertaking of any work or improvement which involves the expenditure of money by the corporation for the [A] use or benefit of the manufacturing business to be aided.

[Originally 63 V. c. 33, s -s. 10 (*d*), later s. 591 (*a*) (*d*). See the notes to s.-s. (*a*), p. 642, *ante*. This sub-section originally had for the words in brackets the words "any street, alley, lane, square or other."

Sec. 2 (*f*) defines highway as a common and public highway including a street and a bridge forming part of a highway, or on, over or across which a highway passes.

The section as first passed had at [A] the word particular.

Sections 591 (12) (now 396) and 591 (*a*) (*d*), and 4 Edw. VII. c. 22, s. 26, which provided that notwithstanding anything in ss. 591 (*b*), the council might—without submitting the same to the electors—pass a by-law for closing up streets, etc., and conveying the same to any person for the particular use or benefit of any manufacturing industry, if the passing of such by-law did not involve expense to the municipality; provided that the council should comply with the general provisions of the Act as to notice, compensation, etc., were considered in In re John Inglis Co. and the City of Toronto (1904), 8 O. L. R. 570, but a by-law passed under these sections was held invalid, as it closed up a street which could not be closed up without the prior consent of the Dominion Government [see s. 472 (4)] which had not been obtained. It was also held that the giving of such consent after the passing of the by-law and the passing of an amending by-law could not give life to the first invalid by-law which the council had exhausted its powers in passing. [Per MacMahon, J.]

A similar but later by-law came up for consideration in 1905 in In re Inglis and the Corporation of the City of Toronto (1905), 9 O. L. R. 562. The by-law provided for the closing up of a

portion of the street and the conveyance to a manufacturing company by way of bonus for the promotion of their business and of an intended enlargement of their works. Anglin, J., referred to ss. 591 (12)—now 396— and 12 (*c*) —now 396— 591 (*a*), (*c*) [now 395 (*c*)], and 4 Edw. VII. c. 22, s. 26, and then said, at p. 567, "The by-law in question imposes no terms or conditions upon the donees of this 'bonus.' It makes of the strip of land dealt with an absolute and unconditional gift to the respondent company. Mr. Osler argues that though the statute places no restriction upon the nature or the value to the municipality of the terms or conditions which the council may impose, it requires that there should be some terms or conditions annexed to any grant of aid by way of bonus; that clause (*c*), providing for security, emphasizes this requirement; and that the absence of all terms and conditions is inconsistent with the by-law having been passed in the public interest. There is much ingenuity in this argument. But the legislature has expressly sanctioned the 'bonus' system. Benefit to the proprietors of the manufacturing industry interested is necessarily involved in that system. Where lands owned by a municipality form the bonus, the legislature authorizes a 'gift' of them or 'the leasing of (such) lands either freely or at a nominal rental.' These provisions of the Act of 1903 seem inconsistent with any obligation to annex terms or conditions to the 'gift.' The Act of 1904 in express language confers powers to pass precisely such a by-law as that under consideration, and neither terms nor conditions are mentioned in it. It further imposes the obligation to compensate persons injured upon "the owner of the manufacturing industry for whose use or benefit the by-law was passed." 4 Edw. VII. c. 22, s. 26. And at p. 568, "When it is in the public interest to pass a 'bonus' by-law 'for the benefit of the owner of a manufacturing industry' and whether any, and if any, what terms and conditions should be imposed upon such an owner so aided, the legislature has authorized the municipal council to determine, without to some extent usurping the powers and functions so conferred, the Court cannot enter upon the inquiry which would be involved in an acceptance of the contention of the appellants. Nor does the absence of terms and conditions afford any evidence that a by-law, admittedly beneficial to a manufacturer, may not at the same time serve public interest. It may be for the best interests of the municipality that it should make the gift in the unconditional form, which the legislature sanctions. Whatever may be thought of the policy of this legislation, its purpose and intent seem clear—and with that only

are we now concerned." [See also per Street, J., at p. 565]. "Neither can effect be given to the objection made to the by-law on the ground of alleged interference with rights of owners of a property adjoining . . . (the street in question) and purchased according to a registered plan showing that thoroughfare with a width of 80 feet throughout. The legislature has conferred upon the municipal council absolute and unrestricted powers. It cannot be assumed that any private right so obvious in character escaped its attention. Nor can we in order to safeguard such rights narrow and restrict, to the extent of virtually abrogating them, powers thus conferred in terms so wide and positive."

Waterous v. City of Brantford, *ante*, p. 638, distinguished.

See United Buildings Co. Ltd. and Vancouver, p. 638, *ante* and the cases referred to.]

395.—(*e*) The supplying of water, light or power by the corporation either free of charge or at a less rate than that charged to other persons.

[Originally 63 V. c. 33, s. 10 (*e*), later 591 (*a*) (*e*). See notes to s.s. (*a*), p. 642, *ante*.

See Norfolk v. Roberts, p. 636, *ante*.]

395.—(*f*) The total or partial exemption from municipal taxation or the fixing of the assessment of any property.

[This section first appeared as s.-s. 10 (*g*) of 63 V. c. 33, in the following form:—

(*g*) A total or partial exemption from municipal taxation or the fixing of the assessment of any property for a term of years, but nothing in the Act contained shall be deemed to authorize any exemption for a longer period than ten years and a renewal of such exemption for a further period not exceeding ten years or any exemption, either partial or total, from taxation for school purposes, or any by-law or agreement which directly or indirectly has or may have the effect of such an exemption.

It later appeared as s. 591 (*a*) (*g*). These provisions now appear partly in the above s.-s. 395 (*f*) and partly in s. 396 (*e*); the two must be read together. See also Lamb v. City of Ottawa, p. 644, *ante*. See the notes to s.-s. (*a*), p. 642, *ante*. There was at that time in the Act a section, 411, providing that:—

411.—"(*a*) Every municipal council may by by-law exempt any manufacturing establishment or any building for the storage of ice for commercial purposes or any waterworks or water company in whole or in part from taxation except as to school taxes for any period not longer than ten years and to ["?,may"] renew this exemption for a further period not exceeding ten years.

"The power of municipal councils to exempt manufacturing establishments from taxation was first conferred in 1868 by 31 V. c. 30, s. 44. Under that Act municipalities were authorized to exempt from taxation for any period not longer than five years "manufacturers of woollens, cottons,

glass, paper and such (?) other commodities of the like nature." In 1869 this power was extended so as to cover "any manufacturing establishment," (33 V. c. 26, s. 15). In the Act of 1873, (36 V. c. 48, s. 259), the section read:—

"'Every municipal council shall have the power of exempting any manufacturing establishment in whole or in part from taxation for any period not longer than ten years, and to renew this exemption for a further period not extending ten years.'"

In 1882 similar power was conferred in respect to "any water-works or water company." The words "except as to school taxes" were added in the Revision of 1892, (55 V. c. 42, s. 368; see also R. S. O. c. 292, s. 75). and the section was again amended in 1895 so as to include "any building for the storage of ice for commercial purposes" (58 V. c. 42, s. 14).

See R. S. O. c. 208, s. 25, as to the power of a municipal council to exempt from taxation the property of a street railway company and the income derived therefrom by the shareholders.

Exemption from Taxation.—See p. 653, *post.*

A by-law under 31 V. c. 30, s. 44, exempting "new manufactories" only, and limited to those doing a specified amount of business, was held bad in Re Pirie and Town of Dundas, 29 U. C. R. 401 (1869).

A. Wilson, J., said, at p. 407:—"The by-law provides that every person, firm, or corporation, who shall thereafter commence and proceed to carry on any *new manufacture* of the nature contemplated by the Statute, shall be exempt, etc. It appears to me that this is clearly bad, as it is giving a benefit to new businesses over prior established businesses of the same kind. I do not think it would be against the Statute to provide that *all* cotton manufacturers should be exempt from taxation; because it places all persons of the same line of business on the same footing, without giving any advantages or privileges to one or more of that trade over the others. Nor do I think it would be bad because it gave *cotton* manufacturers some advantage over woollen or other manufacturers, for the Statute did not intend that every kind of manufacture should be exempted or that none of them should, but that all or any of them should be exempted as the council of the municipality might deem advisable. There might be special reasons which might induce them to cultivate and encourage one or more branches of trade that did not apply to other branches. But in no case—is A., of the cotton or any particular trade, to get a benefit which B. of the same trade is not to get also. For this is a monopoly of the worst description, and it cannot be necessary either for the proper stimulus of the trade, though it may stimulate A. very wonderfully in that trade, but then only at the expense of B. I also think, that if one manufacturer is to be exempt, that all manufacturers of the same trade must be exempt, though they do not each employ in carrying on business a sum exceeding $1,000, and though they do not each pay weekly in wages to operatives a sum

exceeding $30. For this is to protect the large business against the small beginning, and it is well known that a large trade is always conducted more economically in proportion than a small one, and requires less protection. It is as vicious a distinction to make between the capitalist and the energetic handicraftsman, as it is to make between the old and the new manufacturer."

In Re Scott and Town of Tilsonburg, 10 O. R. 119 (1885); 13 A. R. 233 (1886), referred to in United Building, etc., Ltd. v. Vancouver, at p. 639, the rule was laid down that an exemption should not be granted arbitrarily; there ought to be a sufficient public benefit to the taxpayers of the locality to sustain a by-law, and to support the exemption there must be a good and valid consideration which should be in some way connected with the business of the manufacturing establishment. Where a municipality agreed with the owner to exempt two existing manufacturing establishments in consideration of his paying a sum of $1,800 (which the municipality had agreed to pay to a railway company) and providing also the right of way upon the company building a switch into the town, it was held that there was not a proper public consideration from T, and that the agreement was in effect a sale of an exemption; and a by-law passed by the municipality for the purpose, but not submitted to the ratepayers, was quashed.

Biggar, J., said, p. 431:—"The general rule is that the burden of taxation should fall equally; and for this reason Statutes exempting particular persons or particular property from taxation are construed strictly."

A by-law exempting from taxation a manufacturing establishment "established for the purpose of carrying on the milling and grain merchant business," and the land held by it, was held bad as dealing with two kinds of business, the first of which alone there was power to exempt. The by-law was also held bad in exempting all the land and not the mill only, as other buildings suitable for the grain business might be erected thereon. The effect of the by-law was to discriminate against other large milling establishments in the municipality, and the by-law was held bad on this ground also: Re Peoples Milling Co. and Town of Meaford, 10 O. R. 405 (1886). A by-law limiting the assessment on property about to be used for manufacturing purposes to the value of the land without buildings was held not valid under this section. Re Denne and Town of Peterborough, 10 O. R. 767 (1886).

Free from all Assessments and Rates.—This expression in an act has been held to refer only to rate and assessments in existence at the time of the passing of the act and not to apply to a new rate. *Sion College v. London Corporation*, 70 L. J. K. B. 396.

Except as to School Taxes.—This proviso appeared in s. 411 and s. 591(*a*) (*g*) and still appears in s. 396 (*e*). This same exception appears in the following section of the Public Schools Act, R. S. O. 1914, c. 266, s. 39: No by-law of a municipal council, passed after the 14th day of April, 1892, or hereafter passed, for exempting any part of the rateable property in the municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind.

The history of this section appears in Pringle v. City of Stratford, p. 652, *post,* and the Township of Stamford cases, p. 655, *post.*

The important cases dealing with this question follow in order of date. (See also the notes at p. 647, *ante.*)

Canadian Pacific Railway Company v. City of Winnipeg, 12 M. L. R. 581 (1899), 30 S. C. R. 558 (1900).

By 38 V. c. 50, s. 107, amended by 42 V. c. 4, s. 30, the municipality was given power to encourage manufacturers within the limits of the city by exempting from taxation, in whole or in part for a period of one or more years; and by s. 4, c. 42, to bonus any railway, and by 44 V. c. 21 (1881), to exempt from all taxes, assessments and municipal imposts whatsoever for a period not exceeding 20 years any manufactory. . . . There was apparently no express exception of school taxes as in Ontario. [See Pringle v. Stratford (*post* p. 652), per Garrow, J.A., at p. 258]. A by-law was passed exempting the property 'now owned or hereafter to be owned by the . . . railway . . . for railway purposes within the city . . .' from all municipal taxes, rates and levies and assessments of every nature and kind. This was later validated by a special Act. It was held that municipal taxes included school taxes, "and that the property of the company was exempt from any liability to contribute to the support of the city schools." Per Sedgewick, J., at p. 564, who also said: "Mr. Justice Bain, . . . states . . . 'The widest definition I could give to the expression municipal taxes, would be that they are taxes imposed by the governing body of a municipality for the purposes of the municipality' and this definition is approved of by Killam, C.J. I accept this definition, taxes imposed for the support of schools . . . in . . . are . . . taxes for the purposes . . . of the municipality." [As to a railway being an industrial enterprise, see p. 652, *post.*]

The special Act respecting a railway company empowered municipal corporations to exempt the company in whole or in part from municipal assessment or taxation or to agree to a cer-

tain sum per annum or otherwise in gross by way of commutation or composition for payment or in lieu of all or any municipal rates or assessments to be imposed by such municipality.

The City of St. Thomas, on 6th April, 1897, passed a by-law that a certain sum should be accepted by the city for each of the succeeding 15 years "by way of commutation and in lieu of all and every municipal rate or rates and assessment that can be by any law now in force or which may hereafter be enacted or imposed by . . the city . . for any purpose whatsoever," etc., in respect of the lands in the by-law described.

55 V. (O.) c. 60, s. 4, was subsequently passed providing that "no municipal by-law hereafter passed for exempting any portion of the ratable property of a municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind whatsoever." There was no express repeal of the special Act. Teetzel, J., held in Way v. St. Thomas (City) (1906), 12 O. L. R. 240, that the general Act did not repeal the special Act by necessary implication. He also held that the amendment made by the Act of 1892, s. 366 (see now s. 278), to R. S. O. 1887, c. 336 (now s. 278), excepting school taxes from the power of exemption which by a two-thirds vote the council might grant to any manufacturing establishment or waterworks or water company, did not repeal the special prior Act as, to hold that it did so, would be to impute to the legislature a disregard of vested interests. This judgment was affirmed by a Divisional Court, 12 O. L. R. 244.

In Rex ex rel. O'Shea v. Letherby (1908), 16 O. L. R. 581, Cartwright, M.C., said, at p. 583: "The respondent H. (a councillor whose election was being attacked) must also be unseated. He is . . . a member of the partnership known as the M . . E . . Works. The town of Midland by a by-law . . . has assumed to grant this firm a fixed assessment . . . which it is said 'shall be for all purposes, including school taxes, and shall include business tax.' It was, perhaps, owing to the passing of . . . 3 Edw. VII. c. 65 (O.), which enacted that . . . C. . . . should have a fixed assessment 'for all purposes, including school rates,' that it was thought to be within the power of this same corporation to make a similar contract in this case. But certainly such agreement is *ultra vires* and ineffective, under 3 Edw. VII. c. 19, s. 591 (*a*), cl. (*g*), unless ratified by the legislature, as in the case of . . . C. . . ."

"It therefore appears that the respondents' firm is liable to an action by the corporation to have the proper school rates levied

on the true assessable value of the property exempted, even if the by-law is not altogether bad."

C. P. R. v. Town of Carleton Place (1908), 12 O. W. R. 567.

The town agreed to submit a by-law authorizing the payment of a bonus to the plaintiffs, and if such by-law were duly carried and validly passed, that the defendants would pay the bonus to the plaintiff. The agreement provided that "The corporation will, without any unnecessary delay, take such measures as will validly exempt from municipal taxes and assessments, for 10 years, the property and works of the said company, within the municipality of the town of Carleton Place, used or to be used in connection with the said machine and repair shops, and if the corporation can validly do so, it will, instead of the exemption above described, exempt the said property and works from taxes, rates and assessments, both school and municipal, for 15 years, the period of exemption in either case to commence on 1st January, 1897." The agreement was made 17th November, 1896. The company built the works, received the bonus and exemption for 10 years as agreed. The plaintiffs asked for a declaration that the said works of the plaintiffs were, under the agreement, exempt from taxes, rates, and assessments, both school and municipal, for a period of 15 years from 1st January 1897.

Britton, J., held that ss. 366 (278), 411, 694 and 695 (see now 397), did not apply to empower the council to grant such exemption, and that as the plaintiffs were carriers engaged in transportation of people and property they were not "an industrial enterprise or enterprises" within the meaning of the town's special Act permitting such exemptions to be made to such enterprises. [See the Winnipeg case, p. 650, *ante*.] He pointed out that the town did not agree to get additional powers from the legislature.

The question of the right of the defendants to exempt the plaintiffs' property from taxes by mere resolution from year to year as was done, was not discussed. Reference also to ss. 366, 591 and 591 (*a*).

Pringle v. City of Stratford (1909), 20 O. L. R. 246, was the case of an action by a ratepayer of the city for a mandamus compelling the levy from the defendant companies of certain proper school taxes. MacMahon, J., said, at p. 248, "The question is: Do the words in the respective Acts [1899 and 1900, by which the defendant companies were given certain exemptions] 'the said parties of the second part' (the city) 'agree that the said company are to be given exemption from taxation,' include

exemptions from 'school rates' as well as the ordinary municipal taxes." [Reference to the Public Schools Act, R. S. O. 1897, c. 292, s. 73, excepting school taxes from any exemptions after 14th April, 1892.] He held that the companies were not exempted from paying school taxes. This view was affirmed by the Court of Appeal, *ib.* 251. Osler, J.A., said, at p. 253, "The statute law in force as to the power of municipal corporations to exempt manufacturing establishments from taxation, at the time of the submission of the by-law in question to the vote of the electors and of the application for the Act, was s. 411 . . . R. S. O. 1897, c. 223, as substituted for the original section by the Municipal Amendment Act of 1899, 62 Vict. (2), ch. 26, s. 25, clause (*a*), of which provided that 'every municipal council may by by-law exempt any manufacturing establishment . . . in whole or in part from taxation *except as to school* taxes for any period not longer than 10 years and to renew (sic.) this exemption for a further period not exceeding 10 years.' A similar exemption was contained in the original section, 411, and also in the Act from which that section was taken, and in which it first appears, viz., 55 Vic. c. 42, s. 466, assented to 14th April, 1892. And s. 73 of the Public Schools Act, R. S. O. 1897, c. 292, which is a re-enactment of 59 V. c. 70, s. 73, and 55 V. c. 50, s. 4 (the latter assented to 14th April, 1892), also provided that . . . . See also 1 Edw. VII. c. 39, s. 77; 9 Edw. VII. c. 89, s. 39. . . . The words '*exempt from taxation,*' '*exemption from taxation,*' though general and on their face comprehensive of taxation for every purpose, would, if used in reference to a ten-year period, have been subject to the constant exception of the general law, and in the absence of anything to show that in the special Act they were intended to have a larger meaning and to exclude the exception, it ought to be held, in accordance with the settled principle of construction, that the legislature did not intend to do more than to alter the general law in so far as it was necessary to permit a longer period of exemption than by that law the council could grant, or to abandon what seems to have been the settled policy of the legislature in respect of school rates since the year 1892, a policy affirmed by s. 25 of the Municipal Amendment Act, passed at the same session as the Act by which the by-law was confirmed. [Reference to s. 402 (1) of 1903, now s. 297.]

"I refer to Maxwell on Statutes, 4th Ed., p. 122; Craies on Statute Law, 4th Ed. (Hardcastle), pp. 173-4; and to Minet v. Leman (1855), 20 Beav. 269, 278, where it is said: "The general

words of the Act are not to be so construed as to alter the previous policy of the law unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched. . . . This principle of construction, as a general proposition, cannot be disputed. Exemption from taxation may, therefore, well be construed as exemption of such a character as was already permitted, though continued for a longer term than, without special legislation, was capable of being granted by the council in the first instance. The case of C. P. R. W. Co. v. City of Winnipeg (1900), 30 S. C. R. 558, not, I think, cited, on the argument, turned upon the effect of legislation and on the language of a by-law so different from that with which we are concerned that it has no application to the present case, as is shown in the judgment of my brother Garrow (see p. 257). I refer also to Reg. ex rel. Harding v. Bennett, 27 R. R. 314 (1896), merely to show that it has not been overlooked. It deals with a different subject, and the judgment of Street, J., explains why, in his view, at all events, the words 'exempt from taxation,' as used in the proviso added by 56 V. c. 35, s. 4, to s. 77 of the Municipal Act necessarily meant exempt from all taxation, which, he thought, might very well be, in the case of exemption by-laws passed before 1892."

See Stratford Public School Board v. Stratford (1911), noted at p. 655, *post*.

Pringle v. City of Stratford, 20 O. L. R. 246, sub. nom. Whyte Packing Co. v. Pringle, 42 S. C. R. 691 (1910), leave to appeal to the Supreme Court of Canada was refused, no appeal lying in such cases as of right [Attorney-General for Ontario v. Scully, 33 S. C. R. 16 (1902):] and the matter not being of public interest to bring it within the scope of the decision as to leave to appeal in Lake Erie and Detroit River Railway Co. v. Marsh, 35 S. C. R. 197 (1904).

In Canadian Niagara Power Co. v. Township of Stamford (1914), 50 S. C. R. 168, Idington, J., pointed out, at p. 173, that in 1892 the legislature . . . "repealed . . . the long standing legislations which had empowered the municipalities to grant bonuses in aid of manufactures, and such means of aid having been so obliterated in same session, the Municipal Acts were consolidated and what was intended as a complete code was enacted, of which s. 366 provided that municipal councils might, by a two-thirds vote, grant exemption from taxation (except as to school taxes) for a term of 10 years renewable for the like term. . . ." He also pointed out how later s. 366 (*a*) was added in 1900 by s. 8 of the Act.

"And by s. 9 the bonus system was revived in the form and subject to the stringent requirements therein set forth for determining the matter. Then s. 10 defined what is to be held to be a bonus within said s. 366 (*a*), and other sections, and by s.-s. (*g*) thereof 'a total or partial exemption from municipal taxation or the fixing of the assessment of any property for a term of years, etc., etc.,' is the gist of the definition relative to taxation, but the term is limited to 10 years, renewal and exemption from taxation for school purposes is expressly excluded from the operation of the Act. The scope of this legislation is such as to leave no doubt of the purpose of the legislature in relegating to the people the power to pass any by-law in the nature of a bonus."

In the judgment of the Supreme Court the following cases were dealt with: Re Ontario Power Co. of Niagara Falls and Township of Stamford (1914), 30 O. L. R. 378; Re Canadian Niagara Power Co. and Township of Stamford, *ib.* 384; Re Electrical Development Co. of Ontario and Township of Stamford, *ib.* 391.

In the first case the township passed a by-law, [10th October, 1904], fixing the annual assessment of the company at a certain sum and providing that the company and its property should not be liable for any assessment or taxation of any nature or kind whatsoever beyond the amount to be ascertained in each year by the application of the yearly rate levied in each year to the fixed assessment. This by-law was declared by special Act to be "legal, valid and binding, notwithstanding anything in any Act contained to the contrary."

In the second case a similar by-law was passed under the authority of a special Act of 1892, giving powers to exempt from taxation or to fix a certain sum for payment of all municipal rates. It should be observed that the provisions excepting schoool taxes, were passed at the same session.

In the third case a by-law was passed under 5 Edw. VII. c. 12, s. 3, and was similar. The sections of the Act applying at that time were 366 (*a*), 591 (12) and 591 (*a*), (*g*).

In all three cases the Appellate Division and the Supreme Court (Duff, J., dissenting), followed Pringle v. Stratford, *ante* p. 652, and distinguished C. P. R. v. Winnipeg, p. 650, *ante;* Way v. St. Thomas, *ante,* p. 651; and Stratford Public School Board v. Stratford (1911), 2 O. W. N. 499, a decision of Meredith, C.J.O., who said, in Re Canadian Niagara Power Co. and Township of Stamford (1914), 30 O. L. R. at p. 390, "That case is, I think, distinguishable. The agreement that was in question there, which

had been confirmed by the legislature provided that the defendants would commute and fix for a period of years the rates and taxes to be paid by the Grand Trunk R. W. Co., except certain named rates, at the sum of $8,000, and it was conceded by the plaintiff that the effect of the agreement and the Act confirming it was to release the railway company on payment of $8,000, from all taxes, including those imposed for school purposes, and the contest was only as to the application of the $8,000, the contention of the plaintiff being that the council should have applied it first in payment of the public school taxes, for which the railway company would have been liable if there had been no computation, and that only the residue was applicable for the general purposes of the municipality. The application which the defendant had made of the $8,000 was to general and public school purposes respectively, in the same proportion as the taxes, if there had been no commutation, would have been applicable to those purposes."

The Court held that the latter was the correct view and dismissed an action by the Board to compel the defendants to apply the $8,000 in accordance with the plaintiff's contention. The Court expressed the opinion that the case came within the principle of the decision in the C. P. R. Case, 30 S. C. R. 558 (*ante,* p. 650), rather than that of Pringle v. Stratford (*ante,* p. 650).

395.—(*g*) Generally the doing, undertaking or suffering on the part of the corporation of any act, matter or thing which involves or may involve the expenditure of money by it.

This section first appeared as s.-s. 10 (*f*) of 63 V. c. 33, later as 591 (*a*) (*f*). See the notes to s.-s. (*a*), p. 642 *ante.*

Bonuses in Aid of Manufactures.

396. By-laws may be passed by the councils of all municipalities for granting a bonus for the promotion of manufactures in the municipality, [or for the promotion of iron works, rolling mills, works for refining or smelting ore, or the establishment of grain elevators, or aiding a beet sugar factory, an arena, a sanitarium or a hospital, within the municipality or an adjacent municipality,] to such person, in respect of such branch of

industry or undertaking, and on such terms and conditions as to security and otherwise as may be deemed proper.

See the notes to s. 395 (*a*) at p. 642 *ante*, and also the notes at p. 634, *ante*.

[This section first appeared in its present form (but without the words in brackets) in 1900, when it was added by 63 V. c. 9, to the Act as s. 591 (*a*), (12). At that time there were in the Act the following sections giving bonusing powers, I., under title V.—"Powers of Municipal Councils in Certain Districts as to Aiding Smelting Works."]

All Municipalities.—Sec. 591 (*a*) applied to counties, townships, cities, towns and incorporated villages.

By-laws.—The requisites of the by-law are set out in s. 288, the percentage of votes necessary to pass such a by-law in s. 278. See the notes to these sections at p. 391, *ante*. See also Re Holmested and Town of Seaforth below.

Such Terms and Conditions as to Security.—Sec. 591 (12) (*c*) and s. 700 (*c*), contained the following clause:—

Any municipality granting such bonus may take and receive security for the compliance with the terms and conditions upon which such aid is given.

See Scottish-American Investment Co. v. Village of Elora, 6 A. R. 628 (1881); Village of Brussels v. Ronald, 1885, 4 O. R. 1, 11 A. R. 605 (1885); Village of Brighton v. Auston, 19 A. R. 305 (1892).

In Village of New Hamburg v. New Hamburg Manufacturing Co. (1910), 1 O. W. N. 495, Falconbridge, C.J.K.B., held that a clause in a bonus agreement by which the bonused company agreed to pay the corporation $500 for every year they employed less than specified number of men provided for a penalty which should be relieved against and ordered a reference as to damages. [See the authorities there cited on the question of penalty or liquidated damages.]

To satisfy a municipal bonus by-law requiring that the respondents should employ at least a hundred persons during the first year, and from a hundred and fifty to two hundred during the second and subsequent years, it is sufficient to have employed and paid on an average the number of persons mentioned in the by-law: Levis v. King (1900), 9 Que. Q. B. 1.

In re Holmested and Town of Seaforth (1910), 2 O. W. N. 464, Mulock, C.J.Ex.D., said, at p. 465, "Mr. Chisholm argued that, because the guarantee (of debentures of a company) is, by s. 591 (*a*), declared to be a bonus, the procedure to be followed in

the case of by-laws creating debts must here be followed. Sec. 591 (*a*) enumerates many things that are to be deemed bonuses, and amongst them a gift of land by a municipality. Such a gift creates no debt. Manifestly the legislature did not in that case intend that the provisions of s. 384, as to an annual assessment being levied upon the ratepayers, should be observed. They are wholly inapplicable. The section must be construed reasonably. It applies to some and not to other of the 'bonuses' enumerated in the section. It is inapplicable to a gift of land, and it is inapplicable to a guarantee such as that in question."

See also Woodstock v. Woodstock, p. 640, *ante,* and the cases following.

Carleton Woollen Co. v. Town of Woodstock (1905), 26 C. L. T. 316, 3 N. B. Eq. 138.

By statute the council of the town were empowered from time to time, at their discretion, to give encouragement to manufacturing enterprises within the town, by exempting the property thereof from taxation for a period of not more than 10 years. A by-law exempting any company establishing a woollen mill in the town from taxation for a period of 10 years was held to be *ultra vires,* being a discrimination in favour of a company as against private persons engaged in the same business.

In re Campbell and Village of Lanark, 20 A. R. 372 (1893), a village by-law, passed after the statute of 1892 had taken from municipal councils the power to bonus manufacturing establishments (see p. 634) was quashed with costs though valid on its face, it appearing that under the pretext of paying $4,000 for the purpose of "purchasing from one Caldwell for twenty years a water power for electric light purposes," the real intention of the council was to aid Mrs. Caldwell to rebuild a grist-mill which had been burnt down. See also Scott v. Town of Tilsonburgh, 13 A. R. 233 (1886), referred to in the notes to s. 395 (*f*).

396.—(*a*) No person to whom, or who is interested in or holds shares in a company to which, a bonus is to be granted shall be entitled to vote on the by-law.

[Recently s. 591 (12) (*b*). See s. 396, p. 657, *ante.*

By 42 V. c. 31, s. 34 (1879) it was provided that no property owner or lessee interested in or holding stock in any company should be qualified to vote on a by-law granting a bonus to such company.

Sec. 700 contained a similar provision, s. 100 (*b*).

See Baird v. Almonte, 41 U. C. R. 415 (1877); Beauregard v. Roxton Falls, 24 Que. S. C. 474 (1904).

Sec. 591 (12) (*a*) formerly provided that [A] "No such by-law shall be passed until the assent of the electors has been obtained in conformity with the provisions of this Act in respect of by-law for granting bonuses to manufacturing industries." And s. 700 (*a*) contained a similar provision.

The Act of 1903, c. 19, s. 591 (12) (*a*) added at [A] the words, "subject to the provisions of s. 591 (12) (*b*)." See now s. 278 and notes at p. 391, *ante*.]

396.—(*b*) [No by-law shall be passed granting a bonus in respect of a branch of industry of a similar nature to one established in the municipality] unless the person by whom it is carried on consents in writing to the granting of the bonus.

[Recently s. 591 (12) (*d*) which read:—

(*d*) No by-law shall be passed granting a bonus to or for a manufacturer under this section who proposes establishing an industry of a similar nature to one already established in such municipality unless the owner or owners of such established industry or industries shall first have given their consent in writing to the granting of such bonus, loan or guarantee.]

396.—(*c*) No by-law shall be passed granting a bonus in respect of a business *established elsewhere* in Ontario, [or which has been removed to the municipality from another municipality in Ontario, whether the business is to be carried on by the same person or by a person deriving title or claiming through or under him or otherwise or by such person in partnership with another person or by a joint stock company or otherwise.]

[Recently s. 591 (12) (*e*). See notes to s. 396, p. 657, *ante*.

The section first read: "No by-law shall be passed by a municipality for granting a bonus to secure the removal of an industry already established elsewhere in the Province."

The words in s.-s. (*c*) in brackets were added by 2 Edw. VII. c. 29, s. 28 (1902).

Sections 591 (12) (*e*) was considered in Village of Markham et al. and Town of Aurora (1901), 3 O. L. R. 609. Osler, J.A., said, at p. 617, "At the time the by-laws in question were passed, a boot and shoe factory, the property of . . . U. and S. . . . in . . . Markham . . . was then being actively carried on there. It was in the minds of its owners to remove it from that village . . . and they began to negotiate with divers other municipalities with the object of removing it to, and establishing it in, that one which should offer the largest

inducement in the way of cash bonus and exemption from taxes. The town of Aurora was the highest bidder and its offer was accepted by the proprietors of the factory. The by-laws were thereupon passed which are now attacked. It was strongly contended . . . that, as U. and S. had determined to remove from Markham in any case, the by-laws could not be said to have been passed to secure the removal of the industry already established there. I do not appreciate the force of that argument. The fact remained that the industry was already established there. . . . Therefore what the legislature has forbidden is the granting of a bonus by one municipality to secure the removal *into* its own borders of an industry already established elsewhere, *for no municipality ever had authority to grant a bonus in aid of an industry to be established outside of its own limits, and the legislature never meant to enact anything so absurd as to forbid them to do so.* It was a matter of no moment to Aurora where the factory went, if it did not come there, and the council secured its removal from Markham to Aurora by passing the by-laws in question, no matter how deeply its proprietors had sworn, bonus or no bonus, to shake the dust of Markham from their feet." The Court of Appeal, reversing Lamont, J., quashed the by-law. Leave to appeal to Supreme Court refused: (1902), 4 O. L. R. (appendix).

[Legislation favouring the bonusing of manufacturing industries is, in general, contrary to the public interest: Loan Association v. Topeka (1874), 20 Wall. (U.S.) 655. This case was referred to on the argument.]

The words "industry already established in," used in s. 591 (12) (*e*), were interpreted in Black v. Town of Orillia (1913), 5 O. W. N. 67, by Middleton, J. He said, at pp. 68 and 69, "It is contended on behalf of the company that its business was not 'established' in London [whence it was to be removed to Orillia where a by-law to bonus it had been passed] within the meaning of the statute, because, although the business is carried on there, it is carried on in rented premises in a way that indicates that its location in London was of a temporary character, pending completion of the contemplated arrangement for a bonus from that municipality, and that, this arrangement having fallen through, the company ought to be at liberty to move its business to any municipality ready to grant the desired bonus. Mr. Grant argued with great force that the word 'established' should be given its dictionary meaning of 'set up on a secure and permanent basis and ought not to be construed as equivalent to carried on.' . . .

I am unable to give effect to Mr. Grant's contention. . . . The restriction on the bonusing power had its origin in 63 V. v. 36, s. 9, s.-ss. (*d*), (*e*), and the word in question is found in both these sub-sections in that Act and in the present statute. The amendments since made all indicate the policy of the legislature, and that its intention was to prohibit one municipality from offering a bonus to an industry which was being carried on in another municipality. . . . The suggested meaning appears to me to be inadmissible, particularly with reference to s.-s. (*d*), and the word must have the same meaning throughout the two sub-sections. Little assistance can be found in any of the American cases, as there the context is different. The fact the business of the company has been carried on in London for now almost 10 months amounts to an 'establishment' in that city within any meaning that can fairly be given to that word. The location in London may not be permanent, but it is in no sense transitory in its nature."

In Re Wolfenden and Village of Grimsby (1914), 5 O. W. N. 901, Middleton, J., considered the argument that s. 396 (*e*) . . . only prevented a bonus being granted to aid an industry established in another municipality, and has no application to a bonus in aid of a branch business to be established in the bonusing municipality. He said, at p. 902, "The wording of the statute has been changed to some extent since the decision in Re Village of Markham and Town of Aurora (1902. See p. 659); but it serves to indicate that the legislature intended to prevent any municipality from granting any aid to an industry which is in fact established elsewhere. There is no exception made to the wide words of this prohibiting clause." Reference to the words of Osler, J. (printed in italics), in the Markham case (p. 660, *ante*), at p. 618.

Is a business of harvesting, storing and selling natural ice, cut and stored or cut outside the defendant municipality but having subsidiary storage premises and stables with accommodation for some of the vehicles used in delivering the ice in the municipality within 7 Edw. VII. c. 97, and 10 Edw. VII. c. 136. This point arose but was not decided in Fitz Bridges v. City of Windsor (1914), 5 O. W. N. 969. Latchford, J., holding that there was insufficient material, and that an injunction to restrain the passing of a by-law was not the proper procedure. Reference to City of London v. Town of Newmarket (1912), 3 O. W. N. 565. See p. 640, *ante*.

Quebec.—See p. 664, *post*.

The aid to a factory must be granted, not by a simple resolution, but by a by-law approved by the municipal electors and the Lieutenant-Gover-

nor-in-Council. Beauregard v. Roxton Falls, 24 Que. S. C. 474 (1904); Pointe Gatineau v. Hanson, 10 Que. K. B. 346 (1901); Hanson v. Grand Mere, 11 Que. K. B. 77 (1902).]

396.—(*d*) No such by-law shall be passed where the granting of the bonus would for its payment and the payment of bonuses already granted require an annual levy for the payment of principal and interest exceeding 10 per cent. of the total amount required to be raised by taxation for the year next preceding the passing of the by-law, but if the bonus is by way of loan or guarantee, [any amount to be paid annually by the person or company so aided shall be taken into account and deducted from such annual levy] for the purpose of ascertaining whether the limit of 10 per cent. will be exceeded. 3 & 4 Geo. V. c. 43, s. 396 (*d*), *amended*. 5 Geo. V. c. 54, s. 22 (1).

N.B.—The provision enclosed in brackets is to be construed as if it had been passed on the first day of January, 1914.
5 Geo. V. c. 34, s. 22 (2).

[See the notes to s. 396, p. 657, *ante*. This section was recently s. 591 (12) (*f*) which read: "No such by-law shall be passed for granting a bonus by gift or loan or guarantee of money to any manufacturing industry where the granting of such bonus would for its payment, together with the payment of similar bonuses already granted by said municipality, require an annual levy for principal and interest exceeding 10 per cent. of the total annual municipal taxation thereof, but if such bonus is by way of loan or guarantee of money then any amount to be repaid annually by any person or company so aided shall be taken into account and shall for the purposes of this paragraph be deducted from the amount required to be levied annually. Nothing herein contained shall relieve the municipal council from liability for neglecting to levy annually the special rate required to repay any debt contracted by the municipality."]

396.—(*e*) Where the bonus is exemption from taxation or a fixed assessment the same shall not be for a longer period than ten years, but may be renewed from time to time for further periods not exceeding ten years at any one time, and the by-law shall not apply to or affect taxation for school purposes.

[Originally s. 519 (*a*) (*g*) added by 63 V. c. 33, s. 10. See the notes to s. 395 (*f*), at p. 647, *ante*.

396.—(*f*) Where the bonus is by way of loan, the by-law may provide that all money received on

account of the loan shall be deposited to a special account in a chartered bank, and that such money or a sufficient part of it, shall be applied in payment of the amount falling due in such year for principal and interest on account of debentures issued to pay the bonus.

[The original of this section was added by 5 Edw. VII. c. 22, s. 28, which was redrafted as above in 1913.

In the other provinces powers to bonus or aid industries are found in British Columbia, Manitoba, Quebec, New Brunswick and in Saskatchewan in the Rural Municipalities Act, R. S. S. 1909, c. 89, and the exception found in s. 234 of the Cities Act.

Special statutory provisions forbid the granting of such aid in Alberta, the Towns Act, the Rural Municipalities Act and the Villages Act—and Saskatchewan—except in the cases noted above.

A summary of this legislation follows:—

Alberta.—By s. 164 of the Towns Act no council shall have power to grant a bonus or other aid to any person, company or corporation for the construction, establishment or operation of any manufactory, mill or railway or any other business or concern whatsoever either within or without the municipality; or to exempt from taxation any such manufactory, mill or railway or other business or concern, nor subscribe for stock in or guarantee the bonds, debentures or other securities thereof.

Provided, that if any town council attempt to pass a bonus by-law contrary to this section every member voting in favour of it shall be liable on summary conviction to a penalty not exceeding $100 exclusive of costs, and shall also be disqualified from holding any office for 2 years.

The Rural Municipalities Act, s. 197, corresponds to s. 164 above, but omits the proviso, as does s. 64 of the Villages Act.

British Columbia.—Sec. 54 of the Municipal Act, ss. 11 to 21, contains wide powers to aid, bonus and exempt industries.

By s.-s. 11 aid may be granted to waterworks, electric or other lighting systems or other industries established within the municipal limits.

(*a*) By exemption for a period not exceeding 10 years from municipal taxation or water or electric light rates or any of them; or, in addition,

(*b*) corresponds in effect to s. 395 (*a*). The municipality may take *security* from the industry aided for the compliance with the terms and conditions upon which such aid is given. The by-law providing exemption from water or electric light rates must limit the quantity of water or electric light which is to be exempt.

The section contains a proviso similar in effect to the provisions of s. 396 (*b*) in brackets [to "unless."] See article 5929 of the Quebec Act.

S. 54, s.-s. 12, provides for aid by endorsing or guaranteeing debentures of such industries. See 395 (*b*).

S. 54, s.-s. 13, provides for aid by grant of money, land or exemptions for a period not exceeding 10 years to railways, dykes, ditches and canals.

By s. 54, s.-s. 14, by-laws granting the aid mentioned above may permit payment of a fixed sum in lieu of taxes if approved by the Lieutenant-Governor-in-Council.

S. 54, s.-s. 15. For acquiring by subscription or otherwise any number of shares in the capital of any company incorporated by or under any Dominion or Provincial statute or otherwise with authority to construct a bridge (or) (and) tunnel which the council declares to be a work for the

general benefit, of the municipality, whether it is within or without or partly within or without the limits of the municipality. The Lieutenant-Governor-General must approve the by-law.

S. 54, s.-s. 16. By guaranteeing the debentures of any railway, tramway, ferry or bridge company serving the municipality and levying a sum sufficient to discharge such debt.

S. 54, s.-s. 17. By guaranteeing the debentures of a ferry company giving direct means of communication between the municipality and another, and levying a sum sufficient to discharge such debt.

S. 54, s.-s. 18. By subscribing for stock in a waterworks or a ferry company; 19, subsidizing lines of steamships; 20, issuing debentures to such companies; granting bonuses to railways, tramways, ferries, bridges or waterpower companies and for issuing debentures to provide money to meet such bonuses.

In the cases where stock is taken or interest or bonds are guaranteed, the mayor or reeve is ex officio to be a director in addition to the number authorized by the act of incorporation with all the rights and powers thereof and must be so recognized by the other directors, s.-s. 21 (*a*).

Every by-law passed under ss. 11 to 21 must name a reasonable time limit for the commencement as well as for the completion, operation, or carrying into effect, as the case may be, of the manufactory, industry, enterprise or work to be aided, s.-s. 21 (*b*).

Manitoba.—In Manitoba by s. 461 the council of every municipality may pass by-laws for exempting any industry in whole or in part from taxation for any period not exceeding 20 years. Such a by-law must be voted upon in the same way as a by-law creating debt. Any municipality granting aid or exemption under s. 461 may take security for the compliance with the terms and conditions upon which such aid or exemption is given. [Compare the British Columbia Act, s. 54, s.-s p. *ante*.]

See also the following sections:—

Sec. 464, the council of any city or town may pass by-laws without submitting the same to a vote of the ratepayers, for exempting from taxation for municipal purposes any manufacturing industry hereafter established, to an extent not exceeding sixty per cent. of the assessed value of the property of such industry, for any period not exceeding twelve years, on condition and so long as such industry shall employ not less than fifteen workmen for at least nine months in each and every year during such term of exemption. All by-laws exempting from taxation, in whole or in part, for a longer period or on terms more favorable to the proprietors of such manufacturing industry than the foregoing shall be submitted to a vote of the ratepayers.

Sec. 465, the council may embody in any such by-law such further conditions as to the carrying on of such industry as it may deem expedient or necessary, as a condition of such exemption, and may enter into any contract respecting the same. Every such by-law and contract, before coming into force, shall be approved by the Lieutenant-Governor-in-Council.

New Brunswick.—By s. 102, R. S. N. B. c. 165, now s. 102 of 2 Geo. V. c. 35. The council to encourage the development of mines may exempt in whole or in part from taxation all plant, machinery, works, buildings or improvements which may be used or erected for or in connection with the developing or operating of mines or minerals within the county for a period not exceeding 20 years.

Quebec.—Art. 5775 made subject to Art. 5929 et seq., permits the council by resolution to exempt from municipal taxes for a period not exceeding 20 years any person who carries on any industry, trade or enterprise, or to agree with such person for a fixed annual sum for the same period in commutation of all municipal taxes. The Article excepts work on watercourses, boundary ditches, fences, drains, sidewalks or roads connected with taxable property so exempted or commuted.

Art. 5922 permits exemption from taxation for a period not exceeding 10 years of all new manufactories except flour mills, gas works or distilleries.

By Art. 5924, the exemption may be granted to any railway company having a station in the municipality: for not more than 25 years: the assent of the proprietors is needed, also that of the Lieutenant-Governor.

By Art. 5927 the exemption may be given to all agricultural or horticultural societies subject to les travaux mitoyens.

By Art. 5928, a municipality may aid a bridge over or tunnel under the St. Lawrence at Montreal, by granting of cash, bonds or debentures, subscribing for shares or guaranteeing principal and interest of securities issued by the contract.

Art. 5929 corresponds to s. 396 (*b*)—the part in brackets—adding the words "without having received a bonus." See s. 54 ss. 11 and 12 of the British Columbia Act.

Art. 5930 corresponds to s. 396 (*c*).

Art. 5931 prohibits electors personally interested in a bonused enterprise from voting on the bonus by-law.

Saskatchewan.—By the Cities Act, s. 234, no city shall have power to bonus in any manner, exempt from taxation beyond the current year, [see s. 204 (3)], subscribe for stock in, or guarantee the payment of any bonds or debentures issued by, any industrial or commercial undertaking, or any railway company [other than an incorporated street railway company operating within or near the city.]. [See Keay v. Regina (1912), 2 W. W. R. 1072; 22 W. L. R. 185, p. 635, *ante*].

The Towns Act, s. 231 has not the clause in brackets but is otherwise similar.

The Rural Municipalities Act, R. S. S. 1909, c. 89, s. 59, s.-s. 39, permits exempting from taxation for more than one year, and s. 59, s.-s. 40 permits the making of loans or granting bonuses to manufactories, mills or any other works of a public nature with the consent of the ratepayers.]

[**Bonuses in Aid of Railways.** — Any municipality may "bonus" a railway—"bonus is defined in s. 395—for the purpose of "securing the construction of a railway, in the construction of which the inhabitants of the municipality are interested," or through any part of or near to which the railway will pass or the works of the company be situate: see s. 397 (2); or may subscribe "for any number of shares in the capital stock of a railway company:" see s. 397 (17). Any local municipality—a city, a town, a village or a township—may be excluded from the operation of any bonusing by-law passed by a county and a section of a township may be empowered by a township by-law to grant aid: [s. 397 (14)]. A petition to the council is required [s. 397 (2) and notes] and the "bonus" by-law passed by the council, if approved or amended and approved by the Railway Board, is then submitted for the assent of the qualified electors: [s. 397 (7)]].

INTERPRETATION.

397.—(1) In this section

(*a*) "Railway" shall include a railway operated by steam, electrical or other motive power and a street railway;

(*b*) "Railway company" shall include a person authorized by a special Act to construct a railway,

and shall also include a railway company incorporated by or under the authority of the Parliament of Canada or of the late Province of Canada or of this Legislature.

[These sections were new in this form in 1913—the provisions in the Railway Act of 1906—[6 Edw. VII. c. 30, ss. 2 (1) and (20), and see the notes on the sub-section immediately following, p. 667, *post*] were to the same effect. Section 694 (1) of the former Act [R. S. O. (1897) c. 223] applied to an incorporated railway company, to which s. 18 of the Statute 14 and 15 Vic. c. 51, or ss. 75 to 78 inclusive of c. 66 of the Consolidated Statutes of Canada, or the equivalent sections of the Railway Act of Ontario, had been or might be made applicable by any special Act; or to which the equivalent sections of the Railway Act of Canada did or might thereafter apply.

Street Railway Companies.—In 1899 (by 62 Vic. 2nd sess.) c. 26, s. 44 (1), powers to aid street railways were given. They appeared in s. 699 of R. S. O. 1897, c. 223, and 3 Edw. VII. c. 19. Section 699 read as follows:—

"One-fourth in number of the persons shewn by the last revised assessment roll to be the owners of real property comprised in a township, city, town or village, or any portion of any such municipality to be defined in the petition hereinafter referred to, and who according to such assessment roll represent at least one-third of the value of such property, may petition the council to aid any street railway company by granting money or debentures by way of bonus or gift or by way of loan to such company to assist in the construction of the railway to, through, or partly through or near to such municipality or portion thereof, and may in such petition define the manner and amount of the aid desired."

(2) "Upon receipt of such petition the council (after the assent of a majority of the ratepayers within such municipality or portion thereof who are entitled to vote thereon has been obtained in the manner provided by this Act), may pass the by-law for the granting of such aid in accordance with the petition and for raising the amount petitioned for in the municipality or portion thereof mentioned in the petition, by the issue of debentures of the municipality, and for the delivery of the debentures or the application of the amount to be raised thereby as may be expressed in the by-law, and for assessing and levying upon all the rateable real property lying within the municipality or portion thereof defined in the by-law an annual special rate for the repayment of the said debentures within twenty years, with the interest thereon payable yearly or half-yearly: which debentures the council, reeves and other officers of the municipality are hereby authorized to execute and issue."

(*a*) "In every such case any agreement which has been entered into between the municipal corporation and the street railway company defining the terms and conditions upon which the construction of such railway is to be authorised, shall be published in full with such by-law; and all provisions of law respecting the publication of any such by-law in any newspaper or otherwise shall also apply to such agreement."

(3) "The principal and interest of the debentures may be made repayable by annual instalments, as provided for by s. 386 of this Act, or a sinking fund may be provided for by the by-law."

(4) "In any and every case in which street railway lines are built by different duly incorporated street railway companies in the same or adjoining municipalities along different routes to the same terminal point, then in case an agreement cannot be arrived at between two such companies providing for the exchange and transfer of tickets for a continuous trip over both such lines or portion thereof, the matters in difference in respect thereof shall be referred to arbitration under the provisions of this Act."

Adamson v. Township of Etobicoke, 22 O. R. 341 (1892), was decided on s. 699 (2) (54 V. c. 42, s. 36), and laid down that a by-law would be carried if the majority voting upon it voted for it. See now s. 278 (1).

397.—(2) By-laws may be passed by the council of all municipalities for granting a bonus to a railway company [*for the purpose of securing the construction of a railway in the construction of which the inhabitants of the municipality are interested or through any part of or near to which the railway will pass or the works of the company be situate.*]

[**The History of the Section.**—The power of a municipality to aid a railway is purely statutory and did not exist at Common Law: See Whitby (Corporation of) v. Grand Trunk Railway Co. (1901), 1 O. L. R. 480; MacMurchy and Denison Railway Act, 2nd edition, p. 131.

The statutory power to aid railways was first given to municipal corporations in 1851 by 14-15 V. c. 51, s. 18 (1-3), The Railway Clauses Consolidation Act.

The history of the Act of 1851 appears in MacMurchy and Denison, at p. li.

These provisions were first introduced into the Municipal Act in 1858 by 22 V. c. 99, s. 332, and gave municipalities power to subscribe for shares in or lend money to the railways mentioned in the note to s. 397 (1) (2), to guarantee repayment of any money borrowed by such railways, to endorse or guarantee the debentures of such railways, etc.

These sections then passed into the various revisions and consolidations—[see 36 V. c. 48 (1873), R. S. O. (1877), c. 174—55 V. c. 42 and R. S. O. (1897), c. 223, s. 694].

Bonusing powers were first given in 1871 by 34 V. c. 30, s. 6, and see per Armour, C.J.O., in Whitby v. Grand Trunk, *ante*, and see also 36 V. c. 48, s. 471 (4).

In 1906 these provisions, with some new ones, were carried into the Railway Act (Ont.), upon the formation of the Ontario

Railway and Municipal Board, when the provisions dealing with aid to railways first appeared in very much their present form. Municipalities were by that Act, 6 Edw. VII. c. 30, s. 130, empowered to aid railways by "giving money or debentures by way of bonus, gift or loan or by the guarantee of the municipal corporation under and subject to the provisions" in the Act; s. 143 permitted gifts of land; s 149 (1) permitted exemption from taxation.

Bonus is defined by s. 395 (*a*) to (*f*), pp. 642-656, *ante*, to which reference should be made.

Section 395 (*a*). R. S. O. (1897) c. 223, ss. 694 (1) and 699—street railways—gave power to lend money, and s. 694 (5) to "bonus:" See "what is a bonus," p. 635, *ante*.

Section 395 (*b*). R. S. O. (1897) c. 223, ss. 694 (1) and (2) and 699 gave similar powers.

Section 395 (*c*). 6 Edw. VII. c. 30, s. 143, first permitted municipal gifts of land to railways.

Section 395 (*d*). This was new in 1913, so far as railways are concerned.

Section 395 (*e*). This section was also new in 1913.

Section 395 (*f*). This power was first given to municipalities, in so far as railways were concerned, by 6 Edw. VII. c. 30, s. 149.

Section 395 (*g*). This power was new in 1913.

The Purpose of the Aid.—The Railway Act (1906), s. 130, permitted municipalities or any portions of townships which might be interested in securing the construction of the railway, or through any part of which or near which the works of the railway should pass or be situated, to aid the railway in the manner set out above.

In 1913 (3-4 Geo. V., c. 43, s. 397), the power to aid was limited to the purposes specified in this section by the words printed in italics: see p. 667, *ante*. No bonus may be granted for any other purpose: See Scott v. Tilsonburg, 13 A. R. 233 (1886-7); Re Campbell and Village of Lanark, 20 A. R. 372 (1893).

Subscriptions for Stock of a Railway Company.—This is provided for by s. 397 (17), p. 679, *post*.

All municipalities may pass such by-laws but parts of a local municipality may be excluded from the operation of the by-law—[see s. 397 (5) (2)].

Section 694 expressly applied to counties, townships, cities, towns and villages.

Procedure.—See the notes to s. 397 (3), p. 672, *post*.

The Amount of the Bonus.—See s. 397 (13) and notes.

Terms and Conditions of the Bonus.—In the absence of special statutory provisions in the Act incorporating the railway company, the only way in which conditions may be imposed upon a grant of aid to the company is by inserting such conditions in the by-law. Section 397 (2) does not contain a provision similar to the one in s. 396 as to terms and conditions as to security, referred to at p. 657, *ante*.

The grant of money as a gift or loan may, by s. 395 (*a*), be made conditionally.

It follows then that:—

(1) The non-fulfillment of conditions contained in a collateral contemporaneous agreement entered into between the municipality and the company is not a ground for withholding the bonus, in the absence of the special legislation referred to above.

The P. W. and P. P. Railway Company was incorporated by 31 Vic. c. 42 (O.) before municipal corporations were empowered to grant bonuses to any railway [a right first given by 34 Vic. c. 30 (O.)]. The incorporating Act permitted the railway to receive aid by way of bonus and municipalities to give the same The town of Whitby authorized a grant of $50,000 to the railway to be raised by the issue and sale of debentures. Before the final passage the railway gave its bond to the town that it would always keep certain offices and shops in the municipality. It was held that the recital of such an agreement in the bond, which was executed under the company's corporate seal, was a covenant for breach of which action might be maintained against the company. Farrall v. Helditch (1859), 5 C. B. N. S. 840, followed; but in the absence of any statutory power such as existed in the company in Wallace v. Great Western R. W. Co. (1877), 25 Gr. 86, 3 A. R. 44, which contained a clause similar to s. 396 as to security, the company was not able to enter into any conditions as to the terms upon which such aid might be given. Ashbury Railway Carriage, etc., Co. v. Riche (1875), L. R. 7 H. L. 653; Attorney-General v. Great Eastern R. W. Co. (1880), 5 App. Cas. 473; and Baroness Wenlock v. River Dee Company (1885), 10 App. Ca. 354, applied, and the judgment of Boyd, C. (1900), 32 O. R. 99, reversed. Whitby v. Grand Trunk Railway Co. (1901), 1 O. L. R. 480. See also Bickford v. Chatham (Town of), 10 O. R. 257; 14 A. R. 32; 16 S. C. R. 235 (1886-8).

(2) The municipality has, however, its right to damages for non-performance and security for payment of such damages may be exacted by the Court before it will order delivery of debentures.

Bickford v. Chatham, *supra*, and in Whitby v. Grand Trunk Railway Co. (*supra*), the Court, while it held the plaintiffs' claim on the agreement failed, reserved final judgment to enable an application for leave to amend by claiming a remedy in damages.

(3) The conditions may not be set out on the debentures as they are to be negotiable instruments. See notes, p. 517, *ante*. St. Cesaire (Parish) v. McFarlane, 14 S. C. R. 738 (1887).

Conditions in By-laws.—The following conditions have been supported:—

1. That the certificate of a certain person shall be a condition precedent to payment of the bonus: Bickford v. Chatham (*supra*); Canada Atlantic Railway Co. v. Cambridge (Township of), 11 O. R. 392, 12 A. R. 234. 12 S. C. R. 365 (1884-5). See now s. 397 (22) (*c*), p. 683.

2. That certain works shall be erected or maintained: Toronto (City) v. Ontario and Quebec R. W. Co., 22 O. R. 344 (1892); Township of Wallace v. Great Western R. W. Co., 3 A. R. 44 (1878); City of St. Thomas v. Credit Valley R. W. Co., 12 A. R. 273 (1885); Township of Nottawasaga & North-Western R. W. Co., 16 A. R. 52 (1888).

3. That certain running arrangements could be made with other railways or that the company shall not make any arrangement or agreement with any other company: Halton (County) v. G. T. R., 19 A. R. 252, 21 S. C. R. 716 (1892); Haldimand (County) v. Hamilton and North-Western R W. Co., 27 C. P. (1887) 228.

4. That a time limit shall be placed upon certain work, and if no limit is placed there is a presumption that a condition was intended that the bonus should be earned before the expiry of the time fixed by the company's charter: Luther (Township) v. Wood, 19 Gr. 349 (1892); Re Stratford and Huron Railway Co. and Perth (County), 38 U. C. R. 112 (1876); Canada Atlantic Railway v. Ottawa (City), *ante*, p. 640. Extension of time is permitted by s. 397 (12).

5. That the debentures issued shall be accepted at a certain value: Higgins v. Whitby (Corporation), 20 U. C. R. 296 (1860). See s. 397 (22) (*c*).

Remedies on Company's Default.

1. Debentures in the hands of a trustee may be recovered in an action by the corporation: Township of West Gwillimbury v. Hamilton & North-Western R. W. Co., 23 Grant 383 (1876); County of Haldimand v. Hamilton and Northwestern R. W. Co.,

supra; Township of Brock v. Toronto & Nipissing R. W. Co., 17 Grant 425 (1870).

2. The amount of a paid bonus may be recovered as liquidated damages on a bond given to secure performance of the conditions: Halton (County) v. Grand Trunk R. W. Co., *supra.*

3. Damages may be recovered in other cases. The measure of such damages is discussed in St. Thomas (City) v. Credit Valley Railway Company (1888), 15 O. R. 673.

Remedies in Default of Municipality in Delivering Debentures. A mandamus may be obtained in an action, but not upon summary application: Re Grand Trunk R. W. Co. and County of Peterborough, 8 S. C. R. 76 (1882); Re Canada Atlantic R. W. Co. and Township of Cambridge, 3 O. R. 291 (1883); Re Stratford & Huron R. W. Co. and County of Perth, *supra.* See s. 397 (11) and (19). Re Blenheim, p. 680, *post.*

Annulment of By-law.—An action for the annulment of a municipal by-law will lie, although the obligation thereby incurred be conditional, and the condition has not been and may never be fulfilled. Where a resolutory condition precedent to payment of a bonus to a railway company, under a municipal by-law in aid of construction and operation of works, has not been fulfilled within the time limited on pain of forfeiture, an action will lie for the annulment of the by-law at any time after default notwithstanding that there may have been part performance of the obligation undertaken by the railway company, and that a portion of the bonus has been advanced to the company by the municipality. In an action against an assignee for a declaration that an obligation has lapsed and ceased to be exigible on account of default in the fulfilment of a resolutory condition, exception cannot be taken on the ground that there has been no signification of the assignment, as provided by Art. 1571 of the Civil Code of Lower Canada. The debtor may accept the assignee as creditor, and the institution of the action is sufficient notice of such acceptance: Bank of Toronto v. St. Lawrence Fire Insurance Co., 1903, A. C. 59, followed. Sorel v. Quebec Southern R. W. Co., 26 C. L. T. 70, 36 S. C. R. 686 (1905).

Quebec.—See p. 664 *et seq., ante.* To an action brought to recover a bonus of $3,000 voted for the construction of an aqueduct, a municipal corporation cannot plead matters which it has already invoked and which have been pronounced against in an action which has been finally dismissed by the Supreme

Court of Canada, and which was instituted by such corporation to set aside the contract in pursuance of which the bonus was voted.—2. A municipal corporation may pass a by-law granting a bonus to persons who undertake to construct an aqueduct within the limits of the municipality.—3. A municipal corporation, by virtue of Art. 637, C. M., may grant an exclusive privilege for not more than 25 years to persons who undertake to construct an aqueduct within the limits of the municipality. Such privilege, if it is limited to the exclusive right to lay pipes in the streets, is not unconstitutional and does not constitute an illegal monopoly.—4. Even if the terms in which such privilege has been granted are of such a nature as to extend this privilege to a period exceeding 25 years, that would not make the contract and by-law totally void, and the bonus granted by such contract and by-law for the construction and working of the aqueduct can always be claimed: Lariviere v. Richmond, 21 Que. S. C. 37.]

397.—(3) Upon presentation to the council of a petition expressing the desire to aid the railway company and stating in what way and to what amount signed by a majority of the members of the council, or in the case of a county by at least fifty resident freeholders qualified to vote on the by-law, of each of the local municipalities in the county, or in the case of a local municipality by at least 50 resident freeholders thereof qualified to vote on the by-law, the council shall, within six weeks after the receipt of the petition by the clerk, take the requisite proceedings for submitting, in the manner provided by this Act, a by-law for granting the bonus for the assent of the electors qualified to vote thereon.

[This section is taken from 6 Edw. VII., c. 30, s. 131, part. See the notes to the preceding section.

Procedure.—It should be borne in mind that the provisions of these sections as to procedure must be strictly complied with. See Scott v. Tilsonburg, and Re Campbell and Lanark, p. 658, *ante;* MacMurchy and Denison, p. 131.

The Petition, its History.—The procedure by petition was introduced into the Act in the cases now provided for by s. 397 (14) in 1888—in 1899 the section permitting aid to street railway

companies on petition was first passed—see 62 V., 2nd sess., c. 26, s. 44 (1), and p. 666, *ante;* the Act of 1906 extended the procedure to all cases.

When Necessary.—The present arrangement of this and the preceding section might be thought to make it appear that such a by-law could be passed by the council in two cases— (1) of its own initiative, under s. 397, and (2) upon a petition being presented. The Act of 1906 made it quite clear that such a by-law could only be passed upon a petition being presented. Section 131 provided that a by-law such as is specified in s. 397 (2) should be submitted by the council to a vote in the manner following, namely, "the proper petition shall first be presented." There seems to be no doubt that the petition is still necessary in all cases. See also s. 397 (15) and notes.

How the petition should be made.—In the case of a county it must be signed by 50 resident freeholders of each local municipality who are qualified to vote; in the case of local municipality—city, town, village and township—by 50 qualified and resident freeholders; in either case the petition of a majority of the members of the Council will be sufficient instead of a petition by the freeholders.

The Essentials of the Petition.—It must set out: (1) the desire to aid the company—for one of the reasons set out in the preceding sub-section; (2) the form such aid shall take—one or more of the ways specified in s. 395 (*a*) to (*g*)—*Quære,* whether a subscription for shares under s. 397 (17) would come within this section? See the remarks at p. 679, *post;* (3) the amount of the aid to be given. Petitions by parts of townships: See s. 397 (15) p. 678, *post.*

The Duty of the Council.—Unless there is a petition against the submission of the by-law—which is permitted by s. 397 (4), in the case of a county by-law—the council shall, within six weeks, take the requisite steps required by the Act to submit the by-law or the amended by-law, if s. 397 (5) applies to the electors. See s. 260 *et seq.* and notes, p. 367 *et seq., ante.* As to the expense of the vote, see s. 397 (10).

The Assent of the Electors.

Jurisdiction of the Railway Board over by-laws, etc., see s. 397 (4) to (7) *post.*

Requirements as to passing by-laws: see s. 397 (10).

The Expense of Submitting the By-law.—See s. 397 (9). The by-law must be submitted for the electors—and see s. 397 (7), R. S. O. 1897, c. 223, s. 694 (6), 696 (1) and 699 (2), contained similar provisions. See also 55 V. c. 42, s. 634 (5), 635 (*a*) (1), 636 (*a*) (2); 3 Edw. VII., c. 19, s. 694 (6), 696 (1), 699 (2). The Railway Act, 1906, c. 30, s. 130, also required such assent.

The necessary number of votes to be polled is specified in s. 278: see p. 391, *ante*.

Where certain parts of a county are excluded under s. 397 (6) only those persons in the parts affected have the right to vote—[s. 397 (6)].

The Form of the By-law.—This is now provided for by s. 288: see p. 417 *et seq., ante*. Section 132 of the Railway Act, 1906 (O.), provided that such by-law shall in each instance provide:—

(*a*) For raising the amount petitioned for in the municipality or portion of the township municipality (as the case may be), mentioned in the petition, by the issue of debentures of the county or minor municipality, respectively, and shall also provide for the delivery of the said debentures, or the application of the amount to be raised thereby, as may be expressed in the said by-law.

(*b*) For assessing and levying upon all rateable property lying within the municipality or portion of the township municipality defined in the said by-law (as the case may be), an annual special rate, sufficient to include a sinking fund for the repayment of the said debentures within twenty years with interest thereon, payable yearly or half-yearly, which debentures the respective municipal councils, wardens, mayors, reeves and other officers thereof, are hereby authorized to execute and issue in such cases respectively.

This section was not carried into the present Act. R. S. O. 1897, c. 223, s. 696 (1), contained a similar provision as did 3 Edw. VII., c. 19, s. 696 (3).]

397.—(4) Where the aid is proposed to be given by a county, if a petition signed by 50 resident freeholders of the county against submitting the by-law on the ground that certain of the local municipalities or parts of them would be injuriously affected thereby or on any other ground ought not to be included therein, and if a sum sufficient to defray the expense of the reference is deposited by the petitioners with the treasurer of the

county, the council shall forthwith refer the petition to *The Municipal Board.*

[The section was taken from the Railway Act, 1906, where it first appeared as s. 133 part. See the notes to the preceding sub-section.

The Municipal Board.—The Ontario Railway and Municipal Board: See R. S. O. 1914, c. 186, s. 5.

The powers of the Board are confined to county by-laws, and are set out in s.-s. (5).

It may (1) confirm the petition for the by-law [s.-s. 5]; (2) or amend the by-law by excluding all or part of any local municipalities [s.-s. 5]. See the notes to the following s.-ss. (5), (6) and (7).

Local Municipalities.—Section 133 used the words "minor municipalities," which were defined by s. 134 to be "any town not separated from the municipal county, township or incorporated village situate in the county municipality;" local municipalities are cities, towns, villages and townships: See s. 2 (*g*).

Costs of the Reference.—These must be deposited with the treasurer before the reference will be made. The unsuccessful petitioners must pay the costs [s.-s. 8, p. 676, *post*]. *Semble,* there is no discretion: if the by-law is amended the Board may direct the railway company or the corporation of the county to bear all or part of such notes.]

397.—(5) The Board may direct that the prayer of the petition be not granted, or that any of the local municipalities or any part of them or any of them shall be excluded from the operation of the by-law, and that the by-law be amended accordingly.

[Taken from the Railway Act, 1906 (Ont.), s. 133 part, which gave the Board power to "confirm or amend" the by-law by excluding any minor municipality or any part thereof [see the notes to the preceding sub-section]. The meaning of this section would seem to be the same, and the petition referred to, the petition against the by-law. The Board has no power to refuse the petition for the by-law, and it is only in the case of county by-laws that it can exclude certain municipalities or portions thereof, and then only on the ground that the excluded municipality or part would be injuriously affected.

Costs.—See s. 397 (4) and the following sub-section.

397.—(6) Where the Board directs that the by-law be amended by excluding the whole or any part of a local municipality from the operation of it, the by-law shall be amended by imposing the rate to provide for the payment of the bonus or of the principal and interest of the debentures issued therefor on the rateable property within that part of the county not so excluded and that only, and the assent to the by-law of those persons qualified to vote on it in that part of the county not so excluded shall be sufficient, and they shall be the only persons entitled to vote on the by-law.

[See the notes to s. 397 (2), p. 667, *ante*.]

397.—(7) The by-law as confirmed by the Board or amended by its direction shall, at the option of the railway company, be submitted by the council for the assent of the electors qualified to vote thereon.

397.—(8) If the prayer of the petition is not granted by the Board, the expense of the reference shall be borne by the petitioners, and if the Board directs the by-law to be amended by excluding any part of the county from the operation of the by-law, shall be borne by the railway company or by the corporation of the county or in such proportions between them as the Board may direct.

Taken from the Railway Act, 1906, c. 30, s. 133 (part). See the notes to s. 397 (4) p. 675, *ante*.]

397.—(9) The council may require that before submitting the by-law for the assent of the electors the railway company shall deposit with the treasurer of the municipality a sum sufficient to defray the expense of its submission.

[Taken from the Railway Act, 1906, s. 135. See the notes to s. 397 (3).]

397.—(10) If the by-law receives the assent of the electors the council shall, within four weeks from the day on which the vote was taken, pass the by-law.

[Taken from s. 136 of the Railway Act of 1906. See the notes to s. 397 (3) and 397 (7).]

397.—(11) Unless otherwise provided by the by-law, the debentures, the issue of which is provided for by it, shall be issued and disposed of or delivered to the trustees appointed to receive them as hereinafter provided.

[Taken from the Railway Act, 1906, c. 30, s. 144 part.

Trustees.—See s. 397 (19) and notes p. 682, *post*.

Debentures.—See s. 314 (1) and notes p. 522, *ante*.

In Bogart v. King (1901), 1 O. L. R. 496 (21 C. L. T. 279), a by-law was passed under the provisions of ss. 386, 694 and 696, authorizing the issuing of debentures to bonus a railway. "Certain instruments in the form of debentures have been prepared and signed by the proper officer and perhaps sealed with the corporate seal, no doubt as and for debentures which might be issued under the authority of the by-law, but they have always remained in the possession of the defendant corporation. They have not been sold or delivered to or placed in hands of any one as trustee for the corporation and the company. No one other than the corporation has hitherto acquired any right to deal with them and they might be destroyed by the corporation to-morrow without the right on the part of anyone to object to their doing so: Mowat v. Castle Steel and Iron Works Co. (1886), 34 Ch. D. 58. (Clarke v. Palmerston (1883), 6 O. R. 616, distinguished). I am, therefore, of the opinion that the plaintiff had the right to maintain the action to restrain the defendants from levying upon him the rate under the by-law—per Osler, J.A., at p. 501.]

397.—(12) Where the period within which the construction of the railway or other work is to be commenced or to be completed is provided for in the by-law, the council may by by-law or resolution from time to time extend such period, but no extension shall be for longer than one year at a time.

[Taken from s. 140 of the Railway Act (1906).]

397.—(13) A bonus may be granted or shares may be subscribed for under the authority of this section notwithstanding that the yearly municipal taxation may be thereby increased beyond the limit provided for by section 297, if it does not require the levying of an annual

rate for all purposes, exclusive of school rates, greater than three cents in the dollar.

[Taken from s. 142 of the Railway Act of 1906, which only applied to bonuses.

Bonus may be granted. See s. 397 (2) and notes, pp. 667 to 672, *ante*.

Shares May be Subscribed for.—See s. 397 (17) and notes p. 629.

The Limit Provided for by s. 397.—See this section and notes, p. 478, *ante*.]

397.—(14) By-laws may be passed by the councils of townships for granting a bonus for any of the purposes mentioned in sub-section 2 by a section of the township, [and in that case the rates imposed by the by-law to provide for the payment of the bonus or the principal and interest of the debentures issued therefor shall be imposed upon the rateable property within such section and that only].

[This power was first given by the Act in 1888: See 51 V. c. 28, s. 37, and the section appeared in 1897, and until 1913 as s. 696 (1). The section read as follows:—

"In addition to the powers conferred by s. 694, now s. 397 (2), a portion of a township municipality which may be interested in securing the construction of a railway, or through or near which any such railway may pass or be situated, may aid the said railway by granting money or debentures by way of bonus or gift, or by way of loan to such railway under and subject to the provisions hereinafter contained."

The by-law authorizing such aid would of course have to be passed by the township council, and in 1906 the provision was put in its present form but included in the original of s. 397 (2). See the Railway Act, 1906, s. 130. In 1913 it took its present form: 3-4 Geo. V., c. 43, s. 397 (14).

The Purposes Mentioned in s. [397] (2).—See the notes at p. 668, *ante*.

Rates Imposed upon the Sections Aiding only.—The part of the section in brackets is taken from s. 138 of the Railway Act (1906). A similar provision appeared in s. 696 as para. 3 (*b*).

The Petition and Voting in Such Cases.—See the following sub-section and notes:—]

397.—(15) In the case of a by-law to which the next preceding sub-section applies, the petition shall be by a

majority of the members of the council or at least fifty freeholders of the section qualified to vote on the by-law, and shall define the section by metes and bounds or by lots and concessions, and the assent to the by-law of those persons qualified to vote on it in the section shall be sufficient, and they shall be the only persons entitled to vote on the by-law.

[For the history of the petition in this case, see the notes at p. 672, *ante*. This section appeared as s. 696 (2) and s. 131 (4) of the Act of 1906. See the notes to the preceding sub-section.

Petition.—The general requisites of a petition are set out at p. 673, *ante;* the provisions of this sub-section must also be carefully observed: See Scott v. Tilsonburg, p. 649, *ante*.

Assent of the Voters.—See s. 278 and the notes at p. 391, *ante*.]

397.—(16) In all other respects the provisions of sub-sections 1 to 13 shall apply.

[When a municipal by-law requires approval by the majority of the class of persons interested, for example, the owners of land in a certain quarter of the municipality or in certain streets, a notice calling upon all the ratepayers of the municipality generally to vote is void, and a vote taken pursuant thereto is without effect. On this ground, a by-law, although it has received the approval of the Lieutenant-Governor, will be declared void for non-fulfillment of an essential formality: Aubertin v. Village du Boulevard St. Paul, 33 Que. S. C. 289 (1909).

397.—(17) By-laws may, with the assent of the electors qualified to vote on a money by-law, be passed by the councils of all municipalities for subscribing for any number of shares in the capital stock of a railway company.

[The original of this section was in 14-15 V. c. 51, s. 18. See the notes to s. 397 (2) at p. 668, *ante*. Until 1913 the section appeared in R. S. O. 1897, c. 223, and amending Acts, as s. 694 (1).

The Assent of the Electors.—See the notes at p. 438, *ante*. The procedure must be carefully followed.

May the Electors Petition for the Submission of such a By-law?—The Council seems to be empowered to introduce such a by-law

of its own volition. No petition was formerly required: See s. 694 (1). It should be observed, however, that s. 397 (3) provides for a petition expressing a "desire to aid the company," and it might be argued that subscribing for stock in a company would come within such a provision.

Purposes of the Purchase.—There are no restrictions upon the purpose for which the stock is purchased, such as are placed upon loans by s. 397 (2).

In re Blenheim (1910), 15 O. W. R. 186, Boyd, C., said:—"The by-law as voted on provides that it shall and may be lawful for the municipal corporation of Blenheim to assist the People's Railway Co., by taking stock in the said company to the amount of $15,000 . . . and to pay for said stock with debentures of the corporation to be made and issued, etc. (sec. 1).

The debentures are to be delivered by instalments when the right of way through Blenheim has been secured and as and when the road is graded for one mile between the village of Bright and the village of Plattsville, and so on (sec. 5 of by-law).

The debentures are to be met by levy of a sufficient rate on all the rateable property within the portion of the township through which the railway takes its course (sec. 6).

This by-law is based on the provisions of s. 696 of the Municipal Act, 1903, which may by implication provide for the taking of stock by the municipality, though the marginal note annotates the section as "aid to railways by portions of townships." The text does in terms provide that the debentures are "to be issued by the municipality" (s.-s. 3 (*a*)); and the Act contemplates that these obligations of the whole municipality are to be defrayed by particular assessment upon all the rateable property within the portion of the municipality defined in the by-law. The taking of stock by the municipality and the issuing of debentures by the municipality would *prima facie* place the whole financial burden upon the township at large, but that I do not take to be the meaning or the intention of the Act.

The provisions of the law as to granting municipal aid to railways by way of loan or bonus (which does not involve the taking of stock) are to the effect that if carried by the required majority of voters for the whole or the part of a municipality it shall be the duty of the council to pass the by-law: see 6 Edw. VII., c. 30, ss. 130, etc., and particularly s. 136. This withdraws all discretion from the members of the council in such a case, which is not the present. The clauses in the Consolidated Municipal Act of 1903 relating to aid to railway companies are in phraseology

permissive. The council after successful voting, may pass the by-law, and it is so expressed on the face of this by-law, "it shall and may be lawful for the corporation to assist."

This council, as did the council of the former year, 1909, objects to the final reading and passing of the by-law. One point of difficulty raised is that the by-law is really one for creating a debt payable by local assessment, and that it falls within s. 385 of the Act of 1903. Such a by-law shall recite that the "debt is created on the security of the special rate settled by the by-law and on that security only." That is, I think, the fair meaning of the legislation as to the manner of granting aid to a railway by part only of the township, but this safeguard as to the public and the financial world has not been observed in the promulgation of this by-law. I think the council may have good ground for grave hesitation in committing the whole municipality to the primary burden of this entire $15,000 debt. Their action or inaction does not appear to me unreasonable or unjustifiable, and, if they have a discretion, it should not be interfered with by the Court.

Other grounds of objection were urged; I have dealt with what seems to be the most important, and the result is that I decline to grant an order for a mandamus. It is not a case for costs."

The following state of facts appears in the judgment of Irving, J.A., in Lucas v. North Vancouver (1913), 4 W. W. R. 1381, at pp. 1382-3.

". . . It would appear that the defendants, acting under the powers conferred by the B. C. Municipal Amendment Act of 1913 [see p. 663, *ante*], subscribed for 2,500 shares of the capital stock of the Burrard Inlet Tunnel and Bridge Company, a company incorporated by the Dominion Statute 9-10 Edw. VII., c. 74, to which company the Railway Act of Canada, c. 37 R. S. C., 1906, applies.

"The shares were duly issued to the defendant municipality and the consequence was that by s. 111 the Reeve of N. Vancouver became a director.

"The council then thinking the voting power, and consequently the influence of the municipality in the promotion of the objects of the company, could be increased by causing to be elected on the board of directors certain persons well disposed toward the municipality of N. Vancouver, determined to place in the names of four gentlemen (the defendants), . . . shares sufficient to qualify them for election as directors of the company and the intention was to have them elected as directors. This scheme was being

carried out, when the plaintiff arrived at the conclusion that the appointment of these four gentlemen holding qualification shares from the defendant municipality in the manner I have mentioned, would render any action by the directorate of the tunnel company nugatory, and that thereby the objects which he and the defendant municipality desired to see accomplished, namely, the completion of the undertaking for which the defendant company had been organized, would be delayed and possibly prevented."

The plaintiff obtained an injunction from Murphy, J., restraining the municipality from transferring to the individual defendants the shares held by the corporation.

Irving, J.A., and Galliher, J.A., held that the corporation had power to transfer the shares to the individual defendants to be held in trust for the corporation (reference to Brice on Ultra Vires, 2nd ed., 371); Macdonald, C.J.A., dissented: Macdonald, C.J.A., and Galliher, J.A., held that such individual defendants could not qualify as directors of the company, not being the beneficial owners of such shares; Irving, J.A., dissented.

Provisions of the Canada Railway Act.—This Act, R. S. C. c. 37, s. 99, provides: Municipal corporations in any province of Canada duly empowered so to do by the laws of the province may, subject to the limitations and restrictions in such laws prescribed, subscribe for any number of shares in the capital stock of the company.

Terms and conditions for such subscription. See the notes to s. 397 (2) at p. 669, *ante*.]

397.—(18) Clauses (*a*), (*e*) and (*f*) of section 396. shall apply to a by-law passed under the authority of this section.

[These clauses will be found at pages 658 and 662, *ante*, respectively.

397.—(19) Where a by-law is passed under the authority of this section for granting a bonus to a railway company, the debentures therefor shall, within six months after the passing of the by-law, be delivered to three trustees, all of whom shall be residents of Ontario, who shall be named, one by the Municipal Board, one by the railway company, and one by the head of the municipality, or if bonuses have been granted by the councils of more municipalities than one by the majority of

the heads of the municipalities by which the bonuses have been granted.

[This section is taken from the Railway Act, 1906, c. 30, s. 144 (first part).
See s. 397 (11), and]

397.—(20) If the head of the municipality or the heads of the municipalities, as the case may be, do not within one month after notice in writing of the appointment of the railway company's trustee name their trustee, the company may name him, and if the Board does not name a trustee within one month after notice in writing to the Board of the appointment of the other two trustees, the company may name the third trustee.

[Taken from s. 144 (part) of the Railway Act, 1906.]

397.—(21) The Board may remove a trustee and may appoint a new trustee in his stead, and if a trustee dies or resigns his trusteeship or goes to reside out of Ontario, or otherwise becomes incapable of acting, his trusteeship shall become vacant, and the Board may appoint a trustee in his stead.

[Taken from s. 144 (part) of the Railway Act, 1906.]

397.—(22) The trustees shall receive and hold the debentures in trust:—

(*a*) Under the direction of the railway company, but subject to the conditions of the by-law as to the time or manner of so doing, to convert the same into money or otherwise dispose of them;

(*b*) To deposit the debentures or the amount realized from the sale of them in a chartered bank having an office in Ontario, in the name of "The Railway Municipal Trust Account" (*designating the name of the railway*).

(*c*) To deliver the debentures or pay the proceeds of the sale of them to the company from time to time as it becomes entitled thereto under the conditions of the by-law on the certificate of the chief engineer of the railway company Form 25.

FORM 25.

CHIEF ENGINEER'S CERTIFICATE.

To the Trustees of the Railway Company Municipal Trust Account.

I, Chief Engineer of the Railway Company, do hereby certify that the company has fulfilled the terms and conditions necessary to be fulfilled under by-law number of the municipal council of the of , passed the day of , 19 , that is to say (*set out terms and conditions fulfilled*), to entitle the company to receive from the trustees the sum of

Dated the day of , 19 .

Chief Engineer.

3 & 4 Geo. V. c. 43, Form 25.

[Taken from s. 145 of the Railway Act, 1906. The form (25) is new in this Act, but corresponds in effect to the form in Sch. A. to the Railway Act, 1906.

In Woodruff v. Town of Peterborough, 22 U. C. R. 274 (1862), it was laid down that payment to contractors for the company at the request of the company would discharge the municipality. Probably the company could still request the trustees to pay the contractor.]

397.—(23) The certificate shall be attached to the cheque or order drawn by the trustees for such delivery or payment.

(24) If the chief engineer wrongfully grants any such certificate he shall incur a penalty of $500, recoverable by any person who may sue therefor.

(25) The act of any two of the trustees shall be as valid and binding as if they had all joined therein.

(26) The trustees shall be entitled to their reasonable fees and charges from the trust fund.

[The first two sub-sections are taken from c. 145, the second two from s. 146 of the Railway Act, 1906.]

398.—By-laws may be passed by the councils of all municipalities.

Amateur Athletic and Aquatic Sports.

398.—(1) For aiding amateur athletic or aquatic sports. 3 Edw. VII. c. 19, s. 591 (2*a*). 3 & 4 Geo. V. c. 43, s. 398 (1).

Bands of Music.

398.—(2) For aiding the establishment and maintenance of bands of music by any corps of active militia within the county, or any other bands of music. 3 Edw. VII. c. 19, s. 591 (2); 3 & 4 Geo. V. c. 43, s. 398 (2).

Bathing Houses.

398.—(3) For establishing and maintaining, or for granting money to aid in the construction of public bathing houses. 3 Edw. VII. c. 19, s. 591 (3); 3 & 4 Geo. V. c. 43, s. 398 (3).

Census.

398.—(4) For taking a census of the inhabitants. 3 Edw. VII. c. 19, s. 533 (1); 3 & 4 Geo. V. c. 43, s. 398 (4). See "Population," sec. 2 (*n*).

Charitable Institutions, etc.

398.—(5) For granting aid to any charitable institution or out-of-door relief to the resident poor. 3 Edw. VII. c. 19, s. 588 (2); 3 & 4 Geo. V. c. 43, s. 398 (5).

Crimes—Discovery of.

398.—(6) For offering and paying rewards for the discovery, apprehension and conviction of persons who have or are believed or suspected to have committed flagrant crimes or to have contravened clause (*g*) of section 138, or to have been guilty of personation as defined by *The Dominion Elections Act* or by *The Ontario Election Act* within the municipality. 3 Edw. VII. c. 19, ss. 593 and 594, *redrafted*. 3 & 4 Geo. V. c. 43, s. 398 (6).

Personation.—The Ontario Election Act, R. S. O. (1914), c. 8, s. 174, defines personation as follows:—

174.—(1) ["A person who at an election applies for a ballot paper in the name of some other person whether that name be that of a person living or dead, or of a fictitious person, or who having voted applies at the same election for a ballot paper in his own name] or who votes more than once at the same election, [shall be guilty of the offence of personation.]"

(2) "A person who commits or who directly or indirectly aids or abets, counsels or procures the commission of the offence of personation, shall be guilty of a corrupt practice, and shall incur a penalty of $400, and shall also on conviction be imprisoned for one year."

The Dominion Elections Act, R. S. C. 1906, c. 6, s. 272, is to the same effect as the part of s. 174 (1) printed in brackets. The penalty is to be not more than $200 and not less than $50, and imprisonment for a term not exceeding two years and not less than three months.

Sec. 138 (g) makes it an offence (1) to apply for a ballot paper in the name of another, living or dead, or of a fictitious person; (2) to vote oftener than allowed.

Offering Rewards for Detection of Criminals.—The power to offer and to pay such rewards does not exist unless expressly given. Cornwall v. West Nissouri, 1875, 25 U. C. C. P. 9, commented on in R. v. Van Norman, 1909, 19 O. L. R. 447 at 455. See discussion under sec. 405.

Crimes Committed within the Municipality.—In re Robinson, 1877, 7 P. R. 239, the accused hired a horse in York county, representing that he intended to use it in that county. He then went into Waterloo county and attempted to sell the horse. He was tried and convicted in Waterloo county, the crime having been charged in the indictment to have been committed in Waterloo. The judge having been applied to for an order on the treasurer of Waterloo for the payment of the reward refused to grant it, thinking the theft had taken place in York. Galt, J., granted a mandamus commanding the judge to sign the order as applied for.

What will Entitle Claimant to Reward?—Supplying an indispensable link in the chain of cause and effect; see Tarner v. Walker, 1866, L. R. 2 Q. B. 301. Where the plaintiff gave information that led to the arrest of R., who told where the thieves were, the plaintiff recovered, although the police swore they were already watching the place and that the information of R. was not the means which led to the apprehension of the thieves.

Must Claimant Know of the Offer of Reward when Giving Information?—Apparently not: see Williams v. Carwardine, 1833, 4 B. & Ad. 621, and Gibbons v. Proctor, 1891, 64 L. T. 594; but see criticism in Pollock on Contracts, 8th ed., p. 22.

To whom should the Information be Given?—Either to the advertiser or to the police or to a magistrate: see Lancaster v. Walsh, 1837, 4 M. & W. 16; Lockhart v. Barnard, 1843, 14 M. & W. 674.

Can Police Officers Claim Reward?—Yes. England v. Davidson, 1840, 11 A. & E. 856. Even if the reward is offered after the apprehension of the criminal but before notice thereof: Neville v. Kelly, 1862, 12 C. B. N. S. 740. But if a voluntary confession is made to a policeman he will not be entitled to a reward: Bent v. Wakefield and B. A. Bank, 1878, 4 C. P. D. 1.

The Administration of Justice Expenses Act, R. S. O. 1914, c. 96, s. 11, provides for allowances to constables and others where the warden and Crown attorney direct special services to be rendered and certify to the reasonableness of the allowance. Advances may be made by the treasurer of the county on the direction of the warden and Crown attorney. This section does not apply to a city or separated town having a staff of salaried police. Section 12 permits an advance in cases of emergency on the order of the reeve and the Crown attorney.

See Sills v. Lennox and Addington, 1900, 31 O. R. 512.

Drainage.

398.—(7) For constructing, maintaining, improving, repairing, widening, altering, diverting and stopping up drains, sewers or water-courses; providing an outlet for a sewer or establishing works or basins for the interception or purification of sewage; making all necessary connections therewith, and acquiring land in or adjacent to the municipality for any of such purposes. 3 Edw. VII. c. 19, s. 554 (1), *part redrafted.* 3 & 4 Geo. V. c. 43, s. 398 (7).

The Necessity for a By-law.—In Lawrence v. Owen Sound (1902), 1 O. W. R. 559, the plaintiff recovered damages for injury to his lands caused by water flowing through a cutting constructed by the defendants without the authority of a by-law.

Watercourses.—The judicial definition of a watercourse:

The cases of Beer v. Stroud, 19 O. R. 10 (1888); Williams v. Richards, 1893, 23 O. R. 651; Arthur v. Grand Trunk Railway Co., 25 O. R. 37 (1894), 22 A. R. 89 (1895), and Wilton v. Murray, 12 M. R. 35 (1898), lay down the following rules to determine whether a certain flow of water is a "watercourse."

1. It should have a perennial but not absolutely never failing, living source.

2. The flow may be occasional or temporary.

3. It must be natural and accustomed.

4. It must maintain a distinct and defined channel which must have visible banks or margins within which the water can be confined.

Query—Should the requirement of visible banks be insisted on in flat countries like the Red River valley? Prudhomme, C.C.J., has held not in an unreported case.

See 399 (56).

Sub-section 7 does not cast a duty on municipalities to construct drains and sewers, it is an enabling section.

The Public Health Act, 1875, 38 & 39 Vict. c. 55 (Imp.), s. 15, is as follows:—

> 15. Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act.
>
> The duty imposed by this section cannot be enforced by mandamus, but can only in case of default be dealt with by a complaint under s. 299 of the Act to the local government board, who may after inquiry make an order.

The Public Health Act, R. S. O. 1914, c. 218, s. 6, makes it the duty of the Provincial Board of Health to advise the officers of the Government as to drainage.

Under the same Act, ss. 94 and 98, municipal councils must submit plans and specifications to the Provincial Board for approval whenever the construction of a common sewer or a system of sewerage, or an extension of the same is contemplated, and no by-law shall be passed for any of the said purposes until the Provincial Board of Health has given its approval, and the by-law must recite the approval of the Board. Where the Provincial Board reports in writing that a sewer or a sewerage system or a sewerage treatment plant should be established or continued or improved, extended altered or renewed. it is not necessary to obtain the assent of the electors to any by-law for incurring a debt therefor, and the council is under an imperative duty to pass all necessary by-laws and commence the work and carry it to completion without delay. The by-law must not be finally passed until the Board has given its approval to the work to be done and must recite such approval, and all such works must be maintained and kept in repair as may be necessary for protection of the public health, and as may be directed by any special order of the Board or by its regulations, and any municipal corporation neglecting to act on the report of the Board after notice to do so, is liable to a penalty of one hundred dollars for every day upon which the default continues.

Negligent or Inadequate Construction of Sewers or Drains.—An action will lie for negligence in the construction of sewers or drains. In Whitfield v. Bishop Auckland, Times, November 22nd, 1897, the plaintiff suffered damage by reason of the construction of a sewer with defective joints followed by a negligent attempt on a later occasion to repair the fault, and recovered. The statute which applied was the Public Health Act, 1875, s. 15 of which is given above. The provisions of this section are similar to those found in the Public Health Act, 1914, R. S. O. c. 218, s. 97, requiring municipal corporations at all times to maintain and keep in repair sewers so far as may be necessary for the protection of the public health. On principle it would seem that an action will lie for breach of the duty imposed by s. 97 of the Ontario Act, notwithstanding the imposition of a penalty by the following section: See Atkinson v. Newcastle, 1877, 2 Ex. D. 441; and 46 L. J. Ex. 775. As a general rule there is no right of action where a statute imposes a penalty for a breach of duty. The cases contain conflicting dicta as will appear from the following paragraphs.

Pouring Water on Private Lands.—In Derinzy v. Ottawa, 1887, 15 A. R. 712, a claim was founded on the fact that in constructing and repairing certain streets the corporation negligently made surface drains and water courses along and upon the surface of the streets, whereby large quantities of water, which would not have otherwise done so, flowed on the plaintiff's premises. The trial Judge nonsuited the plaintiff. The nonsuit was set aside by the D.C., which order the C.A. upheld. Hagarty, C.J.O., thus discussed the facts and the earlier cases:—

"Certain legal questions were raised by the defendants' counsel, the main one being, that the case disclosed no liability on the defendants to the plaintiff; that they only did their duty in changing the grade of the street, and in making side drains for the water which, from the level of the ground on which Rideau street was laid out, naturally flowed there.

"But before a municipality can raise the question of non-liability to a person on whose land their drains discharge water that would not otherwise be there discharged, they must at least shew that they have done their work without negligence; and that due care was used to discharge what they saw was their statutable duty in the drainage and management of this highway. The plaintiff's witnesses point out what they consider to be faulty and negligent construction and management to the plaintiff's detriment.

"Here the defendants seek not to disprove the charge, but to shelter themselves under their alleged public duty.

"If they had succeeded in disproving all charges of negligence, they could then be in a position to raise the very serious question whether a private person may be ruined by their action for the general benefit of the public.

"As far back as 11 U. C. R. 89, in Brown v. Corporation of Sarnia, the late Sir J. Robinson says:—

"'The plea cannot be a sufficient defence unless we admit that the municipal authorities in order to drain a highway, may bring down water in any quantity upon the land of an individual, and may leave it to rest and stagnate there, or even to produce any amount of evil, etc., to his dwelling-house, etc., without shewing that the water could in no other way have been got rid of without throwing it on the plaintiff's land, and without shewing that it was not in their power to lead it away from the plaintiff's land after they had conducted it thither.

"This language is peculiarly applicable to this case.

"In Perdue v. Chinguacousy, 1865, 25 U. C. R. 61, the last case is noticed and followed. The Court do not decide the main question now being discussed, remarking:—

"'Without positive legislation, a grave doubt may be expressed as to the absolute right of the conservators of a highway to flood a man's land and destroy his property, even if no other method of drain-

age be attainable. Generally, if public convenience requires the destruction of private property. the owner of the latter has the right to be compensated.'

"In Rowe v. Rochester, 1870, 29 U. C. R. at 595, the present Chief Justice of the Queen's Bench delivered the judgment of the Court, denying the right of the corporation to throw water on plaintiff's land to his injury, even though they did the work in the most scientific and skillful manner, and though it may have been absolutely necessary to drain in this manner to make a good road.

"The same case came up in 22 C. C. 319, and the same rule is noticed.

"In McGarvey v. Strathroy, 1883, 10 A. R. 631, in this Court the general question was noticed, but negligence was averred and proved, and the case did not call for its decision.

"I do not think we are called on at this stage of the present case to discuss it further.

"I cannot see how on the evidence adduced, any defence can arise on the plea added at the trial of a twenty years' use of the right to overflow the plaintiff's land.

"Nor can I accede to the argument that the plaintiff can be barred by his voluntarily coming to reside and build a green-house, etc., on land known to be previously liable to be flooded."

In Foster v. Lansdowne, 1899. 13 M. R. 416, a ditch overflowed the plaintiff's lands causing damage. Negligence in construction was established. Killam. J., in the full Court thus discussed the authorities:—

"In the Province of Ontario, whose municipal legislation is well known to be the model upon which our own is constructed. there has been a long and uniform series of decisions holding that municipalities are liable to actions for consequential damages arising from the negligent exercise of their statutory powers. See Brown v. The Municipal Council of Sarnia, 11 U. C. R. 87; Farrell v. The Mayor, etc., of London, 12 U. C. R. 343; Croft v. The Town Council of Peterborough, 21 U. C. R. 157; Scroggie v. The Town of Guelph, 9 O. R. 368; In re Nickle and The Town of Walkerton, 1886, 11 O. R. 433. This principle was approved by the Court of Appeal of the province of Coghlan v. The City of Ottawa, 1876, 1 A. R. 54; McGarvey v. The Town of Strathroy., 1885, 10 A. R. 631, and Derinzy v. The Corporation of Ottawa, 1887, 15 A. R. 712, and by the Supreme Court of Canada, in Williams v. The Corporation of Raleigh, 1892, 21 S. C. R. 103, and in a British Columbia appeal. The Corporation of New Westminster v. Brighouse, 1892, 20 S. C. R. 520. In this province the same principle was accepted by Mr. Justice Bain in Atcheson v. The Rural Municipality of Portage la Prairie, 1893, 9 M. R. 192, and by Mr. Justice Dubuc in an action in this Court of Foster v. Municipality of Lansdowne, 1897, not reported except as to the decision affirming the judgment upon another ground, 12 M. R. 41

"That the responsibility extends to negligence of those employed by the corporation appears to have been the view of the Court of Queen's Bench for Ontario in Farrell v. London and Reeves v. Toronto.

"By the Municipal Act. R. S. M. c. 100, s. 8, every municipality is a body corporate, having all the rights and subject to all the liabilities of a corporation, with powers to sue and be sued. By ss. 663, 664, provision is made for enforcing executions against such a corporation, and s. 662 provides for tender of amends and payment into Court in actions for damages for alleged negligence of the municipalities

"Upon the principles laid down by Mr. Justice Blackburn, it is impossible to hold otherwise than that these corporations are liable to actions for damages arising from the negligence of their employees, acting within the scope of their employment, in the execution of the statutory powers of the municipalities.

"I have dealt thus at length with these questions. not because they seemed to me open to doubt upon principle or authority. but because they have never been definitely considered by the Full Court of this province. and because the ultimate decision in Raleigh v. Williams,

1893, A. C. 540, is so strongly relied on as authority against the view which I take.

"That case arose through the construction by the municipality of a drainage work under special statutory provisions, which authorized a municipal council, after investigation and report by an engineer, to pass a by-law adopting the scheme of drainage recommended to it. The case was referred to a referee, who reported that a drain had been made without provision for a sufficient outlet, in consequence of which the plaintiff had sustained damage through the flooding of his land by the overflow of the drain. The report was confirmed and judgment was given for the plaintiff.

"This judgment was reversed by the Court of Appeal, which held that a corporation, adopting and carrying out a drainage scheme duly presented to it by a surveyor under the statute, could not be held responsible in damages because the scheme might prove erroneous or deficient in some particular, though it was admitted that the municipality would be responsible for negligence in the execution of the work. Upon appeal to the Supreme Court of Canada the original judgment was restored (21 S. C. R. 103); but this decision was again reversed in the Privy Council, 1893, A. C. 540.

"In delivering the judgment of the Judicial Committee, after showing that the work was constructed under a by-law which the municipality had power to pass even if the drainage scheme should injure a private owner, Lord Macnaghten, said (p. 550): 'It was argued on behalf of the respondents that if a drainage work constructed under a by-law duly passed turns out in the result not to answer its purpose by reason of the insufficiency of the outlet, or by reason of some other defect which a competent engineer ought to have foreseen and guarded against, or if the result of a drainage work is to damage a person's land by throwing water upon it which would not otherwise have come there—that is actionable negligence on the part of the municipality. This argument in their Lordship's opinion is wholly untenable. On the other hand, their Lordships do not agree with the argument of the appellants that municipalities are helpless instruments in the hands of the engineers they employ. They cannot, indeed, modify the engineer's plan themselves. That is no part of their business. But they may return the plan for amendment if they think that it is not desirable in the shape submitted to them. If, however, acting in good faith, they accept the engineer's plan and carry it out, persons whose property may be injuriously affected by the construction of the drainage work must seek their remedy in the manner prescribed by the statute.

"Now, it would be strange indeed if the Judicial Committee should overrule in this off-hand way, and without further discussion, a principle established, not only by the uniform decisions of the Courts of the province from which the appeal came, but also by the English Courts; and it would be equally strange to find the Court of Appeal for Ontario thus abandoning its former opinions.

"The true ground of decision in the Court of Appeal and the Privy Council was the same as that which Williams, J., in Whitehouse v. Fellows pointed out to be the basis of the decisions in the British Cast Plate Manufacturers v. Meredith, Sutton v. Clarke, and Boulton v. Crowther, that the municipality did no more than the statute authorized it to do, even though by so doing it prejudiced the rights of private owners. It had power, in its discretion, to adopt such a scheme and to render by a by-law the execution of it lawful. In such a case no action would lie for damage occasioned by the execution of the scheme without negligence, and the only remedy which an injured party could have was under the compensation clauses. . . .

"This ditch was dug wholly upon land under the control of the municipality in pursuance of the statutory power and duty to repair the public highways. I assume that it was a lawful work, even without a by-law to authorize it. But I do not think that, from the power to make, maintain or repair highways, there can be implied the power to collect the drainage of a highway into a stream and pour it over

the land of a private owner. The power actually given must be exercised with a due regard for private rights, except in so far as authority to interfere with such rights is expressly or impliedly given. That the powers respecting highways do not imply power to turn their drainage over private lands has been definitely settled in Ontario. See Brown v. Sarnia, McGarvey v. Strathroy, and Derinzy v. Ottawa, already cited, and Perdue v. The Township of Chinguacousy, 1865, 25 U. C. R. 61; Rowe v. The Township of Rochester, 1870, 29 U. C. R. 590, 22 U. C. R. 319, and Northwood v. The Township of Raleigh, 1882, 3 O. R. 347.

"In the Gas Light & Coke Co. v. The Vestry of St. Mary's, 1882, 15 Q. B. D. 1, the plaintiff both recovered damages for injury to its gas pipes, lawfully laid under the highway, occasioned by the use of heavy steam rollers in the repair of the highways, and was granted an injunction to prevent the further use of such roller. Lindley, L.J., delivering the judgment of the Court of Appeal affirming this decision, said (p. 5): 'Now, there is no dispute that the defendants can perform their duty without using steam rollers of such a weight as to injure the plaintiffs' pipes; but they say it is their duty and right to repair the roads in the most economical and best way, and to avail themselves of all improvements regardless of the effect on the plaintiff's pipes, but Field, J., has held that this contention cannot be supported, and we are of opinion that his decision is correct. The authorities to which he referred, and particularly the Metropolitan Asylum District Board v. Hill, shew that an action lies for an injury to property, unless such injury is expressly authorized by statute or is, physically speaking, the necessary consequence of what is so authorized.'

"Even if there could be a case in which it would be impossible to drain a highway without thus injuring private property, the present case is not such. The evidence shews that the drainage could be made as effective and nearly, if not quite, as economically, without damage to the plaintiff.

"The compensation clause of the Act, s. 665, does not assist in determining the extent of the powers in the present case, as it only requires compensation to be made for any damage 'necessarily resulting' from the use of the statutory powers, leaving it to be ascertained from other portions of the Act what the powers are. As Mr. Justice Osler pointed out, in McGarvey v. Strathroy: 'The damages for which compensation is given must, however, be such as necessarily result from the exercise of the powers of the corporation, and, therefore, are not such as arise from negligence in doing the work.'

"Here the municipality made no inquiries, and gave no specific instructions as to the nature, extent or outlet of the ditch. All was left to the discretion of the foreman and one councillor. If the work had been done with due care, and injury had ensued to the plaintiff from *vis major* or some event which could not reasonably have been foreseen and guarded against the municipality might not have been liable. The overflow occurred in an unusually wet season, but not in consequence of any such extraordinary occurrence as to constitute *vis major* or that the possibility of its occurrence could not readily have been provided for.

"It was argued that if the acts done were without the powers of the municipality, it could not be liable for them. But the employees of the corporation were acting within the scope of their employment in repairing the highway. If the municipality had had the power to turn the drainage over the plaintiff's land, both it and its employees could have justified under the power. But, as it had not this power, if the damage resulted from the negligence of the employees in doing the work which they were lawfully employed to do, the municipality is liable, as appears from the cases which I have cited. In addition, I may refer to such well known cases as Yarborough v. The Bank of England, 16 East, 6; Smith v. The Birmingham, etc., Gas Light Co., 1 A. & E. 526; Eastern Counties Ry. Co. v. Broom, 6 Ex. 314, and Reeves v. Toronto, 1861, 21 U. C. R. 157, as to the liability of a corporation for tortious acts of employees not appointed by by-law or under the corporate seal.

"My decision in Atcheson v. Portage la Prairie, 1894, 10 M. R. 39, went upon the ground that the work had not been authorized by the municipal council or recognized or adopted by it as a municipal work, and could not, therefore, be considered as constructed by servants of the municipality acting within the scope of their employment. . . .

"In my opinion, it was not within the statutory powers of the municipality to cast the waters of the highway—not to speak of those of the swamp which a witness states the ditch was intended to drain—upon the plaintiff's land, or to discharge them where they would naturally flow there to his damage; but, this result having been due to negligent and improper construction of the ditch by the servants of the municipality acting within the scope of their employment, the plaintiff is entitled to recover compensation therefor by action.

Sewage Backing up in Cellars.—In Garfield v. Toronto, 1894, 22 A. R. 128, during a violent storm nearly an inch and a half of rain fell in twenty-five minutes. In a period of fifty-two years during which meteorological observations for Toronto had been recorded, only two similar storms had occurred. No defect in construction was proven, and it was shewn that the sewer was of greater capacity than was required by the standard of engineers for the area. Water and filth were forced back into the plaintiff's cellar and destroyed a large quantity of goods. Street, J., withdrew the case from the jury on appeal, the Q. B. D. ordered a new trial, but the C.A. upheld the trial Judge. Maclennan, J., said:—

"The effect of the by-law, therefore, so far as applicable, seems to be this. The land-owner could not choose but to drain this sewer. From the sewer to the street line, but no further, the private drain was the property and the work of the city, to be done by its own contractors. Beyond the street line, and upon the premises of the owner, the drain was the property of the latter and to be constructed by himself, and as to that part of it all the authority the city assumed over it was as to its shape and form, and the manner and place of its connection with the common sewer. The shape and form, and manner of connection may be prescribed and controlled by the city, but it has nothing to do with the construction beyond the street line; the latter is to be the work of the owner. We must assume, therefore, that the drain of this house was as to its shape and form such as was prescribed by the city, and was constructed up to the street line by them, but beyond that line was constructed by the owner.

"Now, everything that was done by the city was authorized by the Municipal Act, and it is well-settled law that in the absence of negligence it is not answerable for damages in such a case: Hammersmith R. W. Co. v. Brand, L. R. 4 H. L. 171; and the only question in this case is whether the defendants were shewn to be guilty of such negligence. The learned trial Judge came to the conclusion that they were not, and, with great respect for the learned Judges of the Divisional Court, I think he was right. I agree with him that the rain storm which caused the sewer to be over-charged with water was so extraordinary and unusual that the defendants could not be expected to anticipate it, and that it comes within the class of occurrences described as *actus Dei*.

"It was also contended that the city was guilty of negligence in not using some contrivance of valves or flaps which would prevent the back flow of sewage into the private drain. In Vaughan v. Taff Vale R. W. Co., 5 H. & N. 679, Willis, J., said that negligence is absence of care, according to circumstances. I think the evidence is overwhelming that there is nothing within reasonable limits of expense which the city could use or apply outside of the street line for such a purpose, and therefore, that if anything of that kind can be applied, it can only be done in or upon the premises of the owner. I do not see that there is any duty upon the city in the circumstances to provide against the inflow of sewage at all hazards, any more than to provide against the inflow of sewer gas. Unless the householder inserts traps of some kind in his drains, sewer gas will invade his premises from the common sewer, and it seems to me that the duty is the same as to both."

Discharge From Sewers Causing a Nuisance.—In Weber v. Berlin, 1904, 8 O. L. R. 302, the defendants allowed a tannery to connect with their sewer, reserving the power to stop any discharge into the sewer system except certain specified waste products. The tannery permitted improper substances, such as the hair and scrapping of hides, to pass into the sewer, contrary to the by-law which regulated the use of the sewer, and contrary to the general public health by-law in force under the Public Health Act. The sewage so deposited was brought upon the plaintiff's lands below the outflow, with the result that a heifer of the plaintiff died of anthrax brought down to his farm from the sewer, and that his lands were depreciated. Street, J., said:—

"In my opinion, the defendants are liable to the plaintiff, under the circumstances, for the damage sustained by the plaintiff by reason, not only of the sewage matter, but also for the anthrax germs brought down upon the plaintiff's land by reason of their sewage system. They are authorized by the Municipal Act to undertake and carry out the work in question, but they are not authorized to do it in such a way as to cause a nuisance or to injure other persons. They have by means of the works constructed under their by-law carried their sewage and the anthrax germs directly to the plaintiff's land, and, having given leave to the tanneries from which these germs come to connect with their system of sewers, they are responsible for the result. It is true they have forbidden the throwing of the refuse, from which the germs are believed to come, into the sewers, but they have not exercised the power they reserved to themselves of enforcing this prohibition by stopping the connection. The defendants themselves have constructed this sewer system through their own land and have by means of it brought these injurious substances directly to the plaintiff's land. A private person would undoubtedly be liable under similar circumstances, and I can find no good reason for distinguishing the liability of the defendants from that of a private person: Attorney-General v. Council of Borough of Birmingham, 1858, 4 K. & J. 528; Van Egmond v. Town of Seaforth, 1884, 6 O. R. 599; Close v. Town of Woodstock, 1892. 23 O. R. 99; Charles v. Finchley Local Board, 1883, 23 Ch. D. 767. The last mentioned case is criticized and not followed in Brown v. Dunstable Corporation, 1899, 2 Ch. 378, and Attorney-General v. Clerkenwell Vestry, 1891, 3 Ch. 527, 534, but an examination of the case and of the reasons given for the criticisms shews that the case would have been followed had the conditions which exist in the present case been present there.

"There is here no absolute right on the part of the tanneries to connect with the main sewers and to retain their connection; their connection is only to be made with the consent of the engineer, etc., and when made is subject to good behaviour and may be cut off under the express terms of the by-law if they violate its terms.

"The remedy is in the hands of the defendants themselves to prevent the tanneries from continuing to cast their refuse into the sewers, and they are not thrown upon the remedy of action, as was the case in Attorney-General v. Dorking Guardians of Poor, 1882, 20 Ch. D. 595."

Sewage Backing up in Cellars.—In Faulkner v. Ottawa, 1909, 41 S. C. R. 190. the basement of the plaintiff's premises was flooded by the backing up of sewage. There had been slight flooding on two previous occasions. Great damage was done on the last occasion. His action was framed on the theory that the corporation had been negligent in not providing proper facilities to enable the sewage to flow off without backing up. The trial Judge found that there was negligence and awarded damages, but the verdict was set aside by the C.A., in which disposition of the case the majority of the Judges of the S.C. agreed. The facts on which the decision was based were that the existing drain conformed, so far as its practical capacity was concerned, to the standard exacted by the highest engineering skill, and that it was capable of receiving and carrying off without damage any rainfall up to and including one of an inch and a half per hour. The rainfall which did the damage was very heavy, from five o'clock

to seven-thirty, and for nine minutes of the time fell at the rate of three inches per hour. The engineers were agreed that it was reasonable and proper to provide against one and a half inches per hour. Idington and Duff, JJ., in giving dissenting judgments, attached weight to the fact that on three occasions within a brief period the plaintiff's cellar had been invaded by a discharge from the sewer, and Duff, J., said:—

"The facts would seem in themselves to require some explanation from the respondent municipality when resisting a claim based on the occurrences mentioned at the outset. Sewers, designed with a sufficient capacity to carry the burden cast upon them, and at the same time properly constructed, do not periodically discharge their contents into the premises which as sewers they are intended to serve. *Prima facie*—treating the question at issue as a question of negligence purely—the facts I have just stated would appear to put the municipality on its defence.

"The defence is two-fold: First it is said that the sewer was constructed in accordance with the requirements of good engineering, having regard to the conditions existing at the time of the occurrence upon which the appellant's claim is based. . . . The second defence is that every one of the three floodings, for the consequence of which the appellant seeks to make the municipality responsible, was due to a rainfall of such excessive intensity that the municipality could not reasonably be expected to anticipate it, and consequently cannot be held answerable as being negligent in not providing for it.

"The first of these defences rests upon a certain rule touching the capacity of sewers intended to dispose of storm water as well as of sewage which admittedly is accepted by engineers as a working rule governing the construction of works of that character within a zone known as the northern zone, in which Ottawa is situated. This rule requires that such sewers when designed for places where street paving is extensively used shall be of sufficient capacity to dispose safely of the surface water collected and discharged into them during a rainfall having an intensity of 1¼ inches per hour continued indefinitely.

"The principal contention on behalf of the respondent municipality was that the sewer in question satisfied this requirement. The learned trial Judge found that it did not . . . and the result of my own independent examination of the evidence . . . has led me to the same conclusion. . . .

"As regards the second defence, that is a defence in which the onus is on the respondents. To establish it the respondents must prove that on each of the three occasions in question the storm was one which in Ottawa, to borrow language used by Lord Chelmsford in delivering judgment of the Privy Council in Great Western Railway Co. v. Baird (1) would not 'be expected to occur.' Has this been shewn? The professional witnesses called by the appellant said that in many places within the zone to which the standard above mentioned is applied, the most severe of the three storms—there being an exact record of the rainfall on that occasion—would be regarded as an ordinary storm; and that the rule was designed to provide for and does provide for such a storm. On what ground is that evidence to be rejected: Mr. Ker hardly disputes the first statement that such storms frequently occur on the southern part of the zone. He can only escape the natural inference from that by taking refuge in the trying position already mentioned that the rule is not designed to protect people along the route of the sewer from periodical overflows—one a year or so.

"Moreover, it seems difficult, in view of the admitted facts, to regard the contention seriously. These three storms occurred within the space of fourteen months, yet every one of them is said to be a storm which could not reasonably be expected in Ottawa. Still another of this class of storms is added to the list, in 1905, more violent even than the three earlier ones, making four of these unforeseeable deluges within two years. Earlier than 1903 unfortunately for the appellant, the records are silent. Can it really be argued that in face of all these facts the respondent municipality has acquitted itself of the onus upon

it to shew that each of these storms was of such a character as reasonably careful persons establishing a means for the disposal of storm water would not provide for? The true answer, I think, is to be found in Mr. Ker's repeated excuse, 'it is a matter of expense,'

"There remain the arguments that what the municipality did was done under its statutory powers and that the appellant's remedy (if any) is under the compensation clauses of the 'Municipal Act,' and a further argument based upon the local improvement clauses of that Act.

"The first of these contentions must stand or fall upon the construction of the statute. The general rule of law is clear. If the thing complained of, although an act which would otherwise be actionable, be authorized by statute, then no action will lie in respect of it; that is to say, if it be the very thing the legislature has authorized. Because, of course, no Court can treat as injuria that which the legislature has sanctioned. Examples of the rigid application of the principle will be found in Williams v. Corporation of Raleigh, 1893, A. C. 540, and in East Freemantle Corporation v. Annois, 1902, A. C. 213. The principle is equally applicable to persons and bodies acting under legislative authority for their own profit, and to public bodies exercising powers conferred upon them for the public benefit. In both cases where the authority is in general terms merely it may be inferred from the general scope and provisions of the statute that the powers conferred are not to be exercised to the prejudice of private right. This was the view taken of the statute under consideration by the House of Lords in the Metropolitan Asylum District v. Hill, 6 App. Cas. 193, and that construed by the Privy Council in Canadian Pacific Railway Co. v. Parke, 1899, A. C. 535. It is, nevertheless, entirely a question of the true meaning of the statute. . . .

"It is not necessary for the purpose of this case to decide the question whether the rule applied in Canadian Pacific Railway Co. v. Parke, 1899, A. C. 535, and in Metropolitan Asylum District v. Hill, 6 App. Cas. 193, is applicable to the conduct of a municipality constructing, under the authority conferred by the 'Ontario Municipal Act,' a work such as that which has given rise to the present litigation. Upon that point conflicting opinions would appear to have been expressed at different times in Ontario Courts. Compare, for example, the judgment of Street, J., in Weber v. Town of Berlin, 8 O. L. R. at 305, with the judgments of the Court of Appeal in Garfield v. City of Toronto, 22 A. R. 128, and the judgment of Hagarty, C.J., in Derinzy v. City of Ottawa, 1887, 15 A. R. 712. The point has not been argued, and I express no opinion upon it, but only observe in passing that, reading the statute as it now stands, the legislature would appear to have anticipated that works constructed by a municipality under the powers conferred by the statute might affect injuriously the property of private individuals; and in same cases to have made provision for compensation in respect of such injuries.

"On the other hand, it has been held in a long line of authorities, beginning with Brown v. Municipal Council of Sarnia, 11 U. C. Q. B. 87, the statute does not protect the municipality from responsibility in an action for damages caused by the negligent construction of works of a kind authorized by the statute; I think these authorities have been well decided; but, even if I doubted that, it would be a grave question whether it is not now too late to depart from the rule established by them.

"In this case the corporation by reason of making and maintaining an excessive number of conduits leading to the sewer passing appellant's property periodically conducts into his neighborhood quantities of water and liquid filth for which they have provided no proper means of escape except into the premises abutting upon the street. This cannot be said to be the result of any mere error of judgment; but on the contrary was a consequence of what the municipality did, if not actually foreseen at least foreseeable by the most ordinary forethought.

"That does not seem to me to be a reasonable exercise of the powers vested in the municipality in respect of the control of streets or of the control of sewers.

"The last point arises upon the contention that the municipality is not liable because it has no funds which can properly be applied to remedy the mischief. This point with great respect seems to me to beg the question. If the mischief is the result of an actionable wrong it is hardly conceivable that means are not within the power of the council to remedy it."

Over-loading sewers.—Where the backing up of water which causes damage is the direct result of the deliberate over-loading of a sewer system by a municipal corporation, they are liable unless they can show that on account of the unprecedented nature of the storm the damage to the plaintiff would have been the same, and that it would be unreasonable to expect them to provide a system capable of taking care of such a deluge. The onus of establishing this defence is on the corporation. Per Lamont, J., in Brown v. Regina, 1914, 29 W. L. R. 537 (Sask.).

Construction of Sewer Rendering Change in Gas Pipe Necessary.—In Toronto v. Consumers, 1914, 32 O. L. R. 21, App. Div., 1916, 2 A. C. 618, the city was held liable to pay the cost of lowering gas pipes rendered necessary by the construction of a sewer, as in constructing the sewer the corporation injuriously affected the lands of the gas company, the pipes having been held to be land, in Consumers v. Toronto, 1897, 27 S. C. R. 453.

Is Municipality in Constructing Sewers and Drains Subject to the Rule in C. P. R. v. Parke and Similar Cases.—This rule is, where a landowner is authorized by statute to make a particular use of his land, and the authority given is in the strict sense of the law, permissive merely and not imperative, the legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others. The authorities are: Metropolitan v. Hill, 1881, 6 App. Cas. 193; 50 L. J. Q. B. 353; London B. v. S. C. v. Truman, 1885, 11 App. Cas. 45; 35 L. J. Ch. 354, and C. P. R. v. Parke, 1899. A. C. 535; 68 L. J. P. C. 89. Note the query by Duff, J., in Faulkner v. Ottawa, 1909, 41 S. C. R. 190, at p. 214, as to whether or not this principle applies to municipal bodies exercising powers under s.-s. 7, as to the construction of sewers.

See 399 (50).

Unauthorized Sewer.—In Fieldhouse v. Toronto, 1918, 43 O. L. R. 491, the corporation created a nuisance by the establishment and operation of a sewage plant. There was no by-law authorizing the installation of the plant, and the plans had not been approved of by the Provincial Board of Health as required by section 94 of the Public Health Act; the corporation was held liable, and a defence based on statutory authority was rejected.

Driving or Riding on Roads and Bridges.

398.—(8) For regulating the driving of horses or cattle and the riding of horses on highways and bridges.

(9) For prohibiting racing, immoderate or dangerous driving or riding on highways or bridges. 3 Edw. VII. c. 19, s. 59 (8-9). 3 & 4 Geo. V. c. 43, s. 398 (8-9).

Electors—Submitting Questions to.

398.—(10) For submitting to the vote of the electors of any municipal question not specifically authorized by law to be submitted. 3 Edw. VII. c. 19, s. 533 (1*a*); 9 Edw. VII. c. 74, s. 1, *amended;* 3 & 4 Geo. V. c. 43, s. 398 (10).

Power to Take Plebiscites.—In Helm v. Port Hope, 1875, 22 Gr. 273.

Certain ratepayers of Port Hope obtained an injunction to restrain the corporation from submitting to the whole body of municipal electors a by-law authorizing the incurring of a debt for an illegal purpose, the intention of the council being to use the authority so obtained from the electors in support of an application to Parliament for a bill legalizing the by-law. The electors invited to vote included a class of persons not entitled by law to vote upon questions involving an increase in the pecuniary burdens of the municipality; and the late Chief Justice, then Chancellor, Spragge, by whom the judgment was delivered, calls attention to the danger of the proposed vote being put forward as the expressed will of the ratepayers entitled to vote upon the question involved, and expressed his opinion that it was a proper inference from what was before him, that it would be so put forward, and that the use of the machinery provided by the Municipal Act, was to be regarded as only part of a scheme to effect that object. . . . At the conclusion of his judgment, the learned Chancellor thus guarded himself against an extension of his judgment . . . ; referring to the machinery provided by law for submitting such questions to vote, he said: "I do not mean that a piece of machinery provided by the Legislature for one purpose may not properly be applied to another purpose, if done *bona fide*; but the fault of this proceeding is, that it is done in such a way as to give to it a character and effect calculated to operate to the prejudice of the plaintiff."

In Davies v. Toronto, 1877, 15 O. R. 33, the council sought to take a vote for their information on a question which they had power to deal with and proposed to deal with themselves. Street, J., refused an injunction, saying:—

"Were it now proposed to give to the result of the proposed vote a final and binding effect, there could be no doubt as to the duty of the Court to restrain it, because the attempt then would be to substitute the direct decision of the electors for that of the council to which the law has referred, and which every person concerned is entitled to have. Such an attempt would be clearly illegal and beyond the powers of the corporation; but the council here expressly reserves to itself its proper function of finally deciding upon the propriety of passing the by-laws in question, and seeks to obtain the views of the electors as an aid only to its own ultimate decision . . .

"I have come to the conclusion, upon the whole matter, that the vote proposed to be taken is proposed by the council to the electors with the *bona fide* object of obtaining a fair expression of their views upon the important questions to which it relates; that in view of the time and manner of submitting it, the objections raised to it are more imaginary than real, and that no class of the ratepayers can be prejudiced by its submission."

In Darby v. Toronto, 1889, 17 O. R. 554, Osler, J.A., sitting for Boyd, C., in dismissing a motion for an injunction to restrain the council from taking a certain course which he held was entirely within their power, said:—

"An affidavit has been filed on behalf of the council, in which it is stated that they have submitted to the vote of the electors the question whether they are in favour of the appointment of a paid commission of three persons at a cost of $8,000 per annum for a probable term of five years.

"I cannot see what this has to do with the case. It is another instance of a pernicious practice which has been too frequently resorted to, of taking a plebiscite upon a subject wholly within the discretion of the council, which it is their duty to decide and to take the responsibility of deciding, themselves, without putting the public to expense. In this case, it is true, no additional expense will be incurred as there is also a by-law to be voted on, but the practice is none the less objectionable as an attempt to evade responsibility and to place it where it does not belong."

In King v. Toronto, 1902, 5 O. L. R. 163, there was a motion to continue an injunction, restraining the council from submitting to vote the question:—

"Are you in favor of the city contributing $50,000 towards the establishment of a sanitorium for the treatment of residents of Toronto suffering from consumption?" Britton, J., said:—

"There is nothing in the Municipal Act permitting the council to take a plebiscite, and there is no express prohibition against their doing so. The practice has obtained, and in many cases without objection.

"In this case if I could see that any advantage to the citizens at large could possibly accrue from such answers as the electors may choose to give, I would be slow to interfere at this stage.

"The ballots have been printed, and as there is to be a vote taken upon a money by-law, very little, if any additional expense will be incurred.

"I may say further that in my opinion no actual harm in this particular case would result from allowing the question to be answered."

After referring to the cases mentioned above his lordship proceeded:—

"The gentlemen who in presenting their views to the council, in favour of this large contribution of $50,000, did so only upon the express condition that any such contribution be "surrounded by conditions and restrictions such as should protect the municipality against any future or unexpected expense. . . .

"These conditions and suggestions the majority of the electors know nothing about. Many electors may be in favor of such a contribution upon the conditions named in the report. Many may be in favor of such a contribution upon other conditions. The answers, to be of any value, would depend upon further questions.

"Where is the sanitorium to be located? At what cost? What would be its size and equipment? Would it be free to all, or a part free? If the cost would exceed $50,000, how is the balance to be provided? How is the cost of maintenance to be secured?

"Other questions could easily be suggested, answers to which are necessary to enable the electors to intelligently answer the question. Most important of all is this, is the sanitorium to be established by an individual or company? And is this sum of $50,000 to be given in aid of such an institution when established? Or is the sanitorium to be established by the city alone, or by the city and some other one or more municipality or municipalities?

"In either case, whether to aid or establish, it will be time enough to answer the question when a carefully prepared by-law is submitted, giving all necessary information and safeguarding the grant. . . .

"I continue the injunction."

Following King v. Toronto the legislature gave the power now found in s. 398 (10).

Summary of Cases Decided Before Special Power to Take Plebiscites was given:—

(1) When the council has power to act, but desires a vote for its guidance, there is the decision of Street, J., that an injunction will be refused, Davies v. Toronto, and the dictum of Osler, J.A., that the practice is pernicious; Darby v. Toronto.

(2) Where the council has power to act without taking a vote, but desires to avoid responsibility by submitting an abstract question to the electors, there is the dictum of Street, J., that they should be restrained: Davies v. Toronto, and the decision of Britton, J. (with accompanying dicta that there may be exceptions), that the council should be restrained: King v. Toronto.

(3) If the council has no jurisdiction over the subject matter involved in the question which they propose to submit to vote, but wish an opinion as a basis for seeking power in that behalf from the legislature, there is

the decision of Spragge, C., that they will be restrained if it is a proper inference from the circumstances that the vote may mislead accompanied by a dictum that the taking of a vote *bona fide* might in certain circumstances be permissible: Helm v. Port Hope.

Exhibitions.

398.—(11) For acquiring land within or without the municipality as a place for holding agricultural, horticultural or industrial exhibitions and for erecting and maintaining buildings thereon for that purpose and for the management of the same.

(12) For leasing for any period not exceeding three years from the making of the lease, any part of the land acquired under paragraph 11, which is not immediately required for the purposes for which it was acquired. 3 Edw. VII. c. 19, s. 576 (3-6), *redrafted;* 3 & 4 Geo. V. c. 43, s. 398 (11-12).

Acquiring Land for Exhibitions.—These sections do not authorize municipal corporations to hold exhibitions in express terms, but the necessary implication seems to be that municipal corporations may use the land for holding agricultural, horticultural or industrial exhibitions. Any part of the land so acquired if not needed for exhibition purposes may be leased for other purposes. In the absence of express power in this connection lands if expropriated for exhibition purposes could not be used for other purposes. See cases cited under s. 322. Land acquired for exhibitions may be leased to an exhibition association, agricultural society or any association of the kind. In Marshall v. Industrial Association and the City of Toronto, 1900, 1 O. L. R. 319, affirmed 2 O. L. R. 62 C. A., the plaintiff was a licensee of the Industrial Association occupying a refreshment stand. There was a defective platform in the building in which the stand was placed for the use of the public to enable them to obtain refreshments while remaining outside the building. It was not expected that under the license the plaintiff would use the platform; she did use it and was injured. The Exhibition Association had a lease of the exhibition grounds and buildings, from the city, under which the city covenanted to keep up and maintain other buildings and other erections upon the grounds. The platform was defective at the time the lease was entered into, and continued to be defective until the time of the accident. The city had notice of the condition of the platform, and it was found that there was a breach of its covenant to keep up and maintain the erection in question. The platform was not a highway and did not form part of a highway, as the roads and passage ways in the grounds were maintained for the convenience of the city and the association. Rose, J., dismissed the action, the D.C. upheld the dismissal as to the City of Toronto, on the ground that there were no highway rights involved, and that the city was not occupiers of the ground and did not invite the plaintiff to go where she was hurt. The Industrial Association was held liable, on the ground that they invited the plaintiff upon their ground, and took her money, and by their negligence caused the accident, following: Lax v. The Mayor, etc., of the Borough of Darlington, 1897, 5 Ex. D. 28; Holmes v. North Eastern R. W. Co., 1869, L. R. 4 Ex. 254. It was further held that the Industrial Association would be entitled as damages for the breach by the city corporation of its covenant to maintain no more than the sum it would have cost to do the repairs, and not the damages obtained by the person injured

through the want of them, following Brown v. Toronto General Hospital, 1893, 23 O. R. 599. This was based on the fact that the association had been in the habit of doing such repairs as had been needed and charging the costs to the city.

Fat Stock and Other Shows and Exhibitions.

398.—(13) For granting or lending money or granting land in aid of any association, for the holding of a fat stock show or live stock show or exhibition or any exhibition for the promotion or improvement of farming in any of its branches or departments. 3 Edw. VII. c. 19, s. 591 (1), *amended;* 3 & 4 Geo. V. c. 43, s. 398 (13).

[**Agricultural or Horticultural Societies.**—See s. 398 (11) and notes, p. 700, *ante.*

Ferry Boats and Ferries.

398.—(14) For making an annual grant towards the maintenance and operation of ferry boats or other appliances used at any ferry over a stream or other water *separating a part of the municipality from another part* of it, or separating it from another municipality in Ontario. 9 Edw. VII. c. 73, s. 27; 3 & 4 Geo. V. c. 43, s. 398 (14).

[**The Provincial Power to Create and License Ferries.** — The right to create and license a ferry having been one of the *jura regalia* or royalties which belonged to the provinces of the Union, so continued after Confederation, as declared by s. 109 of the B. N. A. Act; and therefore the lease of a ferry between the town of Sault Ste. Marie, in the province of Ontario, and the town of Sault Ste. Marie, in the State of Michigan, granted by the Dominion Government in 1897, was invalid. The exclusive legislative authority over ferries given to the Dominion Parliament by s.-s. 13 of s. 91, does not carry with it any right to grant ferries. Even if the St. Mary's River at the point in question were a public harbour which passed under s. 108 to the Dominion, this would not give the Dominion Government the right to grant an exclusive ferry privilege. But it is not a public harbour: something more is necessary to convert an open river front into a public harbour than the erection along it of four or five wharves projecting beyond the shallows of the shore. The existence of improvements in the river bed in front of the town, belonging to the Dominion Govern-

ment, afforded no reason for the control of the ferry across the river being held to be in the Dominion Government. The Dominion Parliament or Government have a right to regulate such ferries as the ferry in question, for the purpose of preventing them from interfering with public harbours and river improvements of the Dominion: Perry v. Clergue, 1903, 5 O. L. R. 357; 2 O. W. R. 89 (1903).

The Legislative Assembly of the Territories had power to pass an Ordinance providing for the issue of an exclusive license to ferry over a navigable river, and for the imposition of tolls. Such power was conferred upon the Assembly by one, if not both, of the following provisions of the Dominion Order-in-Council of 26th June, 1893—made under the authority of the North-West Territories Act — which authorized the passing of Ordinances in relation to: 3. Municipal institutions in the Territories—subject to any legislation by the Parliament of Canada as heretofore or hereafter enacted. 8. Property and civil rights in the Territories.—Subject to any legislation of the Parliament of Canada on these subjects. The power of the Legislative Assembly to delegate its powers was discussed. The question of the extent of the jurisdiction of the Legislative Assembly over surveyed highways, the control of which had been given by Parliament to the Legislative Assembly was discussed. A municipality having by Ordinance been given, with respect to a certain portion of a navigable river, all the powers of the various officers named in the Territorial Ordinance respecting ferries:—Held, that it was not necessary for the municipality to exercise its powers by by-law; and that an agreement with, and a license to, the licensee, both under the corporate seal of the municipality, were sufficient. The plaintiff held an exclusive license for a ferry. Another ferry was operated within the plaintiff's territory by an unincorporated association of persons, which issued tickets to its members to the amount of their respective "shares" in the association. Held, that this latter ferry was not a private ferry, and that the plaintiff's right was thereby infringed: Humberstone v. Dinner, 2 Terr. L. R. 106; 26 S. C. R. 252 (1897).

An Act respecting Ferries, R. S. C. c. 97, as amended by 51 V. c. 23, is *intra vires* of the Parliament of Canada. The Parliament of Canada has authority to, or to authorize the Governor-General in Council to, establish or create ferries between a province and any British or foreign country, or between two provinces.

The Governor-General in Council, if authorized by Parliament, may confer, by license or otherwise, an exclusive right to any such

ferry: In re Jurisdiction as to Ferries, 25 C. L. T. 106; In re International and Interprovincial Ferries, 36 S. C. R. 206 (1905).

In an action to restrain the defendants from plying a ferry across Burrard Inlet, a public harbour, the defendants questioned the jurisdiction of the province to grant ferry licenses over this body of water:—Held, that the Court could not, in an action between private parties, consider a matter involving the jurisdiction of the province.—Semble, per Irving, J.A., that there was nothing to prevent the province from granting a franchise in respect of a ferry across Burrard Inlet. It was argued that this arm of the sea could not be considered to be a stream or other water within s. 270 of c. 37 of the Acts of 1896 (B.C.):—Held, per Macdonald, C.J.A., and Irving, J.A., that it fell within the purview of that section. The Lieutenant-Governor in Council, under the powers conferred by s. 70, granted to the corporation of the district of North Vancouver (a rural municipal corporation) a license, dated the 12th December, 1903, to use and ply a ferry between the city of Vancouver and the district of North Vancouver for a period of 15 years. The council of the municipality sublet the ferry to the plaintiffs, as it had power to do under s. 272 of c. 37, by indenture dated the 9th January, 1904, and since that date the plaintiffs had been operating the ferry. About the 1st December, 1908, the defendants began to ply a rival ferry; and in this action contended that the Lieutenant-Governor in Council was not authorized to grant the license to the plaintiffs' lessors for a term exceeding 5 years: s. 5 of the Ferries Act, R. S. B. C. c. 78:—Held, per Macdonald, C.J.A., that, assuming that the Ferries Act applied to licenses granted under s. 270 of c. 37, the language of s. 5 was inapplicable to a license issued under s. 270; and the 15-year license was valid. Per Irving, J.A., that the provisions of the Ferries Act as to duration of the franchise do not control in any way the granting of a ferry license to be established between municipalities. The essence of the Ferries Act is that there shall be competition open to the public. The 5-year limit fixed by s. 5 is applicable only to a license issued after competition—an additional provision to secure competition. And the existence of the plaintiffs' ferry is recognized by the North Vancouver City Incorporation Act, 1906. Per Martin, J.A., that the provisions of the Municipal Clauses Act, R. S. B. C. c. 144, under ss. 275 *et seq.*, "Ferries between Municipalities," deal, so far as regards the granting of licenses, with a state of affairs additional to and distinct from that governed by the Ferries Act; and, therefore, the grant of the license in question for 15 years was within the powers of the Lieutenant-Governor in Council; the objection that the

indenture of the 9th January, 1904, was based upon an invalid grant, was removed; and the North Vancouver Incorporation Act, 1906, validated the agreement and cured any defects in the municipal proceedings. Per Galliher, J.A., that the license granted was *ultra vires* of the Lieutenant-Governor in Council, by reason of the provisions of s. 5 of the Ferries Act, and was not validated by the North Vancouver Incorporation Act, 1906. Judgment of Clement, J., affirmed; Galliher, J.J.A., dissenting. North Vancouver Ferry & Power Co. v. Bunbury (1911), 17 W. L. R. 450; 16 B. C. R. 170.]

Fire Engines and Appliances.

398.—(15) For purchasing or renting for a term of years or otherwise, fire engines, fire apparatus, and fire appliances and their appurtenances. 3 Edw. VII. c. 19, s. 543; 3 & 4 Geo. V. c. 43, s. 398 (15).

See title contracts by municipal corporations, *supra.*

In Waterous v. Palmerston, 1890, 20 O. R. 411; 19 A. R. 47; 21 S. C. R. 556, the then Municipal Act, s. 480 provided that every municipal council should have power to purchase fire apparatus, but the section did not say that the power should be exercised by by-law, and s. 479 and other sections when defining powers of municipal corporations used the phrase "may pass by-laws" for passing such by-laws; then s. 186 (now 249 (1), provided that the powers of every council should be exercised by by-law when not otherwise provided for. The corporation by a contract in writing signed by the mayor and the town clerk with the seal of the town agreed to buy a fire engine from the plaintiffs, and it was delivered subject to tests. The mayor accepted a bill of exchange drawn on the corporation for the price of the engine. The Judge found as a fact that the engine answered the test, but also found that there had not been any acceptance of the engine, and that the acceptance of the draft by the mayor was after the council determined not to carry out the contract. Rose, J., held that a by-law was necessary and that the plaintiffs could not succeed on two grounds: (1) The want of a by-law, and (2) because the debt which would have been incurred by the contract was one which could have been met only by raising money "not payable within the municipal year" (see 289 (1)), and therefore required a by-law and the assent of the ratepayers. Hagarty, C.J.O., thought that the by-law need not sanction the specific purpose sought to be attained, but would be sufficient if it authorized the purchase of one or more engines. He also thought that the contract was wholly executory, so that no question arose on the ground that the contract had been executed. The argument as to the difference in wording between s. 480 and s. 479 was disposed of by holding that the words "may pass by-laws" in the latter section were unnecessary.

Flooding—Prevention of.

398.—(16) For the purpose of preventing damage to any highway or bridge or to any property within the municipality by floods arising from the overflowing or

damming back of a river, stream or creek flowing through or in the neighbourhood of the municipality, for acquiring land in the municipality or in any adjoining or neighbouring municipality, and for constructing such works as may be deemed necessary for that purpose, and for deepening, widening, straightening, or otherwise improving such river, stream or creek in the land so acquired, or removing from it islands, rocks or other natural obstructions to the free flow of the water. 3 Edw. VII. c. 19, s. 563*a* (1) *part redrafted;* 3 & 4 Geo. V. c. 43, s. 398 (16).

Free Libraries.

398.—(17) For granting money or land in aid of any public library established under any Act in the municipality or in an adjacent municipality. 3 Edw. VII. c. 19, s. 391, par. 4; 4 Edw. VII. c. 48, s. 18; 3 & 4 Geo. V. c. 43, s. 398 (17).

Grant to Public Libraries in Addition to Special Levy Therefor.—A grant of money or land in aid of any public library can be made by by-law, and the by-law need not be submitted to the electors unless it is a money by-law, that is, unless it involves the contracting of a debt or obligation, or the borrowing of money. The provisions of "The Public Libraries Act," R. S. O. 1914, c. 202, requiring a by-law for the establishment of a public library to be submitted to the electors, and the provisions of the same Act requiring councils to levy a special rate for library purposes, do not in any way restrict the powers of council under s.-s. 17, under which section the council may bestow either land or money in addition to the amount of the special rate as a matter of bounty and grace on the part of the municipality, and this is true whether the library is established under Part II. of "The Libraries Act" or otherwise. Hunt v. Palmerston, 1902, 5 O. L. R. 76, D. C. *Adjacent Municipality*: For the meaning of adjacent as distinguished from adjoining, see s. 483 (10).

Foxes and Other Wild Animals—Destruction of.

398.—(18) For giving bounties not exceeding $5 per head, for the destruction of foxes and other wild animals which kill or destroy poultry. 3 Edw. VII. c. 19, s. 592 (1); 3 & 4 Geo. V. c. 43, s. 398 (18).

Harbours, Wharfs, Beacons, etc.

398.—(19) For granting aid for the construction of harbours, wharfs, docks, slips and beacons on any river, lake, or navigable water passing in, through, or forming

any part of the boundary of the county, on such *terms and conditions* as to security and otherwise as may be deemed expedient. 3 Edw. VII. c. 19, s. 591 (6), *part redrafted.*

[**Non-navigable Waters.**—The bed of a non-floatable river belongs, up to the middle, to the riparian owners and those who are on the two sides opposite have the property in the whole bed between their lands. They have consequently a right to bring an action for trespass against those who disturb their possession of the bed: Canadian Electric Lighting Co. v. Tanguay, 28 Que. S. C. 157 (1906); Armour, pp. 52 *et seq.*, Baldwin v. Chaplin, 1915, 8 O. W. N. 349, 34 O. L. R. 1.]

398.—(20) For making, improving and maintaining public wharfs, docks and slips, and for preserving shores, bays, harbours, rivers or waters and the banks thereof. 3 Edw. VII. c. 19, s. 562 (1); 3 & 4 Geo. V. c. 43, s. 398 (20).

398.—(21) For regulating harbours.

398.—(22) For prohibiting the injuring, fouling, filling up or incumbering of a public wharf, dock, slip, drain, sewer, water or suction pipe, shore, bay, harbour, river or water.

398.—(23) For erecting and maintaining beacons.

398.—(24) For erecting and renting wharfs, piers and docks in harbours, and floating elevators, derricks, cranes and other machinery for loading, discharging or repairing vessels.

398.—(25) For regulating vessels, crafts and rafts arriving in a harbour, and for imposing and collecting such reasonable harbour dues thereon as may serve to keep the harbour in good order, and to pay a harbour master.

398.—(26) For requiring the owner or occupant of the land in connection with which the same exist, to

remove door-steps, porches, railings, or other erections or obstructions projecting into or over any public wharf, dock, slip, shore, bay, harbour, river or water. 3 Edw. VII. c. 19, s. 562 (2-9), *amended.* 3 & 4 Geo. V. c. 43, s. 398 (21-26).

Dominion Jurisdiction as to Harbours.—Under the British North America Act, 1867, the Parliament of Canada has exclusive jurisdiction as to beacons, buoys, lighthouses (s. 91 (9)); navigation and shipping (s. 91 (10)), and by s. 108, public harbours, lighthouses and piers and river and lake improvements, formerly the property of each province, are vested in the Dominion. The proprietary interest of the Dominion in public harbours is a different thing from the legislative jurisdiction over harbours. See Attorney-General for Canada v. Attorney-General for Ontario et al., 1898, A. C. 700; 67 L. J. P. C. 90 (The Fisheries' Reference). What falls within the description "Public Harbour" cannot be defined in the abstract. It must depend to some extent at all events upon the circumstances of each particular harbour and what forms a part of that harbour. The foreshore on the margin of a harbour may or may not be a part of the harbour, *ibid.* The authority of Holman v. Greene, 1881, 6 S. C. R. 707, on this point was overruled, *ibid.* It would seem that while the title to public harbours is vested in the Dominion, that the franchise of the port may be elsewhere. See remarks of Ritchie, C.J., in Holman v. Greene, 1881, 6 S. C. R. 707, where he said:—

> "The property in public harbours being thus vested in the Dominion, the soil ungranted at the time of Confederation, between high and low water mark, and being within the limits of public harbours, by the express unqualified words of the enactment, became vested in the Dominion as part and parcel of the harbours which belonged as property to the provinces, as distinct from the franchise of a port, it being clear from Lord Hale:—
>
> "'That the franchise of a port may be in one person, and the ownership of the soil within the limits of the port in another.'
>
> "Thus Lord Hatherley in Foreman v. Free Fishers and Dredgers of Whatstable (1):
>
> "'However commodious a place may be for vessels, it will not, therefore, become a port, the establishment of which must be by authority of the Crown.'
>
> "And in the same case Lord Chelmsford said:—
>
> "'It appears from Lord Hale, *de portibus maris*, c. 6, that "though A. may have the property of a creek or harbour or navigable river, yet the King may grant there the liberty of a port to B., and so the interest of property and the interest of franchise be several and divided."'
>
> "The words of the B. N. A. Act, are, in my opinion, too clear to admit of any doubt. But it was contended that the public harbours referred to in the B. N. A. Act, were only such public harbours (if any), as the local governments, as such, had acquired an actual property in, that is to say, artificial harbours constructed by the outlay of moneys and not natural harbours. But I can find nothing in the Act to justify this restriction being placed on the clear words of the statute, and if we look to the general scope of the Act in relation to matters with which harbours are connected, I think it is apparent that Parliament intended the words to be construed in their full plain grammatical sense. In the first place, the exclusive legislative authority over the regulation of trade and commerce, beacons, buoys, lighthouses, and Sable Island, navigation and shipping, is vested in the Parliament of Canada; then, secondly, property in canals, with lands and water power connected therewith, and lighthouses and piers, and Sable Island, is specifically transferred to the Dominion. It is but consistent with this that the property in public harbours, so intimately connected with the essential to trade and

commerce, and shipping and navigation, lighthouses and piers, should likewise be vested in the Dominion for their more efficient management, control and regulation; a matter in which, not only the whole Dominion, but foreign shipping are likewise interested, and which could hardly be effectually managed and regulated if there were to be a divided control. Still less can it be supposed that having vested all matters connected with trade and commerce, and shipping and navigation, and matters pertaining thereto in the Dominion Parliament, the property in the control of the public harbours should have been left to provincial authority."

"Every landing place or dock is not necessarily a part of a public harbour, nor is a bay, roadsted or anchorage, necessarily a public harbour. The question was discussed by the Court of Appeal for Ontario in McDonald v. Lake Simcoe Ice Co., 1898, 24 O. A. R. 411, where Maclennan, J.A., after discussing Holman v. Greene and the Fisheries case, said with reference to the bay, which the plaintiffs claimed was a public harbour:—

"We are without any authoritative definition of what a public harbour is, within the meaning of the Act, unless we are prepared to hold that every little indentation of the shore of the sea, or of the inland lakes, is a public harbour within its meaning. I think this bay does not answer the description. It is merely a small bay, roughly semi-circular, or semi-elliptical, in form, about 308 yards wide at the mouth and 132 yards across at the centre. The essential quality of a harbour is shelter for vessels and craft navigating the sea or the lakes. It is a place where they may lie in safety from storm and tempest. This bay is so widely open to the lake, and of so small an extent, that the shelter it could afford would be very little more than any other part of the shore. The shore itself affords shelter from a storm blowing off the land, and this bay would afford no shelter from a storm blowing from the lake except from the west. The statute was dealing with the harbours of the whole Dominion, including some of the great harbours of the world, both on the sea coast, and in the great lakes and rivers, and it calls them 'public harbours.' I cannot think Parliament meant to include in this expression every little bay like the present, where the owner of the adjacent shore had erected a wharf as a place of call for passing vessels."

Provincial Jurisdiction as to Harbours.—It would appear from the opinions expressed in the Court of Appeal in McDonald v. Lake Simcoe Ice Co., *supra*, that the provinces have jurisdiction over harbours of the kind in question in that case, and generally over all such harbours as do not come within the term "public harbours" as used in the B.N.A. Act, and it is submitted that s.-ss. 21, 23, 25 must be confined to such harbours not being "public harbours," as are within the jurisdiction of the provinces, and the powers conferred by ss. 19, 20 and 24 when proposed to be exercised in respect of "public harbours" vested in the Dominion, and subject to its legislative jurisdiction, must be exercised subject to Dominion legislation and Dominion rights. The powers conferred by ss. 22 and 26 enable the prohibition and penalizing of acts which in most cases would amount to common nuisances. As to the jurisdiction of the province in this connection, see discussion under s. 399 (46).

Municipal Wharfs, Docks and Slips.—Subject to the necessity for complying with the Dominion regulations where municipalities propose to erect these and instal appliances for loading, discharging or repairing vessels in public harbours. Municipalities may under the authorities of s.-ss. 20 and 24 establish public wharfs, docks and slips with the necessary auxiliary equipment. In so far as the operation of these facilities are concerned municipalities in maintaining such work, even though they derive no profit from it, are responsible for any damage which may result by reason of the negligence of their officers, or by reason of negligent construction. The leading case is Mersey Docks Trustees v. Gibbs, 1866, L. R. 1 H. L. 93; 35 L. J. Exchequer 225. See also Thompson v. Sandwich, 1901, 1 O. L. R. 407, where McMahon, J., applying Mersey v. Gibbs, *supra*,

to hold the corporation liable for damage resulting from the collapse of a dock, said :—

> "It would have been sufficient to fasten liability on the defendants that the dock was there in such a position as invited any vessel-owner desiring to unload a cargo to do so, if prepared to pay the dock charges which the statute gave them authority to levy. As said by the Court of Appeal, in the case of a harbour company: 'Generally speaking, whenever, after a company, by receiving tolls, have asserted that their harbour is in a state to receive and shelter vessels, such harbours become unfitted for that purpose, either from danger in the approach or entrance, or insufficient protection when within its limits, the company are *prima facie* liable to compensate those who have suffered proximate damage from any such cause. They must relieve themselves from this *prima facie* liability'; Sweeney v. Port Burwell Harbour Co., 19 C. P. at 380; see also Webb v. Port Bruce Harbour Co., 1860, 19 U. C. R. 615."

Sunken Vessels and Other Obstructions.—See powers conferred by s. 400 (36).

Reasonable Harbour Dues.—Dues cannot be levied for revenue purposes. Re Campbell and Kingston, 1864, 14 C. P. 285. Consignees cannot be rendered liable for the dues: Re McLeod and Kincardine, 1876, 38 U. C. R. 617. The dues can only be imposed on vessels, crafts and rafts: Bogart re Belleville, 1866, 6 C. P. 425.

Hospitals, etc.

398.—(27) For granting aid to any incorporated society or any association of individuals for the erection, establishment or equipment of public hospitals for the treatment of persons suffering from disease or from injuries. 4 Edw. VII. c. 22, s. 25; 3 & 4 Geo. V. c. 43, s. 398 (27).

Indigent Persons—Aid of.

398.—(28) For aiding in maintaining any indigent inhabitant of, or person found in the municipality, at [a house of refuge], hospital or institution for the insane, deaf and dumb or blind, or other public institution of a like character.

(*a*) Where money is advanced by way of charity or relief to or expended for the benefit of a person who, although in destitute circumstances, is the owner of or interested in land the retention of which is necessary for a dwelling for him, the corporation may take a conveyance of or security on such land for the amount advanced or expended, and on the death of such person, or the surrender of the land by him to the corporation, the corporation may sell or dispose of the

land and apply the proceeds in payment of the amount so advanced or expended, with interest thereon at the rate of six per cent. per annum, and the costs of the sale and the residue of such proceeds, if any, shall be paid to the executors, administrators or assigns of such person on demand. 3 Edw. VII. c. 19, s. 588 (1), *redrafted;* 3 & 4 Geo. V. c. 43, s. 398 (28).

Municipal Officers.

398.—(29) For appointing such pound-keepers, road commissioners, pathmasters, fence-viewers, overseers of highways, road surveyors, inspectors of sheep worried or killed by dogs, and other officers in addition to those specially mentioned in this Act and such servants as may be deemed necessary for the purposes of the corporation, or for carrying into effect the provisions of any Act of this Legislature or by-law of the council. 3 Edw. VII. c. 19, s. 557 (1), *part redrafted.*

398.—(30) For fixing their remuneration and prescribing their duties, and the security to be given for the performance of them. 3 Edw. VII. c. 19, s. 537 (2); 3 & 4 Geo. V. c. 43, s. 398 (29-30).

Section 398 (29) and (30).—In Mackay v. Toronto, 1917, 39 O. L. R. 34, the plaintiff, an accountant, was employed by the mayor, there being no agreement as to his remuneration, to make an investigation for the purposes of the proposed purchase of the street railway company and the electric light company. He completed his work and rendered a bill to the city. Payment was refused, and he brought an action. The city disputed liability, contending that there was no contract under the corporate seal—that there was in fact no contract with the city at all—and further contending that there could be no valid contract without a by-law. The plaintiff asserted that this was an executed contract, and that he had the right to recover notwithstanding the lack of a by-law or contract under seal; and that the council adopted the employment in such a way as to preclude the city from now denying liability. Middleton, J., examined the English and Ontario authorities, and deduced from them the same rule as was laid down by the Court of Appeal for Manitoba in Manning v. Winnipeg, saying:—

> "As already stated, the Supreme Court of Canada has more than once acted upon Waterous Engine Works Co. v. Town of Palmerston, and treated it as conclusively settling the law: see Queen v. Henderson, 1898, 28 S. C. R. 425; Ponton v. City of Winnipeg, 1908, 41 S. C. R. 18.
>
> "In the earlier case the plaintiff recovered upon an executed contract, not in writing, because there was no statutory provision requiring the contract to be in writing. In the Winnipeg case the plaintiff failed in an action upon a contract based upon a resolution, because the city charter, like the Ontario Municipal Act, required municipal action to be by by-law.

"The absence of a by-law thus, in my view, affords an answer to the plaintiff's claim; and the fact that the contract has been executed, and that the city has received benefit from the plaintiff's services, is not sufficient to prevent it setting up this defence.

"There is no doubt that a municipal corporation may ratify an act done on its behalf without the statutory authority of a by-law; but, in my view, the ratification is in itself a contractual act on the part of the municipality; and if, as has been held by the Supreme Court, the municipal contract must be based upon a by-law, the contract of ratification must be based upon a by-law. To hold otherwise would be to repeal the statute and to do that which the House of Lords has held that no Court can do, to substitute that which may in the eyes of the Court be regarded as just and fair, for that which the Legislature has declared to be essential. If the Legislature has declared that the corporation can only act in one way, no Court can declare it to be bound in any other way.

"Then, again, before ratification of an unauthorized act it must be shewn either that there was full knowledge of all that had been done, or that there was an intention to adopt and ratify so as to assume full liability, no matter what has been done: see Marsh v. Joseph, 1897, 1 Ch. 213; Pole v. Leask, 1863, 9 Jur. N. S. 829.

"When it is borne in mind that there the arrangement was made with the mayor, and no member of the council is shewn to have known of the situation, the danger of any assumed ratification which might be inferred from mere knowledge and quiescence is obvious. The words already quoted from Lord Bramwell are most appropriate.

"Even if I had to come to the conclusion that this case is governed by Waterous Engine Works Co. v. Town of Palmerston, I should have had great difficulty in applying the rule of Clarke v. Guardians of Cuckfield Union, so as to afford the plaintiff any relief.

"In the first place, the purchase of the street railway and the electric concern, before the expiry of the charters of these companies, was a matter not falling within the purview of the rule. It cannot be said that this was a purpose for which the corporation was created, or that the obtaining of this advice was in any sense a thing necessary to the purposes for which the corporation was created. Without going so far as to accept Mr. McMaster's contention that the whole inquiry was *ultra vires* the city, I may say that no case has gone so far as to apply the doctrine of the liability of the corporation for an executed contract when the contract is one so far removed from the things which are 'essentially necessary for carrying the purposes for which the corporation was created into execution.'

"Then again, all the cases of executed contracts are cases in which the order for the work was given by the duly constituted board at a regularly constituted meeting, the board having general authority to make contracts of the nature in question. Here the contract was with the mayor, and the mayor alone. The council was not in any way consulted, and had no knowledge of the matter till long after the work was undertaken. What is lacking is not any mere formality—the absence of a by-law or the corporate seal—but the entire absence of any action on the part of the council, by which alone, under the statute, the corporation could act."

The above was affirmed on appeal to the Appellate Division of the Supreme Court of Ontario (43 O. L. R. 17), and in delivering judgment Ferguson, J.A., says as follows:—

"The authorities are so well collected in the reasons of the trial judge and in the judgments delivered in the Supreme Court of Canada in Bernardin v. Municipality of North Dufferin, 19 S. C. R. 581, and in the Waterous case, that it would be a waste of time and effort for me to attempt to review them. I will content myself with saying that as I read these opinions and the citations therein, they establish that where there are no express statutory provisions requiring a seal or by-law the Court may and does dispense with the Common Law formality of a seal in respect to corporation contracts which have been fully executed

and are, in the opinion of the Court, within the power of the corporation to enter into as being for work or material necessary or proper for the conduct of the business for which the corporation was created; but that the Court cannot dispense with a seal or by-law, if such requirement is statutory, and such requirement is in the opinion of the Court imperative and not merely permissive or directory, that the proof of compliance with such a statutory provision is as essential in an action to enforce payment of the consideration for an executed contract as it is to the establishment or enforcement of an executory contract."

Which was further affirmed on appeal to the Judicial Committee of the Privy Council, 1919, 3 W. W. 254 (not as yet in official Reports), and judgment of the Court given by Viscount Haldane in which he said as follows:—

"The question which remains is whether the appellant has a legal claim to anything at all against the respondents. It is argued on his behalf that the contract in the present case was an executed contract, and that the principle enunciated by Wightman, J., in Clark v. Cuckfield Union Guardians, 1 B. C. C. 81, 21 L. J. Q. B. 349, applies. What that learned Judge laid down in that case in 1852 was that whenever a corporation is created for particular purposes, which involve the necessity for frequently entering into contracts for goods or works essentially necessary for carrying the purposes for which the corporation is created into execution, a demand in respect of goods or works which have actually been supplied to and accepted by the corporation and of which they have had the full benefit may be enforced by action of *assumpsit*, and the corporation will be liable, though the contract was by parol only and not by deed under seal.

"But their Lordships are of opinion that the case before them is outside the principle of law so laid down. Putting aside the difficulty that it is far from clear that the contract here can be regarded as fully executed, it is obvious that the corporation of the City of Toronto was not created for the particular purpose of acquiring the undertakings to which reference has been made. At best it was endowed with special powers, independent of, and subsequent in date to, those which it originally possessed, of taking steps to acquire them. Again this corporation is not the creature of charter and as such endowed with capacity by the common law, but it is the pure creation of a statute. It may be that the effect of The Interpretation Act of Ontario (R. S. O. c. 1, s. 27), which gives to every corporation the power to contract, makes this power a general feature of its statutory equipment. But the section cannot affect the prohibition imposed by The Municipal Act of the exercise of its distinctive powers otherwise than by by-law under seal. Their Lordships do not desire to be understood as saying that the powers referred to in the context are to be taken as covering the whole field of the capacity of such a corporation to contract. It can hardly have been intended by the Legislature that, for example, note paper cannot be bought for daily use except by a special by-law under seal; it may well be that the power to engage a servant is not a power *ejusdem generis* with the powers with which The Municipal Act is dealing when it imposes restrictions on their exercise. The language of s. 398, which enables by-laws to be made for providing for such minor appointments and for the carrying into effect of the council's own by-laws, appears to indicate that the power to make such appointments is distinguished from the special powers as to which the statute imposes restrictive formalities. But it is enough to point out that the new powers to acquire the undertaking of the Toronto Railway Company and the Electric Light Company, specially added by the two statutes of 1913 already referred to, assuming that they were sufficiently conferred, as an addition to those already in existence, belonged to the latter class. If so the judgments in the House of Lords in Young v. Leamington Corpn., 8 App. Cas. 517, 52 L. J. Q. B. 713, show that the principle of Clark v. Cuckfield Union Guardians, *supra*, has no application, inasmuch as there is an express statutory enactment prescribing conditions for the exercise of all powers of this nature."

In Speakman v. Calgary, 1908, 9 W. L. R. 264, an engineer answered an advertisement of the City of Calgary, making application for the position of City Engineer, and he was finally employed as a result of the correspondence, but there was no by-law, and no contract under seal. The Full Court held that the Calgary City Charter Ordinance No. 33 of 1893, N. W. T., did not render either a by-law or a contract under seal necessary to the validity of the agreement, and considered that Bernardin v. North Dufferin, 1891, 19 S. C. R. 581, applied. The latter was a Manitoba case, where an executed contract which had not been authorized by by-law, was held good, under the then Municipal Act, but note that the Manitoba Act has been amended, making it imperative the powers of council shall be exercised by by-law, and the attitude of the Manitoba Courts is shewn by Manning v. Winnipeg, which however, involved an executory contract.

In Manning v. Winnipeg, 1911, 21 M. R. 203, a solicitor, who was employed by a resolution of a committee to represent the city upon an inquiry made by a County Court Judge, failed to recover the amount of his bill, the Court of Appeal for Manitoba holding that a by-law was necessary. Richards, J.A., said:—

"In the present case the provision of s. 472 of the defendants' charter is of as general a nature as could well be enacted. It says, 'the powers of the council shall be exercised by by-law when not otherwise authorized or provided for.' That is, on its face, a sweeping enactment.

"The council has a great variety of powers and duties, ranging from very important to very petty ones, the latter of which are carried out in practice by many employees of different grades. I am not aware whether the exceptions which are included in the words, 'when not otherwise authorized or provided for,' include the hiring of laborers for city work. But, presuming that they do not, would a laborer who sued for a month's wages be deprived of his remedy because he was not employed by by-law?

"It is evident that there are so many duties, of which the employment of a laborer is but an instance, that it would be impossible to exercise by by-law the city's powers as to each and every such. Then, where is the line to be drawn? Or is it to be presumed that despite the fact that it is impossible to provide for all such matters by by-law, only those can be enforced as to which by-laws are enacted?

"I do not, of course, suggest that such an employment as that under which the plaintiff claims comes within the petty classes above referred to. I mention them only to illustrate the difficulty that occurs to me in dealing with so general an enactment as s. 472 contains. . . .

"Whether, of necessity in certain matters, the law would grant exceptions on such an enactment as s. 472, as the Courts of Ontario, it seems to me, have done, I cannot say. I do not feel here driven to decide that point as the case can, I think, be dealt with on other lines.

. . .

"There was, in the present case, no contract under the corporate seal. That, in itself, and irrespective of the question of a by-law, seems to me to be fatal to the plaintiff's right to recover, unless he can bring himself within one of the common law exceptions to the rule.

"Those exceptions are stated in Lawford v. Billericay Rural Council, 1903, 1 K. B. 772, a decision of the Court of Appeal in England, and now the ruling case on the question. They are:

1st. Where the work done for the corporation is of a trivial nature.

2nd. Where the claim relates to matters of so frequent occurrence that they must, of necessity, be complied with without waiting for the formality of a seal.

3rd. Where the work, in respect of which the plaintiff seeks to recover, is work done in respect of matters for the doing of which the corporation was created, and the benefit of the work is accepted by the corporation.

"I am not aware that in Campbell v. Community, etc., 1910, 20 O. L. R. 467, D.C., a Judge, to whose decisions great deference is due, says 'the distinction once insisted on, as to work done being "essential" to

the purpose of the corporation, is to be modified by the trend of recent decisions, so that the "beneficial" work is enough if it be incidental or ancillary to the purpose for which the corporation exists.'

"That view of the law is, perhaps, supported by previous Ontario decisions. But, with every respect, I do not think it is by Lawford v. Billericay. In the latter case Vaughan Williams, L.J., used expressions which, by themselves, might be taken as not confining the third exception to work done in respect of the purposes for which the corporation was created. But a perusal of the judgments of Stirling, L.J., and Mathew, L.J., shews, to my mind, that they meant to so confine the exception, and, as by the opening words of their judgment, they stated that they were of the same opinion as Vaughan Williams, L.J., whose judgment was pronounced first, I can only conclude that they understood him to so limit it.

"The plaintiff cannot bring himself within either the first or the second exception, and I think he fails to come within the third."

Dismissal of Firemen for Immoral Conduct.—In McPherson v. Toronto, 43 O. L. R. 326, App. Div., the dismissal of a fireman because he was living in open adultery and refused to desist at the request of the chief was held to be justified on the grounds that it was one of the implied terms of the contract that the employee will refrain from indecorous conduct, likely to endanger his own reputation and injure his employer's interests. Meredith, C.J.O., in giving the judgment of the Court, said:

"His employment was one in which only men of good character and conduct should be employed. His duties were such that at any time he might be called upon to enter the houses of citizens, both in the day time and at night. It was important, too, that, brought into contact as he was with the other members of the brigade, he should do nothing to affect prejudicially the discipline of the body to which he belonged. His position was, besides, that of an employee of a municipal corporation, and I cannot believe that his conduct was not such as to affect prejudicially the reputation of his employer."

By-laws Under s.-ss. 29 and 30 are not Contracts, but may Authorize Contracts to be Made by the Proper Officers.

Responsibility of Municipal Corporations for Negligence of (1) Their Officers and Servants, (2) Public Officers who are Merely Appointed by Municipal Corporations as a Matter of Convenience. **See pp. 594-597.**

Ontario Municipal Union.

398.—(31) For the corporation becoming a member of any union of Ontario municipalities for furthering the interests of municipalities and paying the fees for such membership and making contributions for the expenses of the union, and paying the expenses of delegates to any meeting of it or upon its business. 7 Edw. VII. c. 40, s. 19, *amended;* 3 & 4 Geo. V. c. 43, s. 398 (31).

In the absence of express power to spend moneys in sending delegates to the union of Canadian municipalities, the payment of moneys for the purpose is illegal, and will be restrained at the suit of a ratepayer suing on behalf of all the ratepayers, and the action need not be in the name of the Attorney-General, and where the recipient of the moneys is the mayor, whose position with reference to municipal moneys is of a fiduciary character, the rule that moneys paid *ultra vires* cannot be recovered, is not applicable: MacIlreith v. Hart, 1907, 39 S. C. R. 657, 41 N. S. R. 351.

Public Parks and Drives.

398.—(32) For acquiring land for and establishing and laying out public parks, squares, [avenues] boulevards and drives in the municipality or in any adjoining local municipality, and where there is no Board of Park Management for exercising all or any of the powers which are by *The Public Parks Act* conferred on Boards of Park Management. 3 Edw. VII. c. 19, s. 576, par. 1, *amended.*

398.—(32) (*a*) A corporation which expropriates land in another municipality, under the powers conferred by this paragraph shall put the land in an efficient state to be used, and open the same to the general public, for the purpose for which it was acquired, within a reasonable time after such expropriation, and shall maintain and keep the same in an efficient state of repair and shall provide police protection therefor. 3 Edw. VII. c. 19, s. 576 (2), *amended.*

398.—(33) For accepting and taking charge of land, within or without the municipality, dedicated as a public park for the use of the inhabitants of the municipality. 3 Edw. VII. c. 19, s. 576, par. 3, *last part;* 3 & 4 Geo. V. c. 43, s. 398 (32-33).

Leasing Public Park.—In Att.-Gen. v. Toronto, 1903, 6 O. L. R. 159, the corporation by by-law established a park on the "island" out of the land belonging to the corporation of owners in fee. Subsequently the corporation by by-law assumed to take certain lots out of the lands previously dedicated for park purposes, and to lease them to private persons, and this course was held illegal. See also Att.-Gen. v. Toronto, 1864, 10 Gr. 436; In re Peck and Galt, 1881, 46 U. C. R. 211. In the latter case Osler, J., said:—

> "A square or park which the corporation lay out upon lands acquired by them . . . untrammelled by any trust as to its disposal, may be dealt with under the ample powers conferred upon them by s. 509." (See 472), but note that 472 is not as wide as then 509, or its successor, 637.

In Hope v. Hamilton Park Commissioners, 1901, 1 O. L. R. 477, C. A., the City of Hamilton purchased property for a public park and adopted the Public Parks Act, thereby constituting the Board of Park Management an independent corporation. The parks board fenced in a portion of the park and let it to clubs to be used as baseball grounds. The plaintiffs were residents in the Town of Hamilton, and brought an action to restrain the parks board from closing the portion of the park used as baseball grounds. The merits of the action were not discussed, as the Court held that the

plaintiffs had no special or private interest in confining the board within the limits of their power, and that only the Att.-Gen. had a right to complain, unless such special or private interest could be established: Mayor of Liverpool v. Chorley Waterworks, 1852, 2 D. M. & G. 852, was applied.

Lands Acquired by a Municipality in an Adjoining Municipality are Exempt from Taxation by the Latter.—The Assessment Act, R. S. O. 1914, c. 195, s. 5 (7 and 8), provides for the following exemptions:—

> 7. The property belonging to any county or municipality or vested in or controlled by any public commission wherever situate, and whether occupied for the purposes thereof or unoccupied; but not when occupied by a tenant or lessee.
>
> 8. The property belonging to any municipality, and in use as a public park, whether situate within the municipality or in an adjacent municipality.

In re Orillia and Matchedash 1904, 7 O. L. R. 389, C. A., the township of Matchedash sought to assess certain property acquired by the Town of Orillia in the township for use in connection with an electric light plant on the ground that such property could not be said to be acquired for public use, as the town intended to supply light and power to individuals and outside municipalities and it was argued that the express reference to public parks in s.-s. 8 modified the construction of s.-s. 7. Osler, J.A., pointed out that s.-s. 8 was an unnecessary enactment based on a misconception of the scope and meaning of s.-s. 7, and Garrow, J.A., said:

> "It is not unimportant upon the question of construction to consider what would have been the position if the statute had made no provision for exemption. It is a general principle of taxation well known and long established that property held and used for public purposes is exempt from taxation: see Rex v. Terrott, 1803, 3 East. 506, at pp. 513, 514; Rex v. Inhabitants of Liverpool, 7 B. & C. 61. Such property can only be made chargeable by statute, and the intention to charge must be plainly expressed, for an implied power to tax will not be inferred."

Where park property is vested in commissioners or in a parks board the rule as to exemption of course still applies, *ibid.*

Land Acquired by City in Township becoming part of City.—In re Harwich and Kent, 1914, 31 O. L. R. 654, the City of Chatham acquired lands for a cemetery in the township of Harwich, which lands had no physical connections with the city at any point. Section 269 (3) of the then Municipal Act provided that such land "although without the municipality shall become part thereof and shall cease to be part of the municipality to which it formerly belonged." The township contended that the highway on which the cemetery fronted was a boundary line between a city and a county, and that these corporations were bound to erect and maintain bridges on them under then s. 452 (now 452). Meredith, C.J.C.P., in holding that the city and county were not liable as claimed, said:—

> "Having regard, however, to the obvious purposes of the legislation, these things are not substantially inconsistent the one with the other. The object of the legislation was to bring the municipal cemetery, when without the territorial limits of the municipality owning it, completely under its control as if it were within such limits.
>
> "The fact that the cemetery in question is near to the City of Chatham makes no difference; the question involved would be precisely the same no matter how far it might be from the city. There is nothing to indicate any intention that the cemetery is to be treated as if tacked on to the outskirts of the city so as to extend the city's territorial limits. Nor is there anything in any part of the legislation affecting the question which requires that it should be held that the cemetery is a city without the city; that there are to be two separate and distinct parts of the one city. Full effect is fairly given to all the purposes

and words of the Legislature if the cemetery be treated in all things affected by the legislation respecting cemeteries, as if it were within the city. . . .

"No one would, I am sure, think of calling the boundaries of the cemetery boundary lines of the city. The city has its well-defined and well-understood limits or boundaries: and in this case they happen to have been fixed by statute: see 33 Vict. c. 66 (O.); though that in itself does not seem to me to control, in any way, the question. It is not, of course, necessary that a municipality shall be all within a 'ring fence' as it were; it may be that two or more parts of it may be quite, in locality, separated and apart from one another. . . . It is a thing of itself without the city walls, but, for its proper government by the municipality whose it is, it is made part of the city as if within its walls."

Land Expropriated for One Purpose Cannot be Used for Another.—When land is compulsorily acquired for a particular purpose it cannot be permanently used for an inconsistent purpose, thus, lands acquired for sewage purposes cannot be diverted to hospital purposes. See Att.-Gen. v. Handwell Urban Council, 1900, 1 Ch. 51; 69 J. L. Ch. 39, 626, and see cases cited under s. 322.

Doctrine of Irrevocable Dedication. — Once lands have been dedicated to the public by a private owner for public purposes as a public park or market and vested in the corporation presumed to such dedication, the council cannot revoke the dedication. See Guelph v. Canada Co., 1853, 4 Gr. 632; Att.-Gen. v. Goderich, 1856, 5 Gr. 402; Att.-Gen. v. Brantford, 1858, 6 Gr. 592, but the rule is different where a city sets aside lands which it owns for park purposes by by-law. See s.-s. 32.

A corporate body acting as a trustee is amenable to the jurisdiction of equity as an individual. See Att.-Gen. v. Goderich, and any threatened breach of trust will be restrained. See Att.-Gen. v. Mayor of Liverpool, 1835, 1 My. and C. 171 and 210.

Duty to Maintain and Keep in Repair.—The duty cast on the corporation by s. 32 (a) has been in the Act since 1887. In Moore v. Toronto, 1893, 26 O. R. 69, the Chancery Division non-suited a plaintiff who sought to recover damages because his child, four years old, when playing in the water at the edge of a lagoon in the island, got into a hole which had been dredged by the corporation and was drowned. Boyd, C., said:—

"The principles which determine liability as for negligence are to be drawn from cause as to the permissive use of premises rather than those of invitation to use and come upon property of another. Of the former Hounsell v. Smyth, 7 C. B. N. S. 731, is a ruling authority which lays it down that the owners of open waste land who allow persons to go upon it for recreation or business are not under legal obligation to fence or warn against dangerous excavations. The person who chooses to use the waste has no right to complain of the danger. He must take the permission with its concomitant conditions, and it may be, perils. Other cases which may be usefully consulted are: Bolch v. Smith, 7 H. & N. 736; Corby v. Hill, 4 C. B. N. S. 556; Sullivan v. Waters, 14 Ir. C. L. Rep. 468; and Steele v. City of Boston, 128 Mass. 593.

"There is no evidence (even if that would make a difference), to shew that this lagoon was in a safe state for children and others prior to the excavation, and no evidence of any change in the condition of the particular pond during the time in which the plaintiff's family frequented the place as a summer resort. Such evidence might have presented one phase of the conditions mentioned at the end of Bolch v. Smith; that if a hole had been made and covered in such a way as to appear to be sufficient, when in fact it was insufficient, so as to form a 'trap,' query whether the owner would not be liable even as to licenses. But, as at present advised, I do not think a hole in the soil is to be likened to a deepening of water formed by dredging, for it is not to be supposed that persons might walk into one as into the other."

In Schmidt v. Berlin, 1894, 26 O. R. 54, there was a building in a municipal park which was sometimes used when rain fell, as a shelter. The plaintiff and others entered the building for protection during a rain storm. After some demur on the part of the caretaker a board forming part of the ceiling fell on the plaintiff and injured her. The Q. B. Division, following Moore v. Toronto, held that she was not entitled to recover. Armour, C.J., adopted the statement in Beven on Negligence, as to the extent of the duty of the corporation, as follows:—

"1. To caution those using the land against any known insecurity which is of a not readily discoverable character.

"2. Not to alter the character of the land: (a) By placing on it dangerous obstructions; (b) by affecting the condition of the property whereby the danger is increased without notice.

"3. To use diligence—*i.e.*, not to be guilty of negligence—in any work that is being carried on upon the premises, and by default in which injury might arise to the licensee.

"And it is clear that 'the extent of the duty' so pointed out does not cover the case in hand so as to make the defendants liable for the want of repair of the building.

"No statutory duty was imposed upon the defendants to keep the park or building in repair, and it may be that upon this ground no liability whatever was cast upon the defendants: Municipality of Pictou v. Geldert, 1893 A. C. 524."

In Soulsby v. Toronto, 1907, 15 O. L. R. 13, the city maintained a gate, and when the park was frequented kept a watchman at the place where a road through the park led out of it across a railway track. The plaintiff driving out of the park found the gate open and attempted to cross, and while crossing was struck by a train. Britton, J.. in dismissing the action, followed the principles laid down in Moore v. Toronto and Schmidt v. Berlin, apparently adopting the view that roadways in a park are not public highways, and that the liability. if any, on the part of the city, did not extend beyond keeping the roadway in repair and free from dangerous pitfalls and obstructions, of which the city had, or might be deemed to have notice, applying Marshall v. Industrial Exhibition Association, 1901, 1 O. L. R. 319, and Graham v. Commissioners for Queen Victoria, Niagara Falls Park, 1896, 28 O. R. 1, and Skelton v. London and N. W. R. Co., 1867, L. R. 2 C. P. 631, where Willis, J.. said:—

"That the mere failure to perform a self-imposed duty is not actionable negligence; that the omission to fasten the gate did not amount to an invitation to S. to come on the line; and that, therefore, even if S. was not guilty of contributory negligence, the company were not liable."

In view of the express duty imposed by s.-s. 32 (a) and of the rule now laid down by the Supreme Court that an action will lie where a municipal corporation is guilty of negligent default by non-feasance of a statutory duty imposed upon it (see analysis of authorities by Duff, J., in Vancouver v. McPhalen, 1911, 45 S. C. R. 194), it is submitted that the true rule is that laid down by Duff, J., as follows:—

"Where a municipal corporation acting under powers conferred by the statute creating it, constructs a work for use of the public, and invites the public to use it, the corporation having the ownership of and full authority to control the work, and to regulate the use of it by the public; and the statute creating the corporation in express terms imposes upon it the legal duty and at the same time gives it full authority to take all the necessary measures to prevent that work becoming a danger to the public making use of it in the exercise of their right, and owing to the unreasonable neglect of the corporation to perform this duty the work does become a public nuisance, then, in order to resist successfully a claim for reparation by one of the public who has suffered a personal injury in consequence of the existence of the nuisance (while properly using the work in the exercise of the public right), the corporation must shew something in the statute

indicating an intention on the part of the legislature that the remedy by action shall not be available in such circumstances."

River Adjoining a Public Park.—A public authority is required only to take reasonable precautions to make rivers or lakes in public parks safe, and are under no obligation specially to protect children: Stevenson v. Glasgow, 1908, S. C. 1034.

American Cases.—Where plaintiff was injured by the fall of a park stand which had been negligently constructed under authority of the park commissioners of the defendant city who had jurisdiction thereof, the city was liable. Denver v. Spence, 82 Pacific Reporter, 590; 34 Colo. 270.

City not liable for death by drowning of a boy wading out ten feet into a pond in the commons within the city limits. Schauf's Adm'n v. Paducah, 106 Ky. 228; 50 Southwestern Reporter, 42.

A city reservoir set in or adjacent to and in the same block with a public park is a place of danger to persons and particularly to children who may frequent the park which it is the duty of the city to surround by sufficient safeguards to protect such persons and children from injury, but such duty is fulfilled by the exercise of reasonable care in the construction of barriers around the reservoir. Carey v. Kansas, 85 Southwestern, 438.

Rifle Associations—Militia.

398.—(34) For aiding any regular organized rifle association, [or any association or corporation having for its object or one of its objects the promotion of military art, science or literature].

398.—(35) For adding to the sum paid, during the period of annual or other authorized drill or when on active service, to any enlisted member of any corps of Active Militia organized within the municipality.

398.—(36) For providing military outfit or equipment for the members of such corps. 3 Edw. VII. c. 19, s. 591 (7); 7 Edw. VII. c. 40, s. 18; 3 & 4 Geo. V. c. 43, s. 398 (34-36).

Sidewalks, etc.—Vehicles on.

398.—(37) For prohibiting carriages, waggons, bicycles, sleighs and other vehicles and conveyances of every description, and whatever the motive power, or any particular kind or class of such vehicles or conveyances being upon, or being used, drawn, hauled or propelled along or upon any sidewalk, pathway or footpath, used by or set apart for the use of pedestrians, and forming part of any highway or bridge, boulevard or

other means of public communication, or being in or upon any highway, boulevard, park, park-lot, garden or other place set apart for ornament or embellishment or for public recreation. 3 Edw. VII. c. 19, s. 560; 3 & 4 Geo. V. c. 43, s. 398 (37).

A Bicycle is a Vehicle.—In R. v. Justin, 1893, 24 O. R. 327, the defendant was convicted under a by-law passed under the authority of the then Municipal Act, for riding a bicycle on the sidewalk. The by-law referred to bicycles, but the Act simply used the general term vehicles. The Court overruled an objection that a bicycle was not a vehicle, following R. v. Plummer, 30 U. C. R. 41, where the Court held that a velocipede on a sidewalk was within the provisions of a similar by-law.

Hand Carts, Baby Carriages and Wheel Chairs, are within the scope of s. 37, but it is to be noted that the section confers power upon the council to prohibit particular classes of vehicles only. The by-law under consideration in R. v. Justin contained a proviso excepting hand carts and baby carriages when propelled at moderate speed, but provided that under all circumstances these should yield the right of way to pedestrians.

The Highway Act, 1835, 5 and 6 Wm. IV. c. 50, s. 72, imposes penalties for wilfully riding upon footpaths or wilfully leading or driving horses, cattle or carriages of any description, trucks or sledges on such footpath.

Victorian Order of Nurses.

398.—(38) For granting aid to the Victorian Order of Nurses. 3 Edw. VII. c. 19, s. 590; 3 & 4 Geo. V. c. 43, s. 398 (38).

Water for Fire Purposes.

398.—(39) For contracting [A] for a supply of water within the municipality for fire purposes and other public uses, from hydrants or otherwise as may be deemed advisable; and for renting hydrants for any number of years, not in the first instance, exceeding ten; and for renewing the contract from time to time for periods not exceeding ten years, as the council may deem proper; or for purchasing or erecting hydrants necessary for any of such purposes. 3 Edw. VII. c. 19, s. 543, part; 3 & 4 Geo. V. c. 43, s. 398 (39).

Liability of Water Company for Failure to Supply Water for Fire Purposes When Required to do so by Statute.—In Atkinson v. Newcastle and Gateshead Water Company, 1877, 2 Exch. D. 441; 46 L. J. Ex. Ch. 775, the water company were by Act of Parliament charged with the duty of keeping pipes charged with water at a certain pressure for fire purposes, and were made under a penalty of £10 in each case of failure to maintain a statutory pressure. A fire occurred, the pressure in the pipes was below the statutory limit and the plaintiff's saw-mill in consequence thereof was burned down. The C. A. held that the plaintiff had

no action against the water company. The case was decided upon the construction of the statute.

In Dawson v. Bingley Urban Council, 1911, 2 K. B. 149; 80 L. J. K. B. 842, C. A. the local authority was by statute required to provide fire-plugs and to put up a plate near by to mark the situation of each plug. The corporation put up a misleading plate, fire occurred, and delay resulted while the fire company was searching for the fire plug, and the plaintiff's property was destroyed by reason of the delay. He brought an action against the local authority for damages and succeeded. The defendants' claim for immunity under the authority of Atkinson v. Newcastle, *supra*, was rejected, Kennedy, L.J., saying:—

> "So far as regards this case it is to be noted that (a) the defendants there were not a public body, but a private company, so that the Act in the words of Lord Cairns, L.C., ought to be regarded as 'not an Act of public and general policy, but is rather in the nature of a private legislative bargain with a body of undertakers'; and both the Lord Chancellor and Chief Justice Cockburn lay stress upon this point; and (b) the Act, in that case, itself imposed remedies in the form of penalties—a circumstance upon which all the members of the Court of Appeal, questioning the judgment of the Queen's Bench in Couch v. Steel, 1854, 23 L. J. Q. B. 121; 3 E. & B. 402, largely based their conclusion. In the case before us, the Public Health Act, 1875, contains no specific provision for the recovery of penalties or for other remedy if s. 66 is infringed, and the defendants are not a private company or corporation, but a public authority invested by statute with powers and duties for the benefit of the inhabitants of the district in which that public authority exists. . . .
>
> "Having regard, in the language of Lord Cairns, L.C., in Atkinson v. Newcastle and Gateshead Water Co., *supra*, on the purview of the legislature in the particular statute, and the language which they have there employed'—the absence of provision for any other remedy, the precise enactment of a definite duty for the protection of the class of persons to which the plaintiffs, as local residents, belong, against the kind of mischief which has in fact occurred—I am not prepared to say that even if the breach of statute consisted in the omission to set up a donating plate, an action on the case would not lie against the defaulting urban authority. It is not, however, necessary in the present case to decide this point. Here . . . there has it appears to me been action misfeasance causing damage.

Liability of Water Company for Failure to Supply Water According to Contract for Fire Purposes.—The general rule is that must amount to a declaration of trust as distinguished from a mere agreement between parties. On principle it would seem that a person whose property was injured by fire by reason of the failure of a water company to a contract can only be enforced by or against parties to it, and even if a contract was made for the benefit of a stranger and expressly gives him the right to enforce it the rule still applies. See Keighley v. Durant, 1901, A. C. 240; 70 L. J. K. B. 662 (H. of L.). An exception to the general rule exists that a contract is such as to give a third party a beneficial interest as *cestui que trust* under the contract, that the contract supply water pursuant to an agreement with the municipality under the terms of s.-s. 39, could not recover damages.

In the Quebec case: Belanger v. St. Louis, 1912, 8 D. L. R. 601, it was held that a water company supplying water for fire purposes under a contract with the municipality was not liable to the plaintiff, whose house was damaged, owing to failure of the water company to comply with their contract.

Watering Streets.

398.—(40) For contracting with a street railway company for watering any of the highways for any number of years, not exceeding five, and for renewing such

contract from time to time for a period not exceeding five years. 7 Edw. VII. c. 40, s. 14; 3 & 4 Geo. V. c. 43, s. 398 (40).

398*a*. By-laws may be passed by the councils of all municipalities—

1, For erecting, establishing, equipping and maintaining, or for granting aid for the erection, establishment, equipment and maintenance of a memorial home or club-house for nursing sisters, officers and men who have been on active service during the present war with the naval or military forces of Great Britain or her allies, or of a monument, building or structure or a park in commemoration of officers and men who have died while on such active service.

(*a*) The Councils of any two or more municipalities may enter into an agreement for carrying out any of the purposes of this paragraph in any one of them.

2. With the assent of the electors qualified to vote on money by-laws for exempting from taxation except for local improvements and school purposes for a period not exceeding ten years any such memorial home, club-house or building and the lands used in connection therewith;

3. For granting aid to any fund established for providing allowances to widows, children, widowed mothers, parents, persons acting in *loco parentis* or dependents of nursing sisters, officers and men who resided in the municipality for six months prior to enlistment and who died while on active service during the present war with the naval or military forces of Great Britain or her allies;

4. For making grants to nursing sisters, officers and men who have returned from such active service and who resided in the municipality for six months prior to enlistment.

(*a*) Paragraphs 3 and 4 shall come into force on the first day of June, 1919. 9 Geo. V. c. 46, s. 11.

399.—By-laws may be passed by the councils of local municipalities.

Bathing in Public Waters.

(1) For prohibiting or regulating the bathing or washing of the person in any public water in or near the municipality. 3 Edw. VII. c. 19, s. 549 (8); 3 & 4 Geo. V. c. 43, s. 399 (1).

Charivaries.

399.—(2) For prohibiting charivaries and other like disturbances of the peace. 3 Edw. VII. c. 19, s. 586, par. 9, part; 3 & 4 Geo. V. c. 43, s. 399 (2).

Closet Accommodation for Workmen.

399.—(3) For requiring the owners, contractors or master workmen engaged in the erection or construction of buildings or public works to provide, for the use of the workmen employed in such erection or construction, closet accommodation, to be approved of by the medical health officer in connection with them. 5 Edw. VII. c. 22, s. 24; 3 & 4 Geo. V. c. 43, s. 399 (3).

399.—(3*a*) For requiring every dealer in coal who takes orders for coal for future delivery and accepts payment in full or on account of such order to deliver to the purchaser the coal so ordered within the time or times fixed by the by-law. 9 Geo. V. c. 46, s. 13.

Cows and other Animals—Keeping of.

399.—(4) For regulating the keeping of cows, goats, swine and other animals.

399.—(5) For prohibiting the keeping of cows, goats swine or other animals, except horses or mules, within the municipality or within defined areas of it. 3 Edw. VII. c. 19, s. 586 (7); 3 & 4 Geo. V. c. 43, s. 399 (4-5).

Contagious Diseases.

399.—(6) For providing blank forms for recording and reporting cases of contagious or infectious disease;

for placarding houses wherein such cases exist, and for taking such measures as may be deemed necessary for preventing the spread of such diseases. 3 Edw. VII. c. 19, s. 533 (2), *amended;* 3 & 4 Geo. V. c. 43, s. 399 (6).

Cruelty to Animals, etc.

399.—(7) For preventing cruelty to animals and the destruction of birds. 3 Edw. VII. c. 19, s. 540 (2), part; 3 & 4 Geo. V. c. 43, s. 399 (7).

Disorderly Houses.

399.—(8) For suppressing disorderly houses and houses of ill-fame. 3 Edw. VII. c. 19, s. 549 (3); 3 & 4 Geo. V. c. 43, s. 399 (8).

Cities, Towns, Villages and Townships may pass such by-laws, see p. 11, *ante*. Section 549 (3) was to the same effect.

"Disorderly Houses."—These words were substituted in 1866 for the words "tippling houses" used in the Act of 1858. The Act of 1849 read:—

"For suppressing and imposing penalties on the keepers of low tippling houses and houses of ill-fame visited by dissolute and disorderly characters."

Section 228 (1) of the Criminal Code, as substituted by 8-9 Edw. VII., c. 9, defines a disorderly house as "any common bawdy house (defined by s. 225 as substituted by 6 Edw. VII., c. 8, s. 2), common gaming house (defined by s. 227), common betting house (defined by s. 226), or opium joint (defined by s. 227 (*a*), added by 8-9 Edw. VII., c. 9)."

A common bawdy house is defined by s. 225 as a house, room, set of rooms or place of any kind kept for purposes of prostitution or occupied or resorted to by one or more persons for such purposes.

The Code Contains the Following Provisions:

299 (*a*) Every one is guilty of an indictable offence and liable to a penalty not exceeding one hundred dollars and costs and, in default of payment, to imprisonment for a term not exceeding two months or to imprisonment for a term not exceeding twelve months, who is an inmate of any common bawdy-house. (Added by the Criminal Code Amendment Act, 1915, 5 Geo. V., c. 12, s. 5).

Any one who has been convicted three or more times of any of the offences mentioned in ss. 228 and 229*a*, shall be liable on the third or any subsequent conviction to imprisonment for a term of not less than three months and not exceeding two years. (As enacted by 5 Geo. V., c. 12, s. 6).

230. Every one is guilty of an offence and liable, on summary conviction before two justices, to a penalty not exceeding one hundred dollars, and to six months' imprisonment, with or without hard labor, who—

(*a*) wilfully prevents any constable or other officer duly authorized to enter any disorderly house, from entering the same or any part thereof; or,

(*b*) obstructs or delays any such constable or officer in so entering; or

(*c*) by any bolt, chain or other contrivance secures any external or internal door of, or means of access to, any common gaming-house so authorized to be entered; or,

(*d*) uses any means or contrivance whatsoever for the purpose of preventing, obstructing or delaying the entry of any constable or officer, authorized as aforesaid, into any such disorderly house or any part thereof. 55-56 V. c. 29, s. 200.

(*e*) being the owner or other person in control of premises occupied or used as a disorderly house, knowingly allows any contrivance whatsoever upon the said premises for the purpose of preventing, obstructing or delaying the entry of any constable or officer authorized as aforesaid into any such disorderly house, or any part thereof. (Added by 9-10 Edw. VII., c. 10, s. 2).

228. Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming-house, common betting house, or opium joint, as hereinbefore defined.

Any one who appears, acts or behaves as master or mistress, or as the person having the care, government or management of any disorderly house, or as assisting in such care, government or management, shall be deemed to be the keeper thereof, and shall be liable to be prosecuted and punished as such, although in fact he or she is not the real owner or keeper thereof. 55-56 V. c. 29, s. 198. (Amended by 8-9 Edw. VII., c. 9, s. 2, and by 3-4 Geo. V., c. 13, s. 10).

228 (*a*) Any one who, as landlord, lessor, tenant, occupier, agent or otherwise, has charge or control of any premises and knowingly permits such premises or any part thereof to be let or used for the purposes of a disorderly house, shall be liable upon summary conviction to a fine of two hundred dollars and costs, or to imprisonment not exceeding two months, or to both fine and imprisonment.

If the landlord, lessor or agent of premises in respect of which any person has been convicted as the keeper of a common bawdy house fails, after such conviction has been brought to his notice, to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and subsequently any such offence is again committed on the said premises, such landlord, lessor or agent shall be deemed to be a keeper of a common bawdy house unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence. (Added by 3-4 Geo. V., c. 13, s. 11).

229. Every one who, without lawful excuse, is found in any disorderly house shall be liable on summary conviction to a penalty not exceeding one hundred dollars and costs, and in default of payment to two months' imprisonment. (As altered by the Criminal Code Amendment Act, 1913, 3-4 Geo. V., c. 13, s. 12).

Are such By-laws Intra Vires?—In Upton v. Brown (1912), 3 W. W. R. 626, Winter, D.C.J., said:—"The appellant, being convicted with 14 others under the provisions of a by-law of the City of Lethbridge, has appealed against the conviction of a justice of the peace under the following circumstances:

"The by-law, *inter alia*, purports to prohibit within the limits of the City of Lethbridge disorderly houses and to provide for the punishment of inmates of such houses or persons entering them except for lawful purposes. Its preamble reads as follows:

'Whereas it is expedient to pass a by-law for the suppression of vice and immorality within the limits of the City of Lethbridge.'

"Of the other 14, some convictions were for being keepers and the rest for being frequenters of a disorderly house.

"All the defendants pleaded guilty to the informations in respect of which the convictions were made, and raised no objection whatever before the justice of the peace who heard the cases against such convictions being made, and all subsequently gave notice of and entered appeals against their respective convictions.

"The ground stated by the counsel for all appellants was that the by-law in question was *ultra vires* of the City of Lethbridge. This by-law was passed presumably under the powers conferred on the city by s. 2, title xxi., of the Lethbridge Charter, being an Act of the Provincial Parliament. This body could confer on the city only such powers as could be exercised by itself.

"The object of the by-law was to create offences and provide punishments in the interest of the public morals, and not for the protection of private rights. Such legislation falls under s. 91 of the B. N. A. Act, and has relation to the criminal law, with which it is exclusively within the powers of the Federal Parliament to deal. The local Parliament could not legislate on such matter, nor did it, nor could it confer on the respondents power to do so. (R. v. Wason, 17 A. R. 221 (1889-90), 17 O. L. R. 58, 4 Cart. 578; R. v. Shaw, 7 M. R. 518 (1890); R. v. Keefe, 1 Terr. L. R. 280 (1885-93). It follows, therefore, that the by-law in question, so far as it attempts to create criminal offences and provide punishments for breaches of them, is of no effect."

House of Ill-fame.—These words are not directly defined in the Criminal Code, although they are used in s.-s. 216 (*b*) (house of ill-fame or assignation), but see s. 238 (*j*) (disorderly house, *bawdy house or house of ill-fame,* or house for the resort of prostitutes). The word "brothel" is used in s. 216 (*d*), (*e*) and (*f*). Webster defines brothel as "a house of lewdness, a house appropriated to the purposes of prostitution; a bawdy house." E. K. W.]

[**Gambling House.**—See s. 399 (40) and notes, p. 753, *post.*

A gaming house would also seem to be included in the houses referred to in this section.

Crankshaw, 4th ed., at p. 213, defined bawdy house, etc., and the following cases may be looked at for judicial interpretations of the various words:

An hotel where apparently respectable people resort as an ordinary inn, cannot be called a bawdy house in the general accept-

ance of that term, and a domestic therein cannot be convicted as being an inmate of a bawdy house, when there is no evidence that she lived there for any other purpose than as a domestic. R v. Misse (Yuk., 1908), 7 W. L. R. 934.

Where the evidence establishes that there was found in a house all the accessories to the keeping of a bawdy house, that there had been one act of sexual intercourse, and that the accused admitted that for 3 or 4 days before the day upon which she was charged with keeping a bawdy house, that she had kept such a place, it was held, that, although there was no evidence of the general reputation of the house, there was sufficient evidence to justify the conviction. R. v. Marceau (1915), 30 W. L. R. 418, 7 W. W. R. 1174.

Evidence that a known prostitute, who occupies a house, arranged with two men on different occasions that she would with each of them on a future occasion at that house commit acts of prostitution, but nothing was done pursuant to those arrangements, is not sufficient to sustain a charge of keeping a bawdy house, where no acts of prostitution in that house were proved to have taken place at any time R. v. Sands (1915), 32 W. L. R. 775; 9 W. W. R. 129, 436; 25 M. R. 690.

A man cannot be an "inmate" of a bawdy house within the meaning of and so as to be liable to summary conviction under s. 238 (*j*) of the Criminal Code. Looking at the associated provisions of the Code, the meaning to be attached to the word "inmate" is an inmate for the purposes of prostitution—and, therefore, a female. R. v. Knowles (1913), 25 W. L. R. 294.

See also Rex v. Sovereen (1912), 26 O. L. R. 16.

Disqualification of Electors not Paying Taxes.

399.—(9) For disqualifying from voting an elector who has not on or before the 14th day of December next preceding the election paid all municipal taxes due by him. 3 Edw. VII. c. 19, s. 535 (1); 3 & 4 Geo. V. c. 43, s. 399 (9).

Drainage of Cellars, Privy Vaults, etc.

399.—(10) For regulating the construction of cellars, sinks, cess-pools, water closets, earth closets, privies and privy vaults; for requiring and regulating the manner of the draining, cleaning and clearing and disposing of the contents of them.

399.—(11) For requiring the use within the municipality or defined area of it of dry earth closets.

399.—(12) For providing that the cleaning and disposing of the contents of cesspools, water closets, earth closets, privies and privy vaults shall be done exclusively by the corporation.

(*a*) For such purpose the corporation, its officers and servants shall have all the powers of the local board of health and its officers and servants;

(*b*) The council may provide for the expense incurred in such work by imposing in the by-law authorizing the work or in a separate by-law a fixed fee or graded fees varying according to the different kind of premises served, the time involved in service and such other matters as the council may consider applicable, and such fees shall be rated and assessed against the lands in respect of which such services are rendered in the collector's roll of the municipality and collected and recovered in like manner as municipal taxes;

(*c*) The council may provide that the collection, removal and disposal by the corporation of the contents of earth closets or other sanitary closets throughout the municipality or in defined areas if it shall be done at the expense of the owners or occupants of the land therein, and for that purpose may impose on such land a special rate according to its assessed value which shall be collected and recovered in like manner as municipal taxes. 9 Geo. V. c. 46, s. 12.

399.—(13) For requiring and regulating the filling up, draining, cleaning, clearing of any grounds, yards and vacant lots and the altering, relaying or repairing of private drains.

399.—(14) For making any other regulations for sewerage or drainage that may be deemed necessary for

sanitary purposes. 3 Edw. VII. c. 19, s. 551 (1-3 and 5), *amended;* 3 & 4 Geo. V. c. 43, s. 399 (10-14).

Egress from Buildings.

399.—(15) For regulating, subject to the provisions of *The Egress from Public Buildings Act* [*The Theatres and Cinematographs Act*] and *The Ontario Factories Act*:—

(*a*) The size and number of doors, aisles, halls and stairs in and other means of egress from hospitals, schools, colleges, churches, theatres, halls, or other buildings used as places of worship, or of public resort, or amusement, or for public meetings, and the street gates leading to them;

(*b*) The construction and width of stairways in such buildings, and in factories, warehouses, hotels, boarding and lodging houses;

(*c*) The materials of which and the manner in which stairs and stair-railings shall be constructed, and the strength of walls, beams and joists and their supports in all such buildings; and

(*d*) For requiring the production of the plans of the buildings mentioned in this paragraph now erected or which it is proposed to erect, and for prohibiting the use or erection of them until the provisions of the by-law are complied with to the satisfaction of the architect of the corporation or an officer appointed for the purpose. 3 Edw. VII. c. 19, s. 541 (2), *redrafted;* 5 Geo. V. c. 34, s. 23.

399.—(16) For prohibiting and preventing the obstruction by persons or things of the halls, aisles, passage-ways, alleys or approaches in or leading to any such building during the occupation of it by a public assemblage. 3 Edw. VII. c. 19, s. 541 (3), part.

399.—(*a*) While any building mentioned in clause (*a*) of paragraph 15 in a city or town is occupied by a pub-

lic assemblage, the chief constable or any constable of the city or town may enter it to see that the by-law is not being violated, and may require the removal of any obstruction or of any person standing, sitting, or otherwise occupying any hall, aisle, passage-way, alley or approach, except for passing to and fro. 3 Edw. VII. c. 19, s. 541 (3) part; 5 Edw. VII. c. 22, s. 18; 3 & 4 Geo. V. c. 43, s. 399 (15-16).

399.—(17) Subject to *The Municipal Franchises Act* for authorizing any person supplying electricity for light, heat and power, to lay down pipes or conduits for enclosing wires for the transmission of electricity under the highways or public squares, or to carry wires for the transmission of electricity or to erect telegraph and telephone poles and wires across or along any highway or public square, on such terms and conditions as the council may deem expedient.

399.—(17)*a* A by-law shall not be passed under this paragraph in violation of any agreement of the corporation. 3 Edw. VII. c. 19, s. 566 (*a*); *part amended;* 3 & 4 Geo. V. c. 43, s. 399 (17).

The Power Commission Act, R. S .O. 1914, c. 39, s. 46, provides as follows:—

Where lines, the construction or operation of which is authorized by this Legislature, and lines, the construction of which is authorized by the Parliament of Canada, run through or into the same city or town, and the corporation of such a city or town is desirous of having such lines placed underground, the Commission and the Board of Railway Commissioners for Canada may, after the receipt of the applications hereinafter mentioned, by joint session or conference in conformity with the practice to be established by them, hear and determine the application, and may order on such terms and conditions as they may prescribe any company constructing or operating lines in the city or town to place such lines underground, and may abrogate any right to carry lines on poles in such city or town, which may have been given by any Act or municipal by-law, license or agreement.

(a) Any such company or any municipal corporation or other public body, or any person or persons interested, may file with the secretary of the Board of Railway Commissioners for Canada, the application for an order under this section, together with evidence of the service of such application upon the company or companies interested or affected, and where the application is not made by the municipal corporation, upon the head of the municipality within which the lines are situate.

(b) The Chairman of the Commission and the Chairman of the Board of Railway Commissioners for Canada may make rules of procedure and practice covering the making of such applications and the

hearing and disposition thereof, and may vary, alter or rescind the same from time to time.

(c) The Chairman of the Commission and the Chairman of the Board of Railway Commissioners for Canada, may from time to time assign or appoint from each body the members comprising the joint Board that may be required to sit for the hearing and determining of such applications as they arise.

(d) Any such order may be made a rule of the Exchequer Court of Canada, and may be enforced in like manner as any rule, order or decree of such Court: 2 Geo. V. c. 14, s. 9, part.

Provincial Legislature has Jurisdiction to Authorize a Municipality to Grant Exclusive Franchise to a Wire Company.—Hull Electric v. Ottawa Electric, 1902, A. C. 237; 71 L. J. P. C. 58.

Poles Interfering with Public Travel.—See Bonn v. Bell Telephone, 1899, 30 O. R. 696; Joyce v. Halifax, 24 N. S. R. 133; Bell Telephone v. Chatham, 1900, 31 S. C. R. 61, and other cases cited under s. 460.

Dominion Wire Companies.—The Railway Act, 9-10 Geo. V. c. 68, s. 373, provides that a telegraph or telephone company having authority from Parliament to construct and operate a telegraph or telephone system shall not construct, maintain or operate its lines on any highway or public place without the consent of the municipality, and if the company cannot obtain such consent except on conditions not acceptable to the company, the company may apply to the Board of Railway Commissioners of Canada, for leave to exercise its powers, and upon such application shall submit to the Board a plan of the highway or public place showing the proposed location of its lines, wires and poles, and the Board may refuse or may grant such application in whole or in part, and may change or fix the route of such lines, wires or poles, and may by order impose any terms, conditions or limitations in respect of the application which it deems expedient, having due regard to all proper interests.

Sub-section (6) of s. 373, provides that the Board, upon the application of the municipality, and upon such terms and conditions as the Board may prescribe, may order any telegraph or telephone line, within the legislative authority of the Parliament of Canada, in any city or town, or any portion thereof, to be placed underground, and may in any case order any extension or change in the location of any such line in any city or town, or any portion thereof, and the construction of any new line, and may abrogate the right of any such company to construct or maintain, or to operate, or continue, any such line, or any pole or other wires belonging thereto, except as directed by the Board, etc.

Sub-section (7) provides that, except as provided in s.-s. (6), nothing in the section shall affect the right of any telegraph or telephone company to operate, maintain, renew or reconstruct underground or overhead systems or lines, theretofore constructed.

Section 371 of the Railway Act gives the Railway Board power to order telephonic connection between the station or premises of a railway company and the telephone system of any province, municipality or telephone company, notwithstanding any exclusive privilege which the railway company has given.

Section 372 provides that no lines or wires shall be erected along or across a railway without leave of the Board.

Section 373 provides that any Dominion wire company may with the consent of the municipal council having jurisdiction, break up and open any highway or public place subject to the following conditions: Travel shall not be interfered with; no door or gateway or entrance shall be obstructed; no wires shall be less than twenty-two feet above the highway; not more than one line of poles shall be erected; poles shall be straight and perpendicular, and in cities and towns shall be painted; trees must

not be unnecessarily interfered with; the work must be done under the supervision of the municipal council and the highway must be restored without unnecessary delay; if it is necessary to cut wires and move poles for the purpose of moving buildings or in the exercise of the public right of travel, the company must upon reasonable notice in writing, at its own expense, remove such poles and wires; the company shall be responsible for all unnecessary damage; the company shall not be entitled to damages on account of poles or wires being cut by officers in charge of fire brigades; every person employed on the work of erecting or maintaining wires must wear a badge showing plainly the name of the company and a number by which he can be identified; if the company cannot obtain consent from the municipal council it must apply to the Board of Railway Commissioners, filing a plan of the proposed work, and the Board may authorize construction upon terms.

Consent Under s. 373 Cannot be Withheld to Serve Ulterior Purposes.—In Bell Telephone v. Owen Sound, 1904, 8 O. L. R. 74, which was decided under 43 Vict. c. 67, s. 3, and 45 Vict. c. 95, s. 2 (D), similar in effect to s. 373, the company applied to the council for permission to carry their wires across a certain street in a conduit instead of overhead. The council refused consent unless the company would pay a business tax, which the corporation had no legal right to demand. Meredith, J., in granting an injunction restraining the corporation held that the refusal had been unreasonably withheld in bad faith.

Similar provisions to those contained in s. 373 were considered by the Privy Council in Montreal v. Standard Light & Power Company, 1897, A. C. 527; 66 L. J. P. C. 113. The company in that case sent a copy of their proposals with a plan annexed to the municipal council, requiring them within ten days to prescribe the manner in which the streets were to be opened, and stating that in case of default they would proceed with the works. No notice was taken of this communication, and eighteen days later the works were commenced. The city then attempted to interfere with the works, and the company brought an action for an injunction which was granted, and although appeals were taken through the Provincial Courts and through the Judicial Committee the injunction was upheld.

In Toronto v. Bell Telephone Co., 1902, 3 O. L. R. 65, reversed 6 O. L. R. 335, and 1905, A C. 52; 74 L. J. P. C. 22, while the company under the then Act were held to have power to construct their lines along the streets of Toronto without the consent of the corporation, the Judicial Committee held that words in the act of incorporation giving the engineer or other officer appointed by the municipal council a voice in "the location of the line," as well as in "the opening up of the street," did not have the effect of enabling the council to refuse the company access to streets through which it proposed to carry its lines, though they might give the council a voice in determining the position of the poles in the street selected by the company, and possibly in determining whether the line in any particular street is to be carried overhead or underground.

Poles and Wires. — The powers of local municipalities with respect to pipes, conduits. poles and wires on highways will be found in s.-ss. 17, 50 and 51 of s. 399, and the powers of counties in the same connection will be found in s.-s. 4 of s. 408. Sub-sections 17, 50 and 4 above mentioned, are expressly subject to the Municipal Franchises Act, R. S. O. 1914, c. 197, and s.-s. 51 is subject to the Power Commission Act, R. S. O. 1914, c. 39.

The Municipal Franchises Act, R. S. O. 1914, c. 197.—Provides that no franchise for a public utility shall be granted by the council of a municipality until the by-law has been assented to by the municipal electors (s. 3). This provision does not apply where it is merely intended to carry lines through a municipality or where a county or township by-law has been approved by the Lieutenant-Governor in council (s. 5).

Consent of Local Authorities to the Erection of Wires Under Imperial Acts.—Under the Telegraph Acts of 1863 to 1916, it is necessary in certain cases to obtain the consent of a local authority before telegraph or telephone works can be constructed along or under streets. If consent is refused a judicial decision can be obtained on the questions in dispute. Under the above Acts it has been held that the authority having jurisdiction over the highway may impose conditions when giving consent. Such conditions must be such as are incidental to the use of the street. In Postmaster General v. London, 1908, 10 Rail. & Canal Traffic Cas. 234, it was held that the words of the Act which were "any consent may be given on such pecuniary or other terms or conditions (being in themselves lawful) as the person or body giving consent thinks fit"—only entitled street authorities in withholding such consent to raise objection of a kind which concerned them as a street authority; and that the objection raised by the corporation was an unreasonable one, inasmuch as it did not apply to the public at large and did not affect the corporation's interests as a street authority at all (Mews' Digest). In Croydon v. Postmaster General, 1910, 8 L. G. R. 1005, it was held that the extra cost of laying wires underground was a reason for overruling a refusal to consent based solely on the ground that the district was purely residential, and that the wires would be out of keeping with the amenities of the street. In Postmaster-General v. Tottenham, 8 L. G. R. 791, the local authority had placed all its own wires underground and refused consent to the Postmaster to place an overhead line a quarter of a mile in length. In view of the small expense involved the Postmaster-General was required to put the wire underground.

Electrolysis.—In view of the damage done by electrolysis to water mains, cables, buildings, etc., by the escape of electric currents from the wires of companies using the highway for the transmission of electricity, complicated questions have arisen as to the liability of the companies transmitting the current in respect to the damage done.

In National Telephone Co. v. Baker, 1893, 2 Ch. 186; 62 L. J. Ch. 699, a company under statutory powers operated tramways on the single trolley system. Electric currents escaped from the company's wires and seriously interfered with the plaintiffs' telephone system. The plaintiffs applied for an injunction, but failed. No question of negligence arose. The Court in discussing the application of the rule in Rylands v. Fletcher, 1868, L. R. 3 H. L. 330; 37 L. J. Exch. 161, said:—

"But after reflecting much on the novelty of the case, on the arguments addressed to me, and on the peculiarity of an electric current as distinguished from every other power, I fail to see any reason why the principle should not be applied to it. I cannot see my way to holding that a man who has created, or, if that be inaccurate, called into special existence, an electric current for his own purposes, and who discharges it into the earth beyond his control, is not as responsible for damage which that current does to his neighbor as he would have been if instead he had discharged a stream of water. The electric current may be more erratic than water, and it may be more difficult to calculate or to control its direction or force; but when once it is established that the particular current is the creation of, or owes its special existence to, the defendant, and is discharged by him. I hold that, if it finds its way to a neighbor's land, and there damages the neighbor, the latter has a cause of action."

Having held that Rylands v. Fletcher was applicable the Court considered the plea of the defendant that they were expressly authorized to use electrical power, and that the Legislature must be taken to have contemplated, and to have condoned by anticipation, any mischief arising from the reasonable use of such power to be good on the principle laid down in Metropolitan Asylums v. Hill, 1881, 6 App. Cas. 193; 50 L. J. Q. B. 353, and London B. & S. v. Truman, 1885, 11 App. Cas. 45; 55 L. J. Ch. 364.

In Eastern and South African Telegraph Co. v. Cape Town Tramways, 1902, A. C. 381; 71 L. J. P. C. 122, stray currents caused disturb-

ances in the plaintiffs' submarine cables, but they were held not liable for the escape of the currents as such was a necessary incident resulting from the exercise of the statutory powers of the defendants.

The American rule will be found in Peoria Water Works v. Peoria Railway Co., 181 Fed. Rep. 990.

Ontario Rule as to Consent to the Erection of Wires.—In Bell Telephone v. Owen Sound, 1904, 8 O. L. R. 74, Meredith, J., said:—

> "The extravagant claims of the defendants that it rests with the municipal councils to determine as they see fit where and how the plaintiffs shall construct their wires seem to me quite unwarranted by the enactment or by any interest the municipalities may have in the matter, and since the decision in the case of the City of Montreal v. Standard Light and Power Company, 1897, A. C. 527, there ought to be little, if any, excuse for it. The defendants are in truth but trustees of the highways within their municipality, the ways being vested in them mainly so that they may the better perform their duties towards all of the King's subjects in respect of them; it is the interests of the public which mainly are to be protected under the powers given to municipal councils. Telephone communication, not alone in any one municipality, but throughout the land wherever the system is or may be in operation, is a thing beneficial to the public, something which now-a-days cannot be done without; the benefit and the convenience to the public are the first considerations, and should be the main purpose of the plaintiffs and of the municipalities in exercising their respective rights."

Explosives—Keeping, Manufacturing and Storing of.

399.—(18) For regulating the keeping, storing and transporting of

(*a*) Dynamite, dualin, nitro-glycerin, or gunpowder;
(*b*) Petroleum, gasoline or naphtha; and
(*c*) Other dangerous or combustible, inflammable or explosive substances;

The Common Law Offence.—From Rex. v. Williams, 1 Russ. 321; Rex v. Taylor, 2 Str. 1167, and see Crowder v. Tinkler, 19 Ves. 617 (1816), it appears that to manufacture and keep large quantities of gunpowder in towns or closely inhabited places was an indictable offence at common law.

Provisions of the Criminal Code Dealing with Explosives.—Explosive substances are defined by the Code as follows: See s. 2 (14).

> 2. (14) 'Explosive substance' includes any materials for making an explosive substance; also any apparatus, machine, implement or materials, used or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; and also any part of any such apparatus, machine or implement.
>
> The Code also contained the following provisions:
>
> 111. Every one is guilty of an indictable offence and liable to imprisonment for life who wilfully causes, by any explosive substance, an explosion of a nature likely to endanger life or to cause serious injury to property, whether any injury to person or property is actually caused or not.

279. Every one is guilty of an indictable offence and liable to imprisonment for life who unlawfully and by the explosion of an explosive substance burns, maims, disfigures, disables or does any grievous bodily harm to any person.

280. Every one who unlawfully,—

(*a*) with intent to burn, maim, disfigure or disable any person, or to do some grievous bodily harm to any person, whether any bodily harm is effected or not,

(i) causes any explosive substance to explode,

(ii) sends or delivers to, or causes to be taken or received by, any person any explosive substance, or any other dangerous or noxious thing,

(iii) puts or lays at any place, or casts or throws at or upon, or otherwise applies to, any person any corrosive fluid or any destructive or explosive substance; or,

(*b*) places or throws in, into, upon, against or near any building, ship or vessel an explosive substance, with intent to do any bodily injury to any person, whether or not any explosion takes places and whether or not any bodily injury is effected; is guilty of an indictable offence and liable, in cases within paragraph (*a*) of this section to imprisonment for life, and in cases within paragraph (*b*) of this section to fourteen years' imprisonment.

633. Every person acting in the execution of any such warrant may seize any explosive substance which he has good cause to suspect is intended to be used for any unlawful object, and shall, with all convenient speed, after the seizure, remove the same to such proper place as he thinks fit, and detain the same until ordered by a judge of a superior court to restore it to the person who claims the same.

2 Any explosive substance so seized shall, in the event of the person in whose possession the same is found, or of the owner thereof, being convicted of any offence under any provision of Part II., relating to explosive substances, be forfeited; and the same shall be destroyed or sold under the direction of the court before which such person is convicted.

3. In the case of sale, the proceeds arising therefrom shall be paid to the Minister of Finance, for the public uses of Canada.

Other Dangerous or Combustible, Inflammable or Explosive Substances.—The section formerly read "other combustible or dangerous materials," and these words were considered in Rex. v. McGregor (1902), 4 O. L. R. 198, by Meredith, C.J., MacMahon and Lount, JJ. The Chief Justice giving the judgment of the Court, said, at p. 202:—

"It was argued by Mr Shepley that the *ejusdem generis* rule should be applied to the words "and other combustible or dangerous materials," and that they, thereupon, apply only to articles or things which are combustible or dangerous, like as gunpowder is, and that they must therefore be confined to explosives.

"It has been pointed out in the more recent cases that the rule which Mr. Shepley invokes has been often pushed too far: Anderson v. Anderson (1895), 1 Q. B. 749; Re Stockport, Ragged, Industrial and Reformatory Schools (1898), 2 Ch. 687, at p. 696, and in the former of these cases the Court of Appeal approved the canon of construction laid down by Knight Bruce, V.C., in Parker v. Marchant (1842), 1 K. & C. 290, that general words are to be given their common meaning unless there is something

reasonably plain on the face of the instrument to be construed to shew that they are not used with that meaning, and that the mere fact that general words follow specific words is not enough. But even if the canon of construction were the reverse of this and, *prima facie,* the general words were to be given a restricted meaning (Maxwell on Statutes, 3rd ed., pp. 475-6), looking at the evident, if not declared, purpose of the whole section—the prevention of fires—and the powers given by the various sub-sections to enable councils to pass by-laws to that end, it appears to me that the sense in which the word 'combustible' and the word 'dangerous' are used is that of liability to cause or spread fire.

"It is hardly necessary to refer to dictionaries for the meaning of the word combustible; but if Murray is consulted it will be found that oil is mentioned as a combustible substance, and one of the meanings given for 'inflammable' is 'susceptible combustion.'

"If the meaning I would give to s.-s. 17 is given to it, as I understood Mr. Shepley, it is not disputed that the articles mentioned in s. 32 of the by-law are combustible or dangerous, or both.

"Mr. Shepley referred to the provisions of 62 Vict. (2) c. 26, s. 34, as supporting his contention, but they make, I think, against it. These provisions relate to the manufacture and storing of gunpowder and other explosive substances, and indicate that when it was intended to speak of a substance as an explosive one, the word 'explosive' was used and not the word 'combustible.'

"I do not mean to concede that the articles mentioned in the s. 32 of the by-law are not or may not be explosive; indeed, I think it very probable that they are or may be.

"It was argued in support of the other objection to the by-law that inasmuch as the Parliament of Canada, by the Petroleum Inspection Act, 1899, 62 & 63 Vict c. 27, has legislated on the subject of the storing of petroleum and naphtha, the provincial legislation, in so far as it deals with the same subject, is superseded by the Dominion legislation."

* * * * * *

"Assuming the provisions of these Acts and regulations to be *intra vires* the Dominion Parliament, it is clear, I think, that they do not supersede the provincial legislation referred to or any by-laws passed under the authority of that legislation.

"The provincial legislation was intended to confer power to make regulations in the nature of police or municipal regulations of a mere local character for the prevention of fires and the destruction of property by fire, and applying the language of Sir Barnes

Peacock in delivering the judgment of the Judicial Committee of the Privy Council in Hodge v. The Queen (1883), 9 App. Cas. 117, at p. 131, as such cannot be said to interfere with the general regulation of trade and commerce, which belongs to the Dominion, and do not conflict with the provisions of the Petroleum Inspection Act, 1899, or the regulations as to the storage of petroleum and naphtha, which are in force under the authority of that Act.

"On the contrary, the Dominion regulations are carefully framed so as not merely not to conflict with the municipal regulations on the subject with which they deal, but to require these regulations to be conformed to as the condition upon which it is to be lawful to keep or offer for sale or have in possession petroleum or naphtha. See also Attorney-General for Ontario v. Attorney-General for the Dominion (1896), A. C. 348; Attorney-General of Manitoba v. Manitoba License Holders' Association (1902), A. C. 73."

In Bears v. The Central Garage Co., 1912, 2 W. W. R. 283, 21 W. L. R. 252, it appeared that the plaintiff rented from the defendants, stall-room in their garage for his motor-car; the garage was destroyed by fire, and the motor-car with it. In an action for damages for the loss of the car, the plaintiff charged negligence. The origin of the fire was not shewn. Just before the fire, a gasolene tank under the garage, was being filled from a tank-wagon in the building, the gasolene being carried from the wagon to the underground tank in buckets of five-gallon measure; and it was urged that this was in contravention of a municipal by-law, and was negligence on the part of the defendants:

Held, that there was no evidence of anything having been done or left undone by the defendants to constitute a breach of the by-law; and, even if there was, a contravention would not constitute negligence; and, besides, there was no evidence of the damage sustained; and the action, therefore, failed.

In re Hamilton Powder Co. and Township of Gloucester (1909), 13 O. W. R. 661, the township had passed a by-law authorizing the company to store explosives within the township limits for five years. The company built a magazine, and then the township passed a second by-law purporting to repeal the first. On an application by the company to quash the second by-law, Britton, J., said, at p. 662 *et seq.*:

"This (the first) by-law is not for the public generally, except so far as the electors and residents are always interested in every contract of their council. It is not general legislation prescribing terms on which any person may store or transport explosives.

It is special legislation, in the form of a contract with the applicants by the reason of which the applicants, in their endeavour to carry out their part of the bargain, have been put to large expense, and have so changed their position as to make the cancellation of the contract a matter of great importance. It is not only a matter of importance financially, but to have such a by-law repealed would weaken the confidence which business men have and ought to have in the contracts of municipal bodies.

"Speaking generally, the power of any municipal body to repeal its own by-laws is expressly given by s. 326 of the Consolidated Municipal Act of 1903, save as by that Act restricted, the restriction being in the case of by-laws under which debts have been credited—See s. 392.

"A repealing by-law would be *intra vires,* save only (apart from matter of form), that it should be passed in good faith and in the supposed interest of the public at large, and not for any private purpose. The general rule is, that it must not impair vested rights—that is, what are really vested rights. The rule as it appears in the Am. & Eng.. Encyc. of Law, 2nd ed., vol. 5, p. 96, is: 'A corporation has not the power, by laws of its own enactment, to disturb or divert rights which it has created, or to impair the obligation of its contracts, or to change its responsibilities to its members, or to draw them into new and distinct relations.'

"There was no motion to quash by-law No. 8 (the first by-law). It was not attacked in law. The council simply undertook to repeal it."

* * * * *

"It appears that the building has been erected in accordance with the provisions of 'standard specifications' for such a building for storing explosives, and that these specifications have been approved by the authorities of Manitoba and Quebec. It did not appear before me that there were specifications for such buildings approved of by the province of Ontario.

"This case is, therefore, brought within the supposed case put by Hagarty, C.J., in Great Western R. W. Co. v. North Cayuga, 23 C. P. (1872), at p. 31: 'If it had been proved that, on the special faith and consideration of this action of the municipality, the applicants had in fact altered their position, or done something which otherwise they would not have done for the benefit of the township, we should then have had to consider whether our statutable powers are sufficient to enable us to prevent the great injustice that would be thus perpetrated by a repeal of the by-law, or left it for a court of equity to have interfered.'

"If argued here that the company have done nothing for the benefit of the township, the answer is that they have spent money in the erection of a building and improving property in the township. The license granted is to do a business authorized by law, and under certain restrictions for the benefit of the public, as well as those carrying it on, and the township is directly interested and benefited in having legitimate business properly carried on within its limits. I take it that upon the facts this is a proper case for the application of the principle laid down in the case just cited. If so, then my duty is made plain by Alexander v. Village of Huntsville, 1894, 24 O. R. 665, and the learned Judge held that this case was applicable and quashed the repealing by-law.

The Imperial Statutes regulating the keeping of gunpowder are considered in Biggs v. Mitchell, 2 B. & S. 523 (1862); Bliss v. Lilly, 3 B. & S. 128 (1862); Rex v. Smith, 5 M. & S. 133 (1816); Webley v. Woolley, L. R. 7 Q. B. 61 (1871); Eliot v. Majendie, L. R. 7 Q. B. 429 (1872). The Imperial Act, 29-30 V. c. 98, extended the provisions of these Statutes to nitro-glycerine and all other substances which might by Order-in-Council be declared to be specially dangerous.

The Forest Reserves Act, R. S. O. 1914, c. 30. s. 3, prohibits the use or carrying of explosives in Forest Reserves.

The Mines Act, R. S. O. 1914, c. 32, s. 164 (3) to (19), regulates the use of explosives in mining work for the protection of miners.

The Provincial Parks Act, R. S. O. 1914, c. 52, s. 9, prohibits the use of explosives in parks under the Act.

By the Coroners Act, R. S. O. 1914, c. 92, s. 33 (*c*), provincial coroners are empowered to hold investigations in any cases where there is, in their opinion, reason to believe that property has been destroyed or damaged by the wilful or malicious use of explosives.

By the Railway Act, R. S. O. 1914, c. 185, s. 153, the companies may refuse to carry explosives, and any such goods so carried must be carried in cars plainly marked in large letters "dangerous explosives."

By s. 152 (1) "no passenger shall carry, nor shall the company be required to carry upon its railway gunpowder, dynamite, nitro-glycerine or any other goods which are of a dangerous or explosive nature."

Any such goods sent by railway are to be distinctly marked as such by the sender, and other written notice is to be given to the company's agent.

The Canadian Railway Act, 9-10 Geo. V. ch. 68, contains similar provisions. See ss. 349 and 350: Macmurchy & Denison, 2nd ed., pp. 481-2 and 641-2, and Rex v. Michigan Central R. W. Co., 10 O. W. R. 660 (1907).

399.—(19) For regulating and providing for the support by fees of magazines belonging to private persons for the storage of the substances mentioned in clause (*a*) of paragraph 18, and for requiring them to be stored in such magazines.

399.—(20) For erecting and maintaining within or without the limits of the municipality magazines for the storage of the substances mentioned in clause (*a*) of paragraph 18, and for acquiring the land necessary for that purpose, and for requiring such substances to be stored in such magazines.

399.—(21) For limiting the quantity of the substances mentioned in clause (*a*) of paragraph 18, which may be kept in any place other than such a magazine, and for regulating the manner in which the same are to be kept or stored.

399.—(22) For prohibiting or regulating the establishment within the municipality of factories or other places for the manufacture or storage of any of the substances mentioned in clause (*a*) of paragraph 18.

399.—(23) For requiring the submission of plans of the premises including the buildings upon or in which it is proposed that such manufacture or storage shall take place, and the approval of them by the council before the manufacture or storing is commenced.

399.—(24) For requiring such buildings to be surrounded by walls or fences and for regulating the height and description of such walls or fences and their distance from such buildings, and also the distance from any other building, at which such manufacture or storage may be carried on.

399.—(25) For regulating the carrying on of the business of manufacturing or storing such substances, whether the business has been heretofore or shall be hereafter established, and prescribing the precautions to be taken for the prevention of fires and accidents from the combustion or explosion of such substances.

399.—(26) For granting licenses for the carrying on of the business of manufacturing such substances or for storing them in quantities of more than twenty-five pounds, and prescribing the time, not exceeding five years, during which the licenses shall remain in force.

(*a*) The license fee shall not exceed $25 a month for every month in which such business shall be carried on. 3 Edw. VII. c. 19, s. 542 (17-17*d*), *redrafted.*

399.—(27) For prohibiting or regulating the keeping or storing of gasoline or benzine, and prescribing the materials of which the vessels containing it shall be composed, and the classes of buildings in which it may be stored or kept for sale, and for making regulations for the prevention of fires and accidents from the combustion or explosion of such substances. 3 Edw. VII. c. 19, s. 542 (17*e*); 10 Edw. VII. c. 85, s. 10, *amended;* 3 & 4 Geo. V. c. 43, s. 399 (18-27).

Fences.

399.—(28) For prescribing the height and description of lawful fences.

(29) For prescribing the height and description of, and the manner of maintaining, keeping up and laying

down fences along highways or parts thereof; and for making compensation for the increased expenses, if any, to persons required so to maintain, keep up or lay down any such fence.

(30) For determining how the cost of division fences shall be apportioned; and for providing that any amount so apportioned shall be recoverable under *The Ontario Summary Convictions Act;*

(*a*) Until a by-law is passed, *The Line Fences Act* shall apply.

(31) *For requiring proper and sufficient protection against injury to persons or animals by fences constructed wholly or partly of barbed wire or any other barbed material to be provided by the owner of the land;* and in towns and cities for prohibiting the erection along the highways of fences made wholly or partly of barbed wire or any other barbed material.

(32) For requiring the owners of land to erect and maintain a water gate where a fence crosses an open drain or watercourse. 3 Edw. VII. c. 19, s. 545, par. s. 2-6, *amended.* 3 & 4 Geo. V. c. 43, s. 399 (28-32).

Fencing.—At common law it is the duty of an owner of cattle to keep them from his neighbours' land and an owner of land is under no obligation to fence his property to protect it from the depredations of wandering cattle, and this principle of the common law has been applied by various provincial Courts. Crowe v. Steeper, 1881, 46 U. C. R. 89; Garrioch v. McKay, 1901, 13 M. R. 404; Dickie v. Gordon, 1905, 39 N. S. R. 311; Kruse v. Romanowski, 1910, 3 S. L. R. 274, 14 W. L. R. 696; Maclean v. Rudd, 1908, 9 W. L. R. 283. Full Court, Alberta.

Line Fences.—The proper mode of construction was discussed by the Chancery Division in Cook v. Tate, 1894, 26 O. R. 403.

In Barber v. Cleave, 1901, 2 O. L. R. 213, a line fence was not kept in repair and did not comply with a township by-law. The defendant's cattle got on the plaintiff's lands through the part of the line fence which it was the defendant's duty to keep in repair, and other cattle of the defendant running at large broke the plaintiff's fences and got on his land and caused damage. MacMahon, J., in giving judgment for the plaintiff said:—

"The line fence between the east and west half of the lot is made of barbed wire (the plaintiff and defendant waiving the statutory requirements and agreeing on something different), and there was an arbitrary division made between the plaintiff and the defendant as to the portion of the line fence which each was to build and keep in repair.

"I find that the plaintiff kept in proper repair the part which it was understood and agreed he should maintain; but the portion which the defendant said formed his half of the line fence was allowed to remain in such disrepair that it was open in many places; and there

was evidence of what is called a 'cattle runaway' through a portion of the defendant's fence, by which the defendant's cattle came upon the plaintiff's land, indicating that they had frequently traversed through the same way. And those who saw the sheep belonging to the defendant on the plaintiff's land noticed that the defendant's fence where it was broken gave evidence of the sheep having passed through it by the wool left on the barbed wire.

"In Buist v. McCombe (1882), 8 A. R. 598, at p. 600, the Court confirmed the opinion expressed by the junior Judge of the County Court of the County of Simcoe, who tried the case: 'That when it is not the duty of either party to keep up any particular and defined portion of the division fence, the one whose cattle trespasses on his neighbour's land is answerable for the trespass, that is, he must keep his cattle from his neighbour's land at his own risk.

"Where the line fence between the adjoining owners has been divided between them for repairs, the law as to damages resulting from trespass by the cattle of one owner on the land of the other is stated in the American Courts in almost the same terms as in the excerpt from the judgment in Buist v. McCombe. Thus, in Polk v. Lane (1833), 12 Tenn. (4 Yerg.) 36, which was an action in trespass to recover for injuries done by cattle, it was held by the Court that the land owner must shew if they entered through his part of the division fence, that it was such as the statute required. And in D'Arcy v. Miller (1877), 86 Ill. 102, it was held that if the cattle entered the plaintiff's land through the part of the fence which the other proprietor was bound to repair, the plaintiff must shew that the fence was not a lawful fence. See also an interesting article on 'Fence Law' in 22 Central Law Journal (1886), p. 196.

"As to that part of the plaintiff's claim for damages arising out of the trespasses alleged, and, as I have found, proved to have been committed by the escape of the defendant's cattle and sheep on to the plaintiff's land through a portion of the fence defined by the defendant himself as his portion of the division fence which it was his duty to keep up, but which duty he neglected to perform, he is I think clearly liable in trespass.

"Then as to the damage caused by the cattle and sheep which had entered the plaintiff's lands from the highway. The by-law does not in my opinion displace the statute. The by-law provides that certain animals therein defined are prohibited from running at large; while the second section of R. S. O. 1897, c. 272, 'An Act Respecting Pounds,' provides that the 'owner of any animal not permitted to run at large by the by-laws of the municipality, shall be liable for any damage done by such animal, although the fence enclosing the premises was not of the height required by such by-laws.' That is, the owner of the cattle will be liable as at common law.

"There is not anything in the by-law which could be construed as permitting these cattle and sheep to run at large, and they, as I find, having strayed from the highway upon the plaintiff's land the defendant must answer for any damage done by them irrespective of any question of fencing: Crowe v. Steeper (1881), 46 U. C. R. 87, at pp. 91-2; McSloy v. Smith (1895), 26 O. R. 508.".

Dickie v. Gordon, 1905, 39 N. S. R. 311, was an action against the defendant for damages resulting from the defendant's cattle having entered the plaintiff's lands. Russell, J., said:—

"It is necessary to refer at the outset to the contention that the doctrine of the common law never did apply to this province. In support of this contention it is said that a ruling to this effect has been made in the Province of Ontario, where the circumstances were similar to our own, and a note is cited from Robinson & Joseph's Digest, column 1517. In the case of Buist v. McCombe et al., 8 A. R., at p. 600, Wilson, C.J., refers to this note in the following terms:—

"'That note of the case was no doubt obtained by the late Hillyard Cameron from the notebook of decisions of the late Robert Baldwin, which was lent to Mr. Cameron on making up his digest.

The note of that case is as follows: 'Spafford v. Hubble, M. T. 2 Vic., a landowner in this country must fence against cattle, contrary to rule in England; Hitchcock v. Ives, in this Court and Prov. Stat. 34 Geo. III., c. 8; 48 Geo. III., c. 4; 33 Geo. III., c. 2, s. 6, and ordinance of Quebec 30 Geo. III., c. 4.' The words of the 33 Geo. III., c. 2, s. 6, are that the inhabitants of the township are to choose a pound keeper who is hereby authorized to impound all cattle, etc., that shall trespass on the lands of any person having enclosed the same by such high and sufficient fence as shall have been agreed upon in manner aforesaid. The case of Hitchcock v. Ives, Draper 259, shows what the decision in Spafford v. Hubble must have been; that if the township law did not forbid cattle from running at large they could not be taken for damage feasant unless the owner of the land trespassed upon had a sufficient fence.'

"The case of Spafford v. Hubble then did not decide that the common law was never in force in Ontario, but simply that under the statutes of that province the cattle could not be distrained damage feasant, if allowed to run at large, unless there was a statutory fence enclosing the property. The judgment of Hagarty, C.J., in Crowe v. Steeper et al., 46 U. C. Q. B., at 91, shows that in the opinion of that learned Judge the common law doctrine did apply to the Province of Ontario except in so far as it was displaced by legislation. He says:—

"'By the common law I think, if these cattle stray from the high road into the land of another and do damage there, the owner is responsible therefor irrespective of any question of fencing. See Mason v. Morgan, 1865, 24 U. C. R. 328, and by our statute law already cited R. S. C. 195, it is pointedly declared that such is the law until varied by by-law.'

"I cannot doubt that the common law principle is applicable to this province unless by our legislation we have either expressly or impliedly repealed it, or so legislated as to afford the inference of a legislative declaration that it never was in force. If we had access to the various legislative enactments applicable to the question in the Province of Ontario, the decisions of the Courts of that Province would no doubt afford us assistance in the interpretation of our own statutes on the subject. In the absence of full and authentic information as to the course of legislation there, the Ontario decisions on a question so entirely dependent upon the precise terms of the legislation are more likely to mislead than to enlighten us."

It was accordingly held by a majority of the Court agreeing with Russell, J., that the common law rule was still in force in Nova Scotia and had not been affected by provincial statutes in respect to fences and the impounding of cattle or the establishment of closed districts. The decision was upheld by the Supreme Court of Canada. See also Smith v. Boutilier, 1907, 42 N. S. R. 1.

In Dalziel v. Zastre, 1910, 19 M. R. 353, the plaintiff sued for damages done by cattle trespassing on his lands, and the defendant pleaded that the land was unfenced and that there was a by-law limiting the right to recover damages to cases where lands were enclosed by a lawful fence, the plaintiff on appeal succeeded. Perdue, J.A., said:—

"At common law the owner of animals must keep them from trespassing upon the lands of other persons, even though such lands are unfenced: Garrioch v. McKay, 13 M. R. 404; Watt v. Drysdale, 1907, 17 M. R. 15. The Legislature enables the municipality to declare, by by-law, what should constitute a lawful fence. In that by-law (or perhaps in a subsequent one), the municipality might also limit the right to recover damages for injury done by trespassing cattle to cases where the land is enclosed by a fence of the nature and kind required by the by-law. If the municipality has not exercised its powers in declaring what shall constitute a lawful fence, I do not think that it has power to interfere with the plaintiff's common law right. In my view the municipality must, as an essential condition, define what is a lawful fence within its boundaries before it

proceeds to take away the right to recover damages occasioned by trespassing cattle."

In Jack v. Stevenson, 1910, 19 M. R. 717, the plaintiff claimed damages for trespass done by cattle, and the defendant pleaded that the plaintiff's fences were not as required by by-law. The plaintiff on appeal succeeded. Cameron, J.A., said:—

"It was admitted at the trial that the plaintiff's fences did not conform with the by-law in question, which in its terms follows the wording of s.-s. (*d*) of s. 644 of the Municipal Act, which provides that the council of any municipality may pass a by-law—

"(*d*) For limiting the right to recover damages for any injury done by any cattle, horses or sheep trespassing upon land, or for the trespass, to cases in which the land is enclosed by a fence of the nature, kind and height required by the by-law.

"There was no by-law passed by the council restraining and regulating the running at large of animals under sub-clause (*b*) of s. 643.

"By the common law the owner of land is not obliged to fence against the cattle of his neighbour or cattle on the highway. 'A general fence law, unless it is a law regulating partition fences, imposes no obligation upon the owner of land to inclose it with a fence, nor does it grant any right to any individual to trespass upon any unenclosed lands. It merely takes away the remedy for injuries done by animals upon lands not fenced as required by the law, such animals being lawfully on the adjoining soil.' Am. & Eng. Encyc., Vol. XII., p. 1044. 'Since, however, one is bound, by prescription, agreement or assignment under the statute, to maintain a fence against an adjoining close only as against such cattle as are rightfully on that close, if the fence be not in fact made, the owner of either close thus adjoining may distrain the cattle escaping from the adjoining close and not rightfully there.' Encyc. of Law & P., Vol. II., p. 401. In Westgate v. Carr, 43 Ill. 450, it was held that, 'Under the general law of the State, cattle have a right to go at large, and the owner of a field upon which they enter shall have no claim for damages, unless his field was enclosed by a good and sufficient fence. But this law, as thus construed, did not impose the duty of fencing as a positive obligation. It simply withheld the common law right to recover damages in cases where there was not a sufficient fence, and this on the ground that the cattle were rightfully at large.' The question involved was discussed but not decided, by the Chief Justice of this Court in Watt v. Drysdale, 17 M. R. 19.

"It seems to me that s.-s. (*b*) of s. 643 and (*d*) of s. 644 of the Municipal Act must be read as supplementing each other, and that the power by by-law to limit or take away altogether the right to recover damages in such cases as this now before us, cannot be held to extend to cases where cattle trespass from a highway when they are not lawfully there. Otherwise we would practically have this result that, whereas the cattle were unlawfully upon the highway, they were lawfully upon the plaintiff's premises."

Barbed Wire Fences. — In Hillyard v. G. T. R. Co., 1885, 8 O. R. 583, Wilson, C.J., Armour, J., concurring, referring to the enactment now found in s.-s. 31, said:—

"That enactment assumes there are 'barbed wire fences constructed.' It would be difficult in the face of that enactment to treat them as a nuisance. It seems to sanction them, and to give power to the municipal councils to provide proper and sufficient protection against injury to persons or animals from them."

See also Plath v. Grand Forks, 1904, 10 B. C. R. 301.

Railway Fences.—The Railway Act (Dom.) prescribes what shall be a lawful fence, and gives an action for damages to any person who suffers damage by reason of default in the duty to maintain such. Sections 254 and 427. The Province has no jurisdiction to interfere in any way

with matters affecting the operation of a Dominion railway as such, see title: Relations between municipal corporations and undertakings under the exclusive jurisdiction of the Dominion Parliament.

See Levesque v. New Brunswick R. W. Co., 1890, 29 N. B. R. 588; Winterburn v. Edmonton R. W. Co., 1908, 1 Alta. L. R. 298, 8 W. L. R. 815; Carruthers v. Can. Pacific Ry. Co., 1906, 16 M. R. 323, 39 S. C. R. 251, 4 W. L. R. 441; Higgins v. Can. Pacific Ry. Co., 1908, 18 O. L. R. 12, D.C.; Parks v. Can. Nor. Ry. Co., 1911, 21 M. R. 103, C.A. (In this case will be found a full discussion of the authorities.)

Fire—Prevention of Accidents by.

399.—(33) For securing against accident by fire the inmates and employees and others in factories, hotels, boarding-houses, lodging-houses, warehouses, theatres, music halls, opera houses and other buildings used as places of public resort or amusement. 3 Edw. VII. c. 19, s. 542, par. 14, cl. (*a*).

Fire Escapes.

(34) Subject to the provisions of any other Act requiring fire escapes, for compelling the owners and occupants of buildings more than two storeys in height, except private dwellings, to provide proper fire escapes therefor in such places of such pattern and mode of construction as may be deemed proper; and for prohibiting the occupation of any such building unless or until such fire escapes are provided. 3 Edw. VII. c. 19, s. 542, par. 15, *redrafted.*

Fires in Open Air.

(35) For prescribing the times during which fires may be set in the open air, and the precautions to be observed by persons setting out fires. 3 Edw. VII. c. 19, s. 542, par. 16, *redrafted.*

Firearms and Fireworks.

(36) For prohibiting or regulating the discharge of guns or other firearms; and the firing and setting off of fireballs, squibs, crackers or fireworks. 3 Edw. VII. c. 19, s. 586, par. 9. 3 & 4 Geo. V. c. 43, s. 399 (33-36).

The Common Law as to Damage Done by Fires.—Furlong v. Carroll, 1882, 9 A. R. 145, was a case of a man dropping a match incidentally in his field after lighting his pipe. The fire thus caused began to spread. He isolated his own crops, but did not put out the fire, which continued for two or three days, and finally, the wind freshening, the fire extended to his neighbour and did damage. The learned trial Judge told the jury the question was one of negligence for them to determine, and they did, indeed, find there was no negligence, and gave a verdict for the defendant.

The Court of Appeal ordered a new trial. Patterson, J.A., thus stated the principles which applied:—

> "I am unable to distinguish the case before us in principle from Jones v. Festiniog R. W. Co., or to see why the doctrine on which Fletcher v. Rylands was decided, which is the same as that deducible from the early authorities, does not govern it.
>
> "It has not been contended before us that the defendant can claim exemption from responsibility under the statute 14 Geo. III., c. 78.
>
> "If I may venture an opinion upon a statute with respect to which we find so little in the books approaching a general definition of its terms, I should say that the key to the meaning of 'accidentally begin,' will be found by considering the peculiarity of the law respecting fires, under the ancient custom of England.
>
> "With regard to torts in general, the liability of a person was limited to the acts or default of himself or of those for whom he was responsible. With regard to injuries done by fire, there was the exceptional liability as shewn by the case in the Year-Book, 2 Hen. IV., for any fire which began in one's house. The Statute of Anne seems to have been designed to strike at this exceptional liability, and to place the responsibility for fire in one's house or chamber, on the same footing as that which attached to injuries from any other cause. It had, however, been held on the authority of Tubervill v. Stamp, that the custom of the realm extended to fires in your field as well as to those in your house. And the statute 14 Geo. III., which in other respects adopted the language of the Statute of Anne, extended the exemption to fires occurring in one's barn, stable or other building, or on one's estate. I take the policy of both Acts to be the same, and that in neither of them was there a design to reduce the responsibility for injuries caused by fire below that which existed with respect to torts of other kinds; that, in short, it was the exceptional and not the ordinary liability which was intended to be done away with."

In Creaser v. Creaser, 1907, 41 N. S. R. 480, a hen-house in defendant's barn was fumigated by placing a pan containing burning paper, splinters of wood and sulphur upon the floor of the barn. The fire from the pan was communicated to hay in a loft overhead, and resulted in the destruction of defendant's barn. Sparks from the latter were carried by the wind to plaintiff's barn, situated some distance away, which caught fire and was also destroyed. Longley, J., in giving the judgment of the Full Court in favour of the plaintiff, said:—

> "This judgment of Patterson, J.A., has been quoted with approval by all text writers since, and its authority has never, so far as I can learn, been questioned. If sound, it seems to me to go a long way to settle the case now before us.
>
> "Fletcher v. Rylands was an important decision involving a principle which remains unquestioned. The words of this well-known decision in the highest Courts are as follows:—
>
> "'Where the owner of land without wilfulness, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned.'

"This principle eliminates the element of negligence in cases where the defendant 'brings upon his land anything which would not naturally come upon it, and which is in itself dangerous and may become mischievous.' Patterson, J.A., declared with the assent of all his associates of the Appeal Court of Ontario, that a fire arising from a discarded match comes within this principle. What shall be said of the present case? It may not be unlawful for defendants to fumigate their hen-house, but if it is done in such a way as to set the barn on fire, and this results in destruction of plaintiff's property, may it not be said that the defendant 'brings upon his land something which would not come naturally upon it, and which is in itself dangerous and may become mischievous'? If it fulfils this definition it comes within Fletcher v. Rylands.

"The principle which has been given full force in respect to the clearing of land by fire, in the promotion of husbandry, does not seem to me to apply to the state of facts in this case. There, if the fire is set at the proper season, and under natural and proper conditions, the defendant is not liable unless some negligence can be shewn. Now the setting of clearing fires in fields is regulated by statute in this province, and is under the supervision of the chief fire ranger of a municipality. The setting of a clearing fire answers the first definition in Fletcher v. Rylands, 'Where the owner of land uses his land in the ordinary manner of its use.' Can the putting of a pan of sulphur on the floor of a barn near the partition, with paper and splinters of wood, with hay in a loft immediately above it, be regarded as 'using his land in the ordinary manner of its use'? It seems to me not. It appears rather to be a 'putting upon the land something which would not naturally come upon it, and which is in itself dangerous and may become mischievous.

"I think Fletcher v. Rylands applies to this case, and that the appeal must be allowed, and judgment entered for plaintiff for amount of his damages.

"Some stress was laid upon the statute 6 Anne, c. 58, which provides that 'no action, suit or process shall be had, maintained or prosecuted against any person in whose house or chamber any fire shall occur accidentally. It was urged that 6 Anne is in force in this province, which I think is true, and that 'house' under legal definition, would include barn. I do not question the definition, but I think the accident theory is not applicable to the state of facts disclosed in this case. There is English authority for the interpretation of this Act. In Vaughan v. Taff Vale Ry., Bramwell, B., says:—

"'We are of opinion that the statute does not apply where the fire originates in the use of a dangerous instrument, knowingly used by the owner of the land in which the fire broke out.'

"It seems to me this interpretation would eliminate the application of the statute to the facts in the case."

Food.

399.—(37) For regulating the delivery and exposure for sale upon a highway or in a market or public place of meat, poultry, game, flesh, fish or fruit, or the carcass of any animal. 5 Edw. VII. c. 22, s. 23; 1 Geo. V. c. 69, s. 14 (1). 3 & 4 Geo. V. c. 43, s. 399 (37).

Sub-section 37.—The power of regulating extends only to highways, markets or public places. As it deals with deliveries as well as sales it enables local authorities to prescribe hours: Re Karry and Chatham, 1910, 21 O. L. R. 566, and methods of delivering and exposing the articles mentioned. A by-law which delegated the right to fix hours would be *ultra vires*. The by-law may provide for the covering of the

articles to prevent contamination, also that every article delivered or exposed shall bear a label showing the date and place of slaughter in the case of flesh, or the date and place of gathering in the case of fruits, and the name of the vendor. The by-law could not require licenses to be taken out, see s. 253, and it could not prohibit either totally or in certain places: Virgo v. Toronto (1896), A. C. 88, 65 L. J. C. P. 4. For power to make similar regulations see Sale of Food and Drugs Acts, 1875-1889, Imp. The Public Health Act, 1875, s. 167, Imp. The Markets and Fairs Clauses Act, 1847, s. 42, Imp.

Exposed for Sale.—An article must be so placed as to be visible to a customer: Crane v. Lawrence, 1890, 25 Q. B. D. 152, 59 L. J. M. C. 110, where the article was behind a screen. Mere wrapping up of the article so that the article itself cannot be seen is not sufficient if the wrapped parcel is visible to customers: Wheat v. Brown (1892), 1 Q. B. 418, 61 L. J. M. C. 94.

399.—(38) For appointing inspectors, and for providing for the inspection of meat, poultry, fish and natural products offered for sale for human food, whether on the streets or in public places, or in shops.

(39) For authorizing the seizing and destroying of tainted and unwholesome articles of food. 3 Edw. VII. c. 19, s. 550, pars. 1-2; 1 Geo. V. c. 69, s. 14 (1); 3 & 4 Geo. V. c. 43, s. 399 (38-39).

UNSOUND FOOD.

The Criminal Code s. 224, provides as follows:—

224. Everyone is guilty of an indictable offence and liable to one year's imprisonment, who knowingly and wilfully exposes for sale, or has in his possession with intent to sell, for human food articles which he knows to be unfit for human food.

2. Every one who is convicted of this offence after a previous conviction for the same crime shall be liable to two years' imprisonment. 55-56 Vic., c. 29, s. 194.

The offering of unsound food for sale may be forbidden by councils of local municipalities by adopting the statutory by-law authorized by s. 115 of the Public Health Act, R. S. O. 1914, c. 218. See s. 11 of the by-law.

A prosecution must be either under the Code or under the statutory by-law: R. v. Dungey, 1901, 2 O. L. R. 223, 5 Can. Cr. Cas. 38.

The Public Health Act, R. S. O. 1914, c. 218, s. 100 (1), enables a medical health officer or sanitary inspector to inspect food and seize and destroy unsound food.

The Milk Act, R. S. O. 1914, c. 221, enables municipal councils excepting county councils to prescribe by by-law standards for milk, and to appoint inspectors.

Sub-sections 38 and 39 enable councils of local municipalities to provide for inspection of all food offered for sale, and the seizure and destruction of unsound food by municipal inspectors, by a magistrate's order. The jurisdiction is concurrent with that of the medical health officer and sanitary inspectors, but the powers of the latter extend to articles "exposed for sale or deposited in any place for the purpose of sale

or for preparation for sale and intended for food for man," while the municipal authority extends only "to articles offered for sale for human food on streets, in public places or in shops."

Imperial Regulations, ss. 116 and 117 of The Public Health Act, 1875, provides:—

116. Any medical officer of health or inspector of nuisances may at all reasonable times inspect and examine any animal carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour or milk exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged; and if any such animal carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour or milk appears to such medical officer or inspector to be diseased, or unsound, or unwholesome, or unfit for the food of man, he may seize and carry away the same himself or by an assistant, in order to have the same dealt with by a justice.

117. If it appears to the Justice that any animal carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour or milk so seized is diseased, or unsound, or unwholesome, or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding twenty pounds for every animal carcase, or fish, or piece of meat, flesh or fish, or any poultry or game, or for the parcel of fruit, vegetables, corn, bread or flour, or for the milk so condemned, or, at the discretion of the Justice, without the infliction of a fine, to imprisonment for a term of not more than three months.

The Justice who under this section is empowered to convict the offender may be either the Justice who may have ordered the article to be disposed of or destroyed, or any other Justice having jurisdiction in the place.

And s. 28 of the Public Health Act, 1890, provides:—

28.—(1) Sections one hundred and sixteen to one hundred and nineteen of the Public Health Act, 1875 (relating to unsound meat), shall extend and apply to all articles intended for the food of man, sold or exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale within the district of any local authority.

(2) A Justice may condemn any such article, and order it to be destroyed or disposed of, as mentioned in section one hundred and seventeen of the Public Health Act, 1875, if satisfied on complaint being made to him that such article is diseased, unsound, unwholesome, or unfit for the food of man, although the same has not been seized as mentioned in section one hundred and sixteen of the said Act.

The Public Health Act, 1896, and the Public Health (Regulations as to Food) Act, 1907, are in part as follows:—

1.—(1) The power of making regulations under the Public Health Act, 1896, and the enactments mentioned in that Act, shall include the power of making regulations authorizing measures to be taken for the prevention of danger arising to public health from the importation, preparation, storage and distribution of articles of food or drink (other than drugs or water), intended for sale for human consumption, and, without prejudice to the generality of the powers so conferred, the regulations may—

(*a*) provide for the examination and taking of samples of any such articles.

(*b*) apply, as respects any matters to be dealt with by the regulations, any provision in any Act of Parliament dealing with the like matters, with the necessary modifications and adaptations;

(*c*) provide for the recovery of any charges authorized to be made by the regulations for the purposes of the regulations or any services performed thereunder.

(2) For the purposes of regulations made under this Act, articles commonly used for the food or drink of man shall be deemed to be intended for sale for human consumption unless the contrary is proved.

For cases under these Acts see Lumley's Public Health, 8th edition, pp. 215-223, 846, 1074, 1095, and for the Imperial Regulations see Encyclopædia of Local Government Law, Vol. 8, p. 164, *et seq.*

Suggestions.—It is suggested that by-laws authorizing the seizure and destruction of food should provide for its condemnation by a magistrate as in England.

Note s. 500, *infra*, under which the by-law may provide for the seizure and destruction to be done by the owner or at his expense, in which case the corporation may recover the expense incurred by action.

Municipal Liability for Wrongful Destruction.—Municipal inspectors are probably within the rule in Hesketh v. Toronto, 1898, 25 A. R. 449, so that the corporation will be liable for damages resulting from mistaken destruction of food by them as unsound, while medical health officers, though appointed by councils, are public officers when proceeding under the Public Health Act. Forsyth v. Canniff and Toronto, 1890, 20 O. R. 478, and the appointing corporation will not be liable. See article on *Respondeat Superior*, *infra*. This result seems to follow from the reasoning of Burton, C.J.O., in Hesketh v. Toronto, *infra*, which was an action to recover damages from the city resulting from the negligence of firemen. The following extract will make the principle plain:—

"In this province the Legislature has created the inhabitants of every city into a corporation, with authority in their corporate capacity to exercise certain specified powers of legislation and regulation with respect to these local and internal concerns, and so far as these powers are granted for public purposes exclusively they belong to this corporate body in its public or municipal character, and no action is maintainable against them, unless specially given by statute, but if the Legislature, in addition to these powers, had chosen to confer upon them power to carry on gas or water works for private gain these powers would be regarded as entirely distinct and separate from those appertaining to the defendants as a municipal body, and quoad such powers and their exercise they would be regarded as a private company and subject to the responsibilities attaching to that class of institutions.

"In other words, whilst no private action would lie against a municipal corporation for damages sustained by reason of its neglect to perform a public duty, it would be civilly liable for damages resulting from acts done in what is sometimes called its private character; that is in the management of property and rights which it has voluntarily assumed for its own advantage or profit as a corporation, although enuring ultimately to the benefit of its citizens.

"But there is a third class of cases in which the city has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, as in this case, where the injury resulted from the alleged negligence of members of the fire department, upon which there may be, and has been in the neighbouring States, a wide divergence of opinion. I may say at once that, in my opinion, if there was a duty or obligation cast upon the council to form such a department, even though the members might be appointed by the city council and paid by them, and liable also to dismissal by them, they could not be regarded as servants, or agents, for whose negligence, or

want of skill, in the performance of their duties the corporation could be made liable, but in such case they would be acting as officers of the city charged with the performance of a certain public duty, and no action would lie against the city for their negligence whilst acting in the performance of these duties.

"In the present case there is no legislation creating separate officials with specified duties as a fire department. The city may in its discretion pass by-laws for appointing fire wardens, fire engineers and firemen, and for promoting, establishing and regulating fire companies. What it has done is to assume the control of a fire department, appointing the members, paying them, and controlling them by certain regulations, with the right to dismiss them, and furnishing them with the engines and other appliances necessary for the extinguishing of fires.

"I quite concede that if they had rendered aid merely to voluntary fire companies the relation of master and servant, or even that of principal and agent, would not necessarily have been created, but that is not what has been done; I am unable to say that the learned Chief Justice has not come to the right conclusion when he holds that these men were the mere servants of the corporation, and that the doctrine of *respondeat superior* applies, so that his judgment should be affirmed."

399.—(39*a*) With the approval of the Municipal Board and within the limitations and restrictions and under the conditions prescribed by Order of the Board.

i. For buying and storing fuel and such articles of food as may be designated by Order of the Board and for selling the same to dealers and residents of the municipality;

ii. For acquiring land, erecting buildings, establishing, conducting and maintaining depots, stores, warehouses and yards and purchasing machinery, plant, appliances and equipment necessary for such purposes;

iii. For appointing officers, clerks and servants to manage and conduct such businesses;

iv. For making rules and regulations and doing all all such other acts and things as may be necessary for the full and proper carrying out of such powers.

v. For borrowing from time to time by the issue of debentures payable in not more than ten years from the date of issue the money necessary for such purposes.

(*a*) The by-law need not be assented to by the electors, but shall require a vote of two-thirds of all the members of the council.

(*b*) After the by-law has been approved by the Municipal Board it shall also be approved by the Lieutenant-

Governor in Council and may then be finally passed by the Council. 7 Geo. V. c. 42, s. 12 (2).

Gambling Houses, etc.

399.—(40) For suppressing gambling houses, and for seizing and destroying faro-bank, rouge et noir, or roulette tables, and other devices for gambling found in them. 3 Edw. VII. c. 19, s. 549, par. 4; 3 & 4 Geo. V. c. 43, s. 399 (40).

In R. v. Shaw, 1891, 7 M. R. 518, a provision in the Winnipeg Charter to the same effect as s.-s. 40 was held *ultra vires* of the Provincial Legislature. For full discussion see *supra*, p. 355. The earlier decision R. v. Keefe, 1890, 1 Terr. L. R. 280, was to the same effect. On the other hand in Ontario a different view has prevailed. In R. v. Matheson, 1883, 4 O. R. 559, where the defendant was charged with gambling contrary to 12 Geo. II., c. 28, Wilson, C.J., referring to the sub-section then corresponding to s.-s. 40, said:—

> "There is a provision in the Municipal Act, 46 Vic., c. 18, s. 49, s.-s. 33, against gambling, which has been in force for many years, and I believe there is a by-law in force applicable to a case like this, under which the defendant might have been prosecuted."

In R. v. Spegelman, 1905, 9 O. L. R. 75, the defendant was charged under a by-law of the City of Toronto which provided:—

> "That no person shall keep or permit to be used in any house or room or other place for the purpose of gambling, any faro-bank, rouge et noir, roulette table, or other device for gambling, or permit or allow any game of chance or hazard with dice, cards, or other device to be played for money, liquor, or other thing within such house, room, or place."

The conviction literally followed the language of the by-law with alternatives changed into conjunctives. The by-law was founded on s.-s. 4 of s. 549, above mentioned. Boyd, C., in the D.C., said:—

> "The legislation is pointed at houses where gaming or gambling is practised, and the house is kept for such purpose. The inquiry in this case was not as to whether the place in question was a 'gambling house,' and there was no evidence to induce that conclusion. One instance is proved, or perhaps two, in which cards for gain had been played at the house, but that falls far short of what would be required to attach to it the character of a 'gambling house.'
>
> "The section is grouped in the Municipal Act with 'disorderly houses' under the general heading of 'public morals,' and contemplates places which are to be regarded as nuisances to the community. For it is old law that 'all common gaming houses are nuisances in the eye of the law . . . not merely because they are great temptation to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood': Hawkins' Pleas of the Crown, 8th ed., book 1, c. 32, s. 6.
>
> "The element of frequency at least is essential to make out that any place is a gambling house, and isolated instances on Sundays, when Jews come together in private houses to play cards, are not under the scope of this statute. It is not needful to consider whether it is in conflict with the criminal law of Canada—although the *ultra vires* question was broached on the argument—and therefore to consider whether there is a distinction between the 'gambling houses'

of the provincial law, and the common gaming house of the Dominion Code, so that both may stand together because referring to different infractions of the law in its police and its criminal aspects.

"For present purposes, it is enough to say that the by-law far transcends the terms of the enabling statute, and assumes to make illegal that which was not in contemplation of the Legislature, as expressed in the statute. . . .

"The conviction should be quashed because resting on an invalid by-law."

The rest of the Court agreed in the result.

The power of the Legislature to enact s.-s. 40 was thus assumed.

Probably the Court in a crucial case would refuse to follow R. v. Shaw and follow the Quebec case.

Gas Works, Tanneries, Distilleries, etc.

399.—(41) For prohibiting or regulating the erection or continuance of gas works, tanneries, or distilleries or other manufactories or trades which in the opinion of the council may prove to be or may cause nuisances. 3 Edw. VII. c. 19, s. 586, par. 3; 3 & 4 Geo. V. c. 43, s. 399 (41).

Under the Public Health Act, R. S. O. 1914, c. 218, offensive trades which are or may become nuisances cannot be established without the consent of municipal councils (s. 84), and by s. 73, it is provided that any condition existing in any locality which is or may become injurious or dangerous to health or prevent or hinder in any manner the suppression of disease shall be deemed a nuisance within the meaning of this Act, and such nuisances may be abated by the summary procedure laid down in ss. 79, *et seq.*

Other Manufactures or Trades.—Section 112 of the Public Health Act, 1875 (Imp), deals with the trade of blood boiler, bone boiler, fellmonger, soap boiler, tallow melter, tripe boiler or any other noxious or offensive business or manufacture.

The words "or any other noxious or offensive trade, etc.," have been held to include only those *ejusdem generis* with the specified trades, and accordingly a smallpox hospital is not within s. 112. See Withington v. Manchester, 1893, 2 Ch. 19; 62 L. J. Ch. 393 (A. C.). Chitty, J., in the D. C. said:—

"The Court of Common Pleas, in Wanstead Local Board of Health v. Hill, 1863, 32 L. J. M. C. 135, had before it practically the same point on a similar section of the Public Health Act, 1848, the specified trades not being identical, but very similar, and the question raised was whether brick-making was an 'other noxious or offensive business, trade or manufacture' within the meaning of the section. The case was decided by a strong Court of four Judges, consisting of Chief Justice Erle, Mr. Justice Williams, Mr. Justice Willes and Mr. Justice Keating, and the substance of the judgment was thus: that to bring the case within the general words, the business or trade must be of itself of a noxious or offensive nature and analogous to those specified. Now, no one can say that the carrying on of a smallpox hospital is the carrying on of a business analogous to any of those specified. It has been decided that the carrying on of a hospital, private or public, is a business—Bramwell v. Lacy, 1879, 10 Ch. 691, 48 L. J. Ch. 339; and, so far, the plaintiffs are right, but it is impossible to hold that it is a business or trade analogous to those specified. There has been a subsequent decision with regard to fish-frying: The Braintree Local

Board v. Boyton, 1885, 52 L. J. 99, a case in which there was more to be said against the trade and more to be said in favour of its being brought within the section; but it was held there that it did not fall within the general words. I base my decision on the authority of the case in Common Pleas, and on the principles there laid down. It appears to me that I should be misreading this section if I held that this hospital was a noxious trade or business within the meaning of it."

And the Court of Appeal upheld the judgment, the Lords Justices expressly approving of the reasons given.

It would therefore appear that s.-s. 41 applies only to the named businesses and others of the same class. With respect to all businesses included the council has the power of prohibition as well as power of regulation, whereas under s.-s. 44 the power of regulation only is given with respect to manufactories and trades which in the opinion of the council may be or cause nuisances.

In the Opinion of the Council.—Paragraph 3 of former s. 586, after the word "trades" read "which may prove to be nuisances." Biggar pointed out that the former power did not extend to every manufacture or trade which in the judgment of the council might prove to be a nuisance, but only to such as might prove to be a nuisance. Under the amended section the council if acting *bona fide* may exercise its discretion as to the circumstances of each trade or manufactory and regulate or prohibit accordingly and their discretion will not be subject to review.

Location of Offensive Trades.—Under the Gas Works Clauses Act, 1871, 34 and 35 Vict. c. 41 (Imp.), there is a prohibition against erecting gas works, except upon lands described in the company's special Act, and a prohibition against storing gas upon those lands without the previous consent in writing of the owner, lessees and occupier of every dwelling house situate within three hundred yards of the limits of the site where such gas is intended to be stored.

The insertion in by-laws regulating offensive or dangerous trades of provisions requiring consents to be obtained, either from persons in the neighbourhood or from an officer of the corporation, has been held objectionable if not *ultra vires*, because it substitutes such persons as the judges of matters which the council should settle.

Re Nash and McCracken, 1873, 33 U. C. R. 181; Mackenzie v. Brantford, 1884, 4 O. R. 382; Re Kiely, 1887, 13 O. R. 451; R. v. Webster, 1888, 16 O. R. 187; Re Latham, 1894, 24 O. R. 616; Re Cloutier, 1896, 11 M. R. 220; Dickie v. Gordon, 1905, 39 N. S. R. 330.

Sub-section 41 enables councils to make regulations for the conduct of the trades mentioned, as for example, requiring offensive products to be stored so as to prevent effluvia, requiring removal of refuse and waste products, regulation of emission of vapours, lime washing, keeping premises in repair to prevent accumulation or escape of refuse or noxious matter, construction of walls, etc., of non-absorbent material, rendering of vapours innoxious, etc.

Graves—Protection of.

399.—(42) For prohibiting the violation of cemeteries, graves, tombs, tombstones, or vaults where the dead are interred. 3 Edw. VII. c. 19, s. 547, par. 1; 3 & 4 Geo. V. c. 43, s. 399 (42).

The Cemetery Act, R. S. O. c. 261, s. 34, prohibits injuring property in cemeteries, and imposes penalties which may be recovered by summary conviction, and also gives a right of action in the name of the owner of the cemetery or of a burial plot for damages, and provides that the sums recovered shall be spent in reparation.

Section 237 of the Criminal Code makes it an indictable offence to violate human remains.

Indignities done to a corpse in disinterring it or otherwise are the grounds of an indictment at common law: Foster v. Dodd, 1877, 3 Q. B. 77; see also R. v. Lynn, 1878, 2 T. R. 733; R. v. Coleridge, 2 B. and Ald. 806; Pettigrew v. Pettigrew, 1904, 207 Pa. 313, 64 L. A. R. 179.

The power given by s.-s. 42 enables provision to be made for the summary punishment of violators of cemeteries, which may be supplementary to the provisions of the Cemetery Act.

Hoists, Scaffolds, etc.

399.—(43) For regulating and inspecting the construction and erection of hoists, scaffoldings and other apparatus and appliances used in erecting, repairing, altering or improving buildings, chimneys, or other structures; and for making regulations for the protection and safety of workmen and others employed thereon; and for appointing inspectors of scaffolding. 3 Edw. VII. c. 19, s. 541, par. 1; 3 & 4 Geo. V. c. 43, s. 399 (43).

As to appointment of inspectors under the Building Trades Protection Act and as to additional scaffold regulations: See 1 Geo. V., c. 71, ss. 3 and 7.

Councils of local municipalities must appoint inspectors under the Building Trades Protection Act, R. S. O. 1914, c. 228, s. 3, and by s. 11 of the same Act it is provided that municipal by-laws passed under s.-s. 43 are valid only in so far as they impose additional or more stringent requirements than those imposed in the Act.

Statutory obligations such as are imposed by the Building Trades Protection Act cannot be got rid of so far as future breaches are concerned, though in respect of the result of past breaches persons may come to what agreements they please: Baddeley v. Granville, 1887, 19 Q. B. D. 423, 56 L. J. Q. B. 501; Thomas v. Quartermaine, 1887, 18 Q. B. D. 685, 55 L. J. Q. B. 340, and the doctrine *volenti non fit injuria* does not apply to breaches of statutory duty, *ibid.*

Manufactures and Trades.

399.—(44) For regulating manufactures and trades which in the opinion of the council may prove to be or may cause nuisances. 3 Edw. VII. c. 19, s. 586, par. 2; 3 & 4 Geo. V. c. 43, s. 399 (44).

Section 549, par. 9, prohibiting sale of liquor to minors struck out as covered by the Liquor License Act.

Regulation might involve the prohibition in certain defined areas on the principle laid down in Slattery v. Naylor, 1888, 13 App. Cas. 446, 57 L. J. P. C. 73, where under a power to regulate the interment of the dead, a by-law was passed which contained the following:—

> "No corpse shall be interred in any existing cemetery now open for burials within the distance of one hundred yards from any public building, place of worship, schoolroom, dwelling-house, public pathway, street, road, or place whatsoever within the borough."

Lord Hobhouse in delivering the reasons of the Judicial Committee of the P. C. for upholding the by-law said:—

"The appellant takes three objections to the validity of the by-law: first, that it is *ultra vires*, because it destroys private property; secondly, that it is *ultra vires* because the council have only power of regulating interments, whereas in the cemetery in question, they have wholly prohibited them. . . .

"The interment of the dead is just one of those affairs in which it would be likely to occur, that no regulation would meet the case, except one which wholly prevented the desired or accustomed use of the property. It may well be that a plot of ground, having been originally far from habitations, and suitably used as the burying place of a family or a religious society, has been reached by the growing town, and has so become unsuitable for the purpose. In such a case, a power to regulate would be nugatory unless it involved a power to stop the burials altogether. Their Lordships hold that the by-law in question is not *ultra vires*, because, in certain circumstances, it may have, as in Mr. Slattery's case it unfortunately has, the effect of taking away an enjoyment of property for which alone that property was acquired and has been used.

"The considerations applicable to the second objection have, to a great extent, been anticipated by the answer to the first.

"And their Lordships cannot hold that a by-law is *ultra vires* because, in laying down a general regulation for the borough of Perersham, it has the effect of closing a particular cemetery . . ."

The power of prohibition is withheld except in so far as regulation necessarily involves prohibition. Under the Public Health Act and under s.-s. 41 there is an express power to prohibit. See s.-s. 41.

Noises.

399.—(45) For prohibiting or regulating the ringing of bells, the blowing of horns, shouting and unusual noises, or noises calculated to disturb the inhabitants. 3 Edw. VII. c. 19, s. 586, par. 8; 3 & 4 Geo. V. c. 43, s. 399 (45).

Calculated to disturb the inhabitants.—In Stanley v. Ferndale, 1892, 56 J. P. 709, the evidence against the accused, a newsboy, was, by a constable, that he had been crying his papers very loudly. There was no direct evidence that any one was annoyed. The Act under which the charge was laid prohibited shouting in the streets to the annoyance of the residents and passengers. The conviction was set aside, but in Innes v. Newman, 1894, 2 Q. B. 292, 63 L. J. M. C. 198, where a newsboy was charged with making a violent outcry in a street to the annoyance of the inhabitants, and the evidence showed that he had cried his papers for six minutes outside the house of one inhabitant, who gave evidence that he was greatly annoyed, it was held by a Divisional Court that if the act complained of was of such a character as to be likely to annoy the inhabitants generally it was not the less an offence under the by-law because only one inhabitant was in fact annoyed.

Noise Disturbing a Congregation.—A congregation of a church situated in a business district are not entitled to any more than the ordinary amount of quiet to be expected in the neighborhood, and in particular are not entitled to any injunction to restrain a corporation from disturbing services by the humming sounds resulting from an electrical generating and transforming station, as this under the circumstances did not amount to a nuisance. Heath v. Brighton, 1908, 98 L. T. 718; 24 T. L. R. 414.

Alternative Offences.—Lord Coleridge in Cotterill v. Lempriere, 1890, 24 Q. B. D. 634, 59 L. J. M. C. 133, said:—

> "The Courts have held in a series of cases extending over a long period of time, that where an Act of Parliament creates offences in the alternative, and inflicts a penalty for the offences so created, the conviction and other proceedings must state for which of the offences the offender has been proceeded against. The information before us only states that the defendant allowed smoke to escape from his engine contrary to the by-law, and the conviction proceeded in the same terms. Therefore in both documents the offence is stated generally, but on looking at the by-law itself we find that there are two alternative offences. It is contended that the conviction is bad. I think that, even now, with the broader principles of construction to which we have become accustomed, we should hold that this conviction should have been more specific. But in the the old cases to which we have been referred, which are not distinguishable, and which deal with convictions not distinguishable in principle from this, such convictions have been held bad on the same grounds as those contended for in the present instance. In the King v. Sadler, 2 Chit. Rep. 519, in the time of Lord Mansfield, when the offence was the killing or attempting to kill fish, and one penalty was specified, a conviction was quashed in which the offence was described in the language of the Act of Parliament, because it did not state of which offence the defendant had been found guilty. In 1825, the case of The King v. North, 6 Dowl. & Ry. 143, was decided by Judges of the very highest authority, and it was held that a conviction for selling 'beer or ale' without a license, which were offences for which the same penalty had been provided, was bad. That case was followed in the next year by a case of The King v. Pain, 7 Dowl. & Ry. 678, in which a conviction for having on board a vessel 'casks of the description used or intended to be used, or fit or adapted for smuggling'—offences for which the same penalty was provided—was held bad, on the same objection being taken. Lord Tenterden there says: 'Now this Act of Parliament mentions three sorts or descriptions of casks which if found on board or attached to a vessel will render it liable to forfeiture. . . . The conviction should have set forth under which of the three the casks in question fell.'
>
> "We cannot refuse to recognize such authorities as these, and the conviction must be quashed."

Regulation or Prohibition of Music.—Under s.-s. 45 this can only be done in so far as the music is "calculated to disturb" or "unusual." It would appear that the *ejusdem generis* rule would apply.

In so far as the noises mentioned in s.-s. 45 amount to nuisances they cannot be dealt with under the power given by s.-s. 46. Sub-section 45, however, gives power to prohibit or regulate even though the noises named do not amount to nuisances at law. But note that the council cannot by by-law decide what are unusual noises or noises calculated to disturb. Note the different language employed in s.-s. 41. This will appear from the following cases:—

In R. v. Nunn, 1884, 10 P. R. 395, a by-law passed under a power identical in terms with s.-s. 45 provides:—

> "No person shall in any of the streets, or in the market place of the City of London, blow any horn, ring any bell, beat any drum, play any flute, pipe, or other musical instrument, or shout or make, or assist in making, any unusual noise, or noise calculated to disturb the inhabitants of the said city.
>
> "Provided always, that nothing herein contained shall prevent the playing of musical instruments by any military band of Her Majesty's regular army, or any branch thereof, or of any militia corps lawfully organized under the laws of Canada."

The defendant was charged with beating a drum on a public street, and was convicted. Rose, J., held the by-law so far as it sought to prohibit the beating of drums simply without evidence of noise being unusual

or calculated to disturb was *ultra vires* and invalid. The evidence was that such processions as those in which the defendant took part, beating a drum, were common on the streets of London, and had been for years, and that he could not hold the noise unusual, and he made the following observations to indicate the scope of the sub-section:—

"It will be observed that beating of drums is not specially provided for, as is 'ringing of bells,' etc. Had it been, it would be difficult to argue that a municipality would not have power to pass a by-law prohibiting the beating of drums, even though not a nuisance, or unusual, or calculated to disturb; as the Legislature would have stated by implication, if not in terms, that the beating of drums in cities, towns and villages might prove annoying, and, therefore, if the municipality desired, it might prohibit its being done.

"As beating of drums is not mentioned, it must be either unusual or calculated to disturb, to warrant its being prevented by by-law. This, Mr. Osler admitted, and with much ingenuity, argued that the usual noises in streets were the rolling of traffic, the patter of feet, the hum of conversation, the noise of trade and commerce, That when the voice was raised to a shout it became an unusual noise, that the beating of drums, as ringing of bells and blowing of horns, could not be said to be common or usual, that one's knowledge of the world and its ways must be applied, and that it was for the Court to say that the beating of drums was an unusual noise, and hence an offence under the by-law, and that the by-law was warranted by the statute. No authority was cited for this proposition. I have looked and found none. I cannot accede to it. In my opinion, if the beating of a drum is an unusual noise, or calculated to disturb, it may be prevented, otherwise not."

In R. v. Martin, 1887, 12 O. R. 800, a by-law passed under the same power provided: "The firing of guns, blowing of horns, beating of drums, and other unusual or tumultuous noises in the public streets of L., on the Sabbath Day, are strictly prohibited."

Wilson, C.J., set aside a conviction for beating a drum contrary to the by-law, saying that the conviction should have alleged that the beating of the drum was without any just or lawful excuse, and that there was no evidence to show that the drum made an unusual noise.

Nuisances.

399.—(46) For prohibiting and abating public nuisances.

Nuisance Resulting from the Exercise of Statutory Powers.—"Wherever, according to the sound construction of a statute, the Legislature has authorized a proprietor to make a particular use of his land, and the authority given is, in the strict sense of law, permissive merely, and not imperative, the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others.

"The leading authorities in the law of England upon this question, which, though not numerous, are of considerable weight, are Metropolitan Asylums District v. Hill, 1881, 6 App. Cas. 193; 50 L. J. Q. B. 353, and London, Brighton and South Coast Railway v. Truman, 1885, 11 App. Cas. 45, 55 L. J. Ch. 354." Canadian Pacific Railway v. Parke, 1899, A. C. 535; 68 L. J. P. C. 89.

If the statute however authorizes the use of a particular thing or the doing of a particular act or series of acts, no action will lie in respect thereof unless there is negligence. Vaughan v. Taff Vale, 1860, 5 H. & N. 679. Where a railway company authorized to use locomotive engines was held not to be responsible for damage from fire occasioned by sparks emitted from an engine in the absence of negligence. This case was approved by the House of Lords in Hammersmith v. Brand, 38 L. J. Q. B. 265, L. R. 4 H. L. 171, 21 L. T. 238, 18 W. R. 12, 1868, and by the Judicial Committee in C. P. R. v. Roy, 1902, A. C. 220; 71 L. J. P. C. 51.

In Jones v. Festiniog Railway, 1865, 9 B. & S. 835, 1868, L. R. 3 Q. B. 733, 37 L. J. Q. B. 214, the railway company which had no statutory authority to use locomotive engines was held liable for damages notwithstanding that the company had taken all reasonable precautions to prevent the emission of sparks. In West v. Bristol Tramways, 1908, 2 K. B. 14; 77 L. J. K. B. 684, C. A., the principle of Jones v. Festiniog, *supra*, was applied and a tramways company which having been authorized by statute to pave between the rails of its tramway with wood employed creosoted blocks, with the result that the effluvia from the blocks injured the plants of a market gardener whose land adjoined the highway, was held liable. In Charing Cross v. London Hydraulic Power Company, 1914, 3 K. B. 772; 83 L. J. K. B. 1352, C. A., the plaintiffs laid an electric cable and the defendants laid water mains on the same street, both acting under statutory powers. The mains without any negligence on the defendant's part burst and did damage to the plaintiff's cable, and the Court of Appeal held them liable on the ground that the doctrine of Rylands v. Fletcher, 1868, L. R. 3 H. L. 330; 37 L. J. Exch. 161, applied as between the companies. The Court also considered that Midwood v. Manchester, 1905, 2 K. B. 597; 74 L. J. K. B. 884, C. A., was indistinguishable.

It should be noted that in Midwood v. Manchester, *supra*, the authority under which the company was acting contained a clause that nothing should exonerate them from any indictment, action or other proceeding for nuisance in the event of any nuisance being caused by them, and that a similar stipulation governed the decision in Shelfer v. London Electric Lighting Co., 1895, 1 Ch. 287; 64 L. J. Ch. 216, C. A. Such a stipulation is a customary one in British acts conferring powers.

In Guelph Worsted Spinning Co. v. Guelph, 1914, 30 O. L. R. 466, a bridge was erected by the city which interfered with the flow of water in a river, with the result that the lands of the plaintiffs were flooded. Middleton, J., applying the British authorities above mentioned, held that apart from any question of a negligence, the city was liable on the ground of nuisance.

In Chadwick v. Toronto, 1914, 32 O. L. R. 111, the corporation under statutory authority was operating a pumping plant which occasioned great noise and vibration in the neighborhood, and especially to the plaintiffs, whose house adjoined the pumping station. The Appellate Division applied the principle of Jones v. Festiniog, and made an order restraining the nuisance; no question of negligence was involved. Meredith, C.J.O., in giving the judgment of the Court, said:

> "If it had been shewn that the machinery for pumping could not be operated unless driven by electrical power (which was the power used, although the corporation was not expressly authorized to use electrically driven machinery), I should hold that the use of that mode of operating the machinery was authorized by the legislation and that no action lay for such injury, and it may be though it is unnecessary to express any opinion upon the point that if, though not absolutely impracticable to use any other than electrically-driven machinery, it was commercially impracticable to do so, the same result would follow."

The Criminal Code contains the following provisions respecting nuisances:—

> "221. A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty's subjects. 55-56 Vict., c. 29, s. 191."
>
> "222. Every one is guilty of an indictable offence and liable to one year's imprisonment or a fine, who commits any common nuisance which endangers the lives, safety or health of the public, or which occasions injury to the person of any individual. 55-56 Vict., c. 29, s. 192."
>
> "223. Any one convicted upon an indictment or information for any common nuisance other than those mentioned in the last preceding section, shall not be deemed to have committed a criminal offence; but all such proceedings or judgments may be taken and had as

heretofore to abate or remedy the mischief done by such nuisance to the public right. 55-56 Vict., c. 29, s. 193."

In Pillow v. Montreal, 1885, Montreal L. R. 1 Q. B. 401, the appellants were convicted under a by-law of the City of Montreal, passed under a provincial statute similar to s.-s. 46, the charge being that their chimney emitted smoke in such quantity as to be a nuisance harmful to the public health. On appeal it was contended that the provincial statute was unconstitutional and *ultra vires* as assuming to deal with criminal law. Doherty, J., upheld the conviction, and on appeal the Full Court also upheld it. The Full Court held that the offence which engaged the attention of the Quebec Legislature and of the city council fell short of the criminal misdemeanor of common nuisance. Cross, J., said:—

"Anything that is hurtful or noxious may be included in the term 'nuisance,' and it may be hurtful to the public health and safety without attaining that degree of annoyance to all the Queen's subjects which would raise it to the degree of nuisance at common law, that is the common nuisance known to the law."

He held that the statute and by-law constitute police regulations incident to municipal government, and Baby, J., said:—

"When the offence complained of is not *per se* criminal, the municipal authorities have the right to make such regulations for restriction and prohibition. It is difficult to draw a line between what the municipal authority may prohibit and what may be considered a nuisance. The mere leaving of an obstacle in the street is in a certain sense a nuisance. If we come to the conclusion that the municipal authorities have no jurisdiction in a matter of this kind of what use would there be for municipal institutions."

In R. v. Reynolds, 1906, 11 Can. Cr. Cas. 312, Graham, E.J., commenting on s. 223, of the Code pointed out that since Parliament had divided nuisances into those which constitute criminal offences and those which do not, one cannot probably look into the Statutes of Canada for further provisions on the subject of those nuisances which are not criminal.

If the Quebec view is correct s.-s. 46 cannot be taken to refer to such nuisances as constitute criminal offences. On the other hand it seems arguable that even a common nuisance which may be the subject of an indictment may from another point of view be the subject of municipal regulations providing for summary punishment and abatement, and certainly private nuisances, as comprehended within the category of property and civil rights, are clearly within provincial jurisdiction. As to this question of provincial statute and by-law overlapping the criminal law, see *ante*, p. 355.

It should be noted that in England the power delegated to local authorities to pass by-laws dealing with nuisances is limited to nuisances not already provided for by statute. This is under s. 23 of the Municipal Corporations Act, 1882, which enables councils to make by-laws for prevention and suppression of nuisances not already punishable in a summary manner by virtue of an Act in force throughout the borough. Such by-laws must, however, be submitted to the local Government Board for confirmation. This follows from s. 187, of the Public Health Act of 1875. There are many English decisions respecting by-laws passed under the provisions of s. 88 of the Municipal Corporations Act, 1882. Such by-laws deal among others with the following matters: Automobile lights, noises, swearing, shooting, spitting in streets, refuse in streets, window cleaning and annoyance of passengers in streets.

The acts prohibited by such by-laws if passed under the power to prohibit nuisances must actually constitute nuisances at law, and not merely be nuisances in the opinion of the council, and the question of the reasonableness of such by-laws will be important in all jurisdictions which do not contain a provision similar to that found in s. 249 (*a*) of the Ontario Act.

Kruse v. Johnson, 1898, 2 Q. B. 91, 67 L. J. Q. B. 782, which is perhaps the most important case dealing with the jurisdiction to quash by-laws for unreasonableness, was a case under a by-law passed under s. 23 of the Municipal Corporations Act, 1882, prohibiting persons from playing or singing in any public place within fifty yards of any dwelling house, after being required by any constable or any inmate of the house to desist. It was urged against the by-law that it ought to show on its face that it prohibits acts which cause a nuisance or annoyance within the principle laid down in Everett v. Grapes, 1861, 3 L. T. 669, and Johnson v. Croydon, 1886, 16 Q. B. D. 708, 55 L. J. M. C. 117, where by-laws were held bad because they prohibited acts lawful in themselves whether they amounted to a nuisance or not. The special Divisional Court which decided the case, upheld the by-law on the ground that it was a reasonable exercise of the powers of the council. See also Strickland v. Hayes, 1896, 1 Q. B. 290, 65 L. J. M. C. 55.

Power to Pass By-laws Prohibiting Nuisances does not Enable Municipalities to Define what Constitutes a Nuisance.—Re Dupuis, 1908, 17 M. R. 416; 7 W. L. R. 699, C. A.

(47) For prohibiting the hauling of dead horses, offal, night soil or any other offensive matter or thing along any highway during the hours of daylight. 3 Edw. VII. c. 19, s. 586, pars. 1-1*a*. 3 & 4 Geo. V. c. 43, s. 399 (46-47).

Placards, etc.—Indecent.

399.—(48) For prohibiting the posting or exhibition of placards, [play bills, posters,] writings or pictures or the writing of words, or the making of pictures or drawings, which are indecent [or may tend to corrupt or demoralize,] on any wall or fence or elsewhere on a highway or in a public place. 3 Edw. VII. c. 19, s. 549, par. 1. 3 & 4 Geo. V. c. 43, s. 399 (48).

What Constitutes Obscenity.—In R. v. Hicklin, 1868, L. R. 3 Q. B. 360; 37 L. J. M. C. 89, the defendant was charged with selling an obscene book under 20 and 21 Vict. c. 83, Imp. Coburn, C.J., said:

> "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to immoral influences, and into whose hands a publication of this sort may come. Now with regard to this work, it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of the most impure and libidinous character. . . . I take it therefore that apart from the ulterior object the publisher of this work had in view, the work itself is, in every sense of the term, an obscene publication."

Plays—Immoral or Indecent.

(49) For prohibiting the production or giving of an immoral or indecent play or performance in any theatre, hall or other public place of amusement or entertainment,

and for authorizing the chief constable, the deputy chief constable or any inspector of police, or any officer specially detailed for that purpose, to enter any theatre, hall or other place of public amusement or entertainment, and if at his request such play or performance is not forthwith stopped, to apprehend the performers without warrant, and to take them as soon as practicable before a Police Magistrate or a Justice of the Peace. 3 Edw. VII. c. 19, s. 549, par. 8*a*, *redrafted;* 3 & 4 Geo. V. c. 43, s. 399 (49).

Poles and Wires.

399.—(50) Subject to *The Municipal Franchises Act* for regulating the erection and maintenance of electric light, power, telegraph and telephone poles and wires and poles and wires for the transmission of electricity upon the highways or elsewhere within the municipality. 6 Edw. VII. c. 34, s. 20.

The Municipal Franchises Act.—The Municipal Franchises Act, R. S. O. 1914, c. 197, provides that a council shall not grant any right to use or occupy any street or lane for the purpose of a public utility unless a by-law setting forth the terms and conditions on which the right is to be granted has been assented to by the municipal electors.

Works originating in another municipality or for the transmission of oil, natural gas or water through the municipality and certain other works are excepted.

Poles and Wires Constitute a Nuisance.—Nuisances can be prohibited or abated under Section 399, Sub-section 46. See also the Dominion Railway Act, R. S. C. 1906, c. 37, s. 247, ss. 1 (a) *infra*, and note the powers of the Hydro-Electric Commission of Ontario under the Power Commission Act, section 37.

Poles and Wires of Dominion Co.—Under the Railway Act, R. S. C., 1906, c. 37, s. 247, it was provided that Dominion Companies operating lines of telegraph or telephone or for the conveyance of light, heat, power or electricity, may with the consent of the municipal council involved enter any highway subject to the following provisions:—

"(*a*) *Travel and access.*—The company shall not interfere with the public right of travel, or in any way obstruct the entrance to any door or gateway or free access to any building;

"(*b*) *Wires.*—The company shall not permit any wire to be less than twenty-two feet above such highway or public place, or erect more than one line of poles along any highway;

"(*c*) *Poles.*—All poles shall be as nearly as possible straight and perpendicular, and shall, in cities and towns, be painted;

"(*d*) *Trees.*—The company shall not unnecessarily cut down or mutilate any shade, fruit or ornamental tree;

"(*e*) *Supervision.*—The opening up of any street, square or other public place for the erection of poles, or for the carrying of wires underground shall be subject to the supervision of such person as the munici-

pal council may appoint, and such street, square or other public place shall, without any unnecessary delay, be restored, as far as possible, to its former condition;

"(*f*) *Temporary removal of wires and poles.*—If, for the purpose of removing buildings, or in the exercise of the public right of travel, it is necessary that the said wires or poles be temporarily removed, by cutting or otherwise, the company shall, at its own expense, upon reasonable notice in writing from any person requiring it, remove such wires and poles; and in default of the company so doing such person may remove such wires and poles at the expense of the company;

"(*g*) *Board may order wires under ground.*—Whenever any city, town or incorporated village is desirous of having lines of telegraph, or telephone, or lines for the conveyance of light, heat, power or electricity, placed under ground, the Board may, on the application of such city, town or incorporated village, and on such terms and conditions as the Board may prescribe, require the company to thus place its lines or wires under ground, and abrogate the right given by this section, or by the Special Act, to carry lines on poles, in such city, town or incorporated village.

"2. *Damages.*—The company shall be responsible for all unnecessary damage which it causes in carrying out, maintaining or operating any of its said works.

"3. *Cutting wires at any fire.*—The company shall not be entitled to damages on account of its poles or wires being cut by direction of the officer in charge of the fire brigade at any fire, if, in the opinion of such officer, it is advisable that such poles or wires be cut.

"4. *Workmen to wear badges.*—Every person employed upon the work of erecting or repairing any line or instrument of the company shall have conspicuously attached to his dress a badge, on which are legibly inscribed the name of the company and a number by which he can be readily identified.

"5. *If municipality does not consent.*—If the company cannot obtain such consent from such municipal council or other authority, the company may apply to the Board for leave to exercise such powers, and upon such application shall submit to the Board a plan of such highway, square, or other public place, showing the proposed location of such lines, wires and poles.

"6. *Board may authorize.*—The Board may grant such application in whole or in part, and may change or fix the route of such lines, wires or poles, and may, by order, impose any terms, conditions or limitations in respect thereof that it deems expedient, having due regard to all proper interests.

"7. *Company may then act as in case of consent.*—Upon such order being made the company may exercise such powers in accordance with such order, and shall in the performance and execution thereof, or in the repairing, renewing or maintaining of such lines, wires or poles, conform to and be subject to the provisions of this section applicable in case of consent obtained from such municipal council or other authority, except in so far as the said provisions are expressly varied by order of the Board.

"8. *No sale of light, power, etc., without consent.*—Nothing contained in this section shall be deemed to authorize the company to exercise the powers therein mentioned for the purpose of selling or distributing light, heat, power or electricity in cities, towns, or villages, without the company having first obtained consent therefor by a by-law of the municipality. 3 Edw. VII. c. 58, s. 195."

Section 248 also provided:—

"248. **Definitions.**—In this section,—

"(a) 'company' means a telephone company, and every person and company having legislative authority from the Parliament of Canada to construct and operate, or to operate a telephone system or line, and to charge telephone tolls, not including, however, a railway company or any person having authority to construct or operate a railway; and,

"(b) 'municipality' means the municipal council or other authority having jurisdiction over the highways, squares or public places of a city, town or village, or over the highway, square or public place concerned;

"(c) 'long distance line or service' means any trunk line or service connecting a central exchange or office in any city, town or village, with a central exchange or office, or with central exchanges or office, in another or other cities, towns or villages.

"2. *Consent of municipality required.*—Notwithstanding anything contained in any Act of the Parliament of Canada or of the legislature of any province, the company shall not, except as in this section provided, construct, maintain or operate its lines of telephone upon, along, across or under any highway, square or other public place within the limits of any city, town or village, incorporated or otherwise, without the consent of the municipality.

"3. *If such consent cannot be obtained.*—If the company cannot obtain the consent of the municipality, or cannot obtain such consent otherwise than subject to conditions not acceptable to the company, the company may apply to the Board for leave to exercise its powers upon such highway, square or public place; and all the provisions of the last preceding section, with respect to proceedings where the company cannot claim the consent of the municipal council or other authority, shall apply to such application and to the proceedings thereon.

"4. *Long distance and trunk lines.*—The provisions of the last two foregoing subsections shall not apply to the construction, maintenance and operation by the company of any long distance line or service or any trunk line or service connecting two or more exchanges in any city, town or village: Provided that the location of every such line, pole or conduit in a direct and practicable route shall be subject to the direction and supervision of the municipality, or of such officer as it may appoint, unless the municipality or such officer after one week's notice in writing shall have omitted to prescribe such location and make such direction.

"5. *Settlement of disputes.*—All matters in dispute relating to the location and installation of long distance lines of service, or of such trunk lines or services as are mentioned in the last preceding subsection, shall be determined by the Board in the same manner and with the same powers as are provided by the last preceding section with respect to proceedings where the company cannot obtain the consent of the municipal council or other authority.

"6. *Changes in line.*—Nothing in this section shall affect the right of any company to operate, maintain, renew or reconstruct underground or overhead systems or lines heretofore constructed, except that, upon application of the municipality, the Board may order any extension or change in the location of the line of the company in any city, town or village, or any portion of such line, or the removal of any poles and the carrying of the wires or cables carried thereon underground, or the construction of any new line; and such extension, change in location, removal or construction shall be ordered upon such terms as to compensation or otherwise, and shall be effected within such time, as the Board directs. 6 Edw. VII. c. 42, s. 35."

See now the Railway Act, 1919, 9-10 Geo. V. c. 68, s. 375.

In Bell Telephone v. Owen Sound, 1904, 8 O. L. R. 74, the town under similar powers to those given in sections 247 and 248 of the Railway Act, refused consent to the plaintiffs in order to coerce them to pay a tax. Meredith, J., held that the refusal of consent was not made in good faith and therefore was of no effect.

In Toronto v. Bell Telephone, 1905, A. C. 52; 74 L. J. P. C. 22; 6 O. L. R. 335, the Dominion Act of incorporation gave the officers of the municipal council a voice in "the location of the line," as well as in "the opening up of the street." The Judicial Committee held that the words did not have the effect of enabling the council to refuse the company access to certain streets, but did give a voice in determining the position of poles in streets selected by the company.

In this case will be found a discussion of the respective spheres of the Dominion and the Provincial Parliaments, and the conclusion is reached

that no provincial legislature has power to limit or control the powers of construction granted by the Dominion Parliament.

In Haldimand v. Bell Telephone, 1912, 25 O. L. R. 467, it was decided that if a Dominion company proceeds without the consent of the municipality, it is a trespasser and the municipality may apply for redress to the courts and is not compelled to proceed under the Railway Act. But a stay will be granted to enable the defendant to take the steps required by the Railway Act.

A bridge is within ss. 247 and 248. Haldimand v. Bell Telephone, *supra.*

In Toronto and Niagara Power Company v. North Toronto, 1912, A. C. 834; 82 L. J. P. C. 14; 25 O. L. R. 475; the Judicial Committee overruling the Court of Appeal held that the company under its special Dominion Act could proceed to erect poles and wires without the consent of the local authority.

The Private Provincial Act enabling the Winnipeg Electric Railway Company to use the streets of Winnipeg for operations in connection with the supply of gas, light and power were considered by the Judicial Committee in Winnipeg Electric v. Winnipeg, 1910, 1 A. C. 494; 81 L. J. P. C. 193, reversing the Court of Appeal, 20 M. R. 337, as follows:—

> "Sections 23, 25, and 29 of this Act of 1880, appear by their provisions to present a most reasonable view of the natural relations which exist on the one hand between a municipality whose streets are used in the course of the operations for the supply of gas and electrical power, and, on the other, of the company furnishing the supply. Under section 25 it is provided that the company shall so construct and locate their works and all apparatus connected therewith as not to endanger the public health, convenience or safety, the whole works, etc., to be open to visit and inspection by the municipality at all reasonable times, and the company being bound to obey 'all just and reasonable orders and directions they shall receive.' Section 29 also makes fairly clear what are the rights and duties of company and municipality respectively, by providing that, when streets are broken up, wires erected, and so forth, the company is to do no unnecessary damage, and take care, as far as may be, to preserve free passage through the said streets, and make such openings as the municipality or the Governor-in-Council, as the case may be, shall permit and point out, and place such guards, lamps, etc., and take such precautions as may be necessary for the prevention of accidents. There follow provisions for the finishing and replacing the work and restoration of the streets. It is provided further that, for the purpose of laying mains, it shall not be lawful for the company, except with the written consent of the engineer of the municipality, to break up or interfere with the streets until after thirty days' notice in writing; but for the purpose of laying or erecting pipes or wires, or for repairing such, this may be done without any notice.
>
> "These provisions have been referred to because, as already indicated, they point to such a regulation and an accommodation of the private interests of the company with the public interest of the inhabitants as seems, if reasonably acted upon, adequate to protect both, and to prevent frictions or collision."

Their Lordships also held that the granting of permits by the local authorities to erect poles for the purposes of their undertaking did not require a by-law in each case but was an executive act to carry out the general by-law which had been properly passed in that connection.

In view of the foregoing it would appear that the regulation of poles and wires, under section 399, sub-section 50, should be confined to the protection of the public interest of the inhabitants and may consist in regulations as to opening and restoration of streets, precautions for the prevention of accidents, provisions for the granting of permits and the making of inspections, preventing the obstruction of access to doors or gates, removal of poles when new buildings are erected, height of wires, painting of poles and keeping same in harmony with the amenities of the district.

The Public Health Amendment Act, 1890, 53 and 54 Vict. c. 59, s. 13, provides that local authorities may pass by-laws for the prevention of danger or obstruction to the public from poles, wires, etc., and that such by-laws may provide for inspection and the prohibition of dangerous poles and wires.

Many disputes have arisen under this Act between the Postmaster-General and the local authorities principally in cases where the latter have prohibited the maintenance of poles with a view to compelling the Postmaster-General to put wires underground. See Croydon Corporation v. Postmaster-General, 1910, 74 J. P. 424.

In Postmaster-General v. London, 1898, 78 T. L. 120, it was decided that section 5 of the Telegraphs Act, 1863, sub-sec. 3, which provides that any consent by the street or road authority may be given on such pecuniary terms or other terms or conditions (being in themselves lawful) or subject to such stipulations as to the time or mode of execution of any work as the person or body giving the consent thinks fit. The Railway and Canal Commission Court did not authorize the street authorities to raise objections of a kind which concerned them as a road authority and any objections they might raise should be objections affecting the whole of the public and accordingly the commission overruled an objection made to bring a company to terms as to a tariff of telephone charges.

Under the same section the Railway and Canal Commission in Postmaster-General v. Hutchings, 1916, 1 K. B. 774, 85 L. J. K. B. 1008, dealing with the owner of the soil of public roads not taken over by the local authority who refused consent to the erection of telegraph posts except on condition that he should be paid £10 a year so long as the lines were maintained, held that if he would be put to risk of expense in his capacity of owner of the soil of the roads it would be right to guard him against such risk, but that there was no such risk, as the Postmaster-General would make good all damage. An objection on the ground of unsightliness was also overruled and a provision made to prevent the roads being rendered unnecessarily unsightly.

In Toronto Electric Light Company v. Toronto, 1916, 31 D. L. R. 577, P.C., aff. 21 D. L. R. 859, 33 O. L. R. 267, the Judicial Committee held that Toronto has power to prohibit erection of poles of Toronto Electric Light Company and that no vested right to maintain poles once erected arose and that there was no estoppel as both parties were fully aware of their rights.

In view of the fact that sub-section 50 merely gives a power to regulate and not to prohibit it would appear that municipalities have no power under this sub-section to compel provincial companies to put wires underground. This view is confirmed by the provisions of sub-section 51 which contemplate that the putting of wires underground shall be a matter of agreement.

CASES UNDER SUB-SECTION 50.

In C. P. R. v. Falls Power Company, 1907, 10 O. W. R. 1125, under the Consolidated Municipal Act, 1903, the then sub-section gave power to pass by-laws permitting and regulating poles, wires, etc. Riddell, J., held that a council could not by consenting to and approving of the location of poles and wires authorize an interference with the existing poles and wires of another company lawfully on the highway.

In Bucke v. New Liskeard, 1909, 1 O. W. N. 123, 14 O. W. R. 841, a power company was restrained at the suit of a township from erecting poles and wires without consent.

In Walkerville v. Walkerville Light Company, 1913, 5 O. W. N. 429, Latchford, J., refused an interim injunction to restrain the defendants from erecting poles without the consent of the town as required by their Act on the ground that the consent had been unreasonably withheld to serve the ulterior purpose of keeping down the value of the defendants' undertaking with a view to its expropriation should the ratepayers approve of a contract with the Hydro-Electric Commission.

In Re Winnipeg and St. Boniface, 1913, 14 D. L. R. 187, 25 W. L. R. 618, Robson, Public Utility Commissioner, upheld the refusal of the City of St. Boniface to permit the City of Winnipeg to use the streets of St. Boniface for its poles and wires for its light and power department, which was seeking to dispose of surplus power on the ground that there was no need

so extensive as to create a public interest for the introduction of additional electricity into St. Boniface.

In British Columbia Electric v. Stewart, 1913, 14 D. L. R. 8, the Judicial Committee held that the mere consent by a municipality to the exercise of powers derived from other sources does not amount to a charter bestowing a right or franchise, but a restrictive provision, the function of the municipality being to circumscribe and impose conditions upon the exercise by the company of its powers and such consent does not require a vote of the electors under section 64 of the Municipal Clauses Act, 1896, B.C., requiring any grant of a charter or franchise to be submitted to the electors.

(51) Subject to *The Power Commission Act* for constructing or laying down pipes or conduits for enclosing wires for the transmission of electricity under, or for erecting towers or poles for the support of wires for such purpose across or along any highway or public place, and for entering into agreements with electric light or power, telegraph or telephone companies for the use by them of such pipes, conduits or poles, for such consideration and on such terms and conditions as may be agreed upon. 7 Edw. VII. c. 40, s. 13, *redrafted;* 3 & 4 Geo. V. c. 43, s. 399 (50-51). See Rules to sec. 398 (17).

THE POWER COMMISSION ACT.

Under the Power Commission Act, R. S. O. 1914, c. 39, s. 32, it is provided that the Hydro-Electric Power Commission of Ontario may prescribe the location and mode of construction of all wires, pipes, poles, conduits, ducts and other fixtures, appliances or apparatus proposed to be placed under or upon any highway, street, lane, road, square or other public communication in, under or upon which any other corporation has already constructed such works and nothing done by the commission within its jurisdiction is open to review or question in any action or proceeding or by any Court, and section 35 provides that no Court shall have any authority to grant or shall grant any injunction or other order restraining the construction, maintenance, operation of any works, the location and mode of construction of which have been approved by the commission if the same are being or have been constructed in the place and according to the mode which have been so approved.

Under section 42, when the corporation of a city or town is willing to undertake the construction of a tunnel or conduits for carrying lines under ground, the commission may require all companies to make use of such tunnel or conduits and to pay such compensation as may be agreed upon or as the commission may determine. By section 44 all such works must be maintained in accordance with the directions of the commission.

Under section 37 the commission may regulate as to equipment and inspection and may order changes therein to insure the safety of the public and protection of workmen and property.

Under section 46 where lines, the construction of which is authorized by the Parliament of Canada, run through a city or town where lines are authorized by the Legislature of Ontario, the Hydro-Electric Power Commission and the Board of Railway Commissioners for Canada may by joint session or conference prescribe the terms and conditions and may abrogate any right to carry lines on poles in any such city or town which may have been given by an Act, municipal by-law, license or agreement, and any order may be made the rule of the Exchequer Court of Canada and enforced accordingly.

PURPOSE OF SUB-SECTION 51.

Sub-section 51 is an enabling section conferring power upon municipalities to construct or lay down pipes, conduits, towers or poles and to enter into agreements for the use thereof. In towns and cities the Hydro-Electric Power Commission may require companies to use the system of transmission installed by the municipality.

Under section 43 of the Power Commission Act the corporation of a town or city may exercise the power of expropriation conferred by the Municipal Act in respect of any such transmission system.

AMERICAN DECISIONS AS TO CONSENT.

New York and some other States have constitutional provisions to prevent their legislatures from granting franchise involving the use of highways excepting with the consent of municipalities, and in some cases of a proportion of the abutting owners, and there are many decisions dealing with the nature of such consents and the terms which a municipality can attach before giving consent.

Some Courts have limited the power of the municipalities to attach conditions to its consent to such conditions as materially affect or relate to the powers of government which are conferred on the municipality by its charter or by statute. Dillon on Municipal Corporations, paragraph 1229, citing Galveston v. Galveston, 90 Texas, 398, in the application of this principle, stipulations having in view the preservation of crossings, the character of the district, the feeling of the locality and the danger, inconvenience and expense involved, may be upheld. Conditions requiring the grantee to permit other companies to use poles and tracks to pay compensation for the use of streets, to pay a percentage of gross earnings and fixing or regulating telephone rates or street car fares or requiring an annual tax for each mile of track, have been upheld. See Dillon, par. 1229.

Pounds, etc.

399.—(52) For providing sufficient yards and enclosures for the safe keeping of such animals as it may be the duty of the pound-keeper to impound.

(53) For prohibiting or regulating the running at large or trespassing of animals, other than dogs, and for providing for impounding them and for causing them to be sold, if they are not claimed within a reasonable time, or if the damages, fines and expenses are not paid according to law.

(54) For appraising the damages to be paid by the owners of animals impounded for trespassing, contrary to law or the by-laws of the municipality.

(55) For determining the compensation to be allowed for services rendered in carrying out the provisions of any Act, with respect to animals impounded or distrained and detained in the possession of the distrainor. 3 Edw. VII. c. 19, s. 546. *See 2 Geo. V. c. 66.* 3 & 4 Geo. V. c. 43, s. 399 (52-55),

When Defendant's Negligence is not Material.—As Osler, J.A., pointed out, Patterson v. Fanning is to be distinguished from such cases as Lee v. Riley, 18 C. B. N. S. 722; Ellis v. Loftus, 1875, L. R. 10 C. P. 10, which are really actions for trespass committed in the plaintiff's close by the defendant's horse. They turn on the principle enunciated in Cox v. Burbidge, 1863, 13 C. B. N. S. 430, approved by Blackburn, J., Fletcher v. Rylands, 1868, L. R. 1 Ex. 265, 281, viz.:—

> "If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial."

In Flett v. Coulter, 1903, 5 O. L. R. 375, a quiet horse with no known vicious propensity, escaped from the defendant's pasture by reason of a defective fence, and running at large contrary to a city by-law, kicked a boy who interfered with it. Britton, J., distinguishing Patterson v. Fanning, *supra*, held that the negligence was not connected with the damage complained of.

In Patterson v. Fanning, 1901, 1 O. L. R. 421, 2 O. L. R. 462, C.A., the defendant's horse strayed through his defective fence on to a highway and was running at large, where a municipal by-law made it unlawful for any person to allow horses to run at large: a bag frightened the horse and it ran on the sidewalk and injured the plaintiff. The trial Judge refused to admit evidence of the by-law, but the Court of Appeal admitted it. The damage was held to be just such as might naturally be caused by horses running along the street uncontrolled. Osler, J., giving the reasons of the majority of the Court, said:—

> "It is not necessary, nor is it in my view accurrate, to speak of the horses as being trespassers on a street, the whole title to which is in the public, either the Crown or the municipality. That would give the plaintiff no right of action, though it might subject the owner to some form of prosecution by way of indictment for a nuisance or for infringement of the municipal by-law against such animals being allowed to run at large. It is enough to say that they were unlawfully on the street in consequence of the negligence of the owner, and that the damage suffered by the plaintiff was the natural result of, or properly attributable to, such negligence, having been caused by just what horses would be likely to do under the circumstances. The gist of the action is not trespass but negligence, and therefore, in considering whether the defendant is to be liable for the damage, we must see that it is such as might reasonably be expected to follow the negligent act."

In Barber v. Cleave, 1901, 2 O. L. R. 213, some of the defendant's animals escaped on to the defendant's lands through a fence he was bound to keep up; others strayed on the highway and thence entered the defendant's land, and not being permitted to run at large by the municipal by-law in force, s. 2 of the Pounds Act was applied, and the defendant was held liable in such cases, following Crowe v. Sleeper and McSloy v. Smith, *supra*.

Animal Running at Large Eating Poisoned Wheat. — In Kruse v. Romanowski, 1910, 3 S. L. R. 274, 14 W. L. R. 696, Full Court of Saskatchewan, the plaintiffs and the defendants were neighbours—their lands being unfenced and separated by a highway. The plaintiff's horse strayed on to the defendant's land and ate poisonous wheat intended for gophers. The trial Judge found that it was the custom of the country to allow stock to run at large over unlevied lands, during the period the Herd Ordinance was not in force, and that the common law rule, as to animals, had been modified by custom and legislation, and he gave a verdict for the plaintiff which was set aside by the Full Court, which held that the common law of England was in force, applying Pouting v. Noakes, 1894, 2 Q. B. 281, and Jordin v. Crump, 8 M. & W. 782, where the

true test is stated to be whether or not the animal had a right to be where he was when he was hurt in the absence of intention to injure as in Bird v. Holbrook, 4 Bing. 667, or of nuisance as in Barnes v. Ward, 9 C. B. 392.

Animals Running at Large Falling into Open Well. — In Baldrey v. Fenton, 1914, 29 W. L. R. 258, Full Court Saskatchewan, the plaintiff's horse, running at large, fell into an open well on the defendant's farm — a municipal by-law forbidding running at large was in force, and an Act was in force, prohibiting open wells dangerous to straying stock. The Court, following Kruse v. Romanowski, *supra*, held that the plaintiff's animal being a trespasser at common law, trespassed at his peril, and the owner was under no duty at common law beyond this, that he must not allure the trespasser with malicious intent to injure him, or do anything wilfully to injure him, or make the premises more dangerous for him on the principle of Grand Trunk v. Barnett, 1911, A. C. 361; Latham v. Johnson, 1913, 1 K. B. 398. It was further held that the defendant, in not observing the provisions of the Open Wells' Act, was guilty of negligence, and the plaintiff, in not observing the provisions of the municipal by-law, was also guilty of negligence in letting the horse run at large, as the by-law had all the force of a statute. The Court, however, disposed of the case on the ground that

> "The plaintiff knew that the well was there and that it was dangerous to stock, yet, knowing that, he turned his horses at large, well knowing that they would probably stray into the defendant's field where the well in question was situate, and in doing so he did it in direct violation of the by-law. That being so, he must be held to have decided to take chances and to assume the risk of his horses falling into the well when he turned them out."

Animal Running at Large Frightening Other Animals and Causing Damage.—In Moon v. Stephens, 1915, 31 W. L. R. 832, the Full Court of Saskatchewan, applying Baldrey v. Fenton, 1914, 29 W. L. R. 258, *supra*, held the defendant liable, though the injury was done while the plaintiff was endeavouring to drive away animals at large, contrary to a by-law; applying the rule in Jones v. Boyce, 1 Starkie, 495, that "if I place a man in such a situation that he must adopt a perilous alternative I am responsible for the consequences."

Animal Running at Large Entangled in Unlawful Fence.— In Maclean v. Rudd, 1908, 9 W. L. R. 283 (Full Court of Alberta), the horse of the plaintiff, which had been turned out and was running at large upon open and unfenced lands belonging to a third party immediately adjoining the defendant's lands, was discovered badly cut two hundred yards away from the defendant's fence which consisted of a single barbed wire.

The plaintiff failed to recover. Sifton, C.J., Scott and Harvey, JJ., concurring, said:—

> "In my view of the case, it will not be necessary in order to dispose of the appeal to express any opinion upon the very important point whether the animal was a trespasser or not. Were it not for the decision of the Supreme Court of Canada in Canadian Pacific R. W. Co. v. Eggleston, 1905, 36 S. C. R. 641, a case which, after all, is quite possibly distinguishable, I should have been strongly inclined to the view that the common law rule as to animals had been to some extent modified in this province by the effect of local legislation and by the generally prevailing custom. However, even if we were to distinguish Canadian Pacific R. W. Co. v. Eggleston, I do not think that the result could possibly be to place the owner of animals who permits them to run at large and to enter on uninclosed private lands in any more favourable position than that of a bare licensee."

The Court then applied the principle of Hounsell v. Smyth, 7 C. B. N. S. 731, holding that the risk of entanglement in such a wire as the one in question, though not constituting a full legal fence, was one which owners of animals, running at large, took on themselves.

The provisions of the Railway Act, R. S. O. 1906, c. 37, as to animals are as follows:—

294. Cattle not Allowed at Large Near Railway.—No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway, with any railway at rail level, unless they are in charge of some competent person or persons, to prevent their loitering or stopping on such highway at such intersection, or straying upon the railway.

2. May be Impounded. — All horses, sheep, swine or other cattle found at large contrary to the provisions of this section, may, by any person who finds them at large, be impounded in the pound nearest to the place where they are so found, and the pound-keeper with whom the same are impounded shall detain them in like manner, and subject to like regulations as to the care and disposal thereof, as in the case of cattle impounded for trespass on private property.

3. No Right of Action.—If the horses, sheep, swine or other cattle of any person, which are at large contrary to the provisions of this section, are killed or injured by any train, at such point of intersection, he shall not have any right of action against any company in respect of the same being so killed or injured.

4. Cattle Killed or injured on Property of Company — Burden of Proof.—When any horses, sheep, swine, or other cattle at large, whether upon the highway or not, get upon the property of the company, and are killed or injured by a train, the owner of any such animal so killed or injured shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such loss or injury against the company in any action in any Court of competent jurisdiction, unless the company establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent.

5. Right to Recover Preserved.—The fact that any such animal was not in charge of some competent person or persons shall not, if the animal was killed or injured upon the property of the company, and not at the point of intersection with the highway, deprive the owner of his right to recover. 3 Edw. VII., c. 58, s. 237.

295. No Right of Action if.—No person whose horses, cattle, or other animals are killed or injured by any train shall have any right of action against any company in respect of such horses, cattle, or other animals being so killed or injured by reason of any person:—

(*a*) Gates not Closed.—For whose use any farm crossing is furnished, failing to keep the gates at each side of the railway closed, when not in use; or

(*b*) Or Wilfully Left Open.—Wilfully leaving open any gate on either side of the railway provided for the use of any farm crossing, without some person being at or near such gate to prevent animals from passing through the gate on to the railway; or

(*c*) Or Fence Taken Down.—Other than an officer or employee of the company while acting in the discharge of his duty, taking down any part of a railway fence; or

(*d*) Or Cattle Turned Within Railway Inclosure.—Turning any such horse, cattle, or other animal upon or within the inclosure of any railway, except for the purpose of and while crossing the railway in charge of some competent person using all reasonable care and precaution to avoid accidents; or

(*e*) Or Railway Used Without Consent.—Except as authorized by this Act, without the consent of the company, riding, leading or driving any such horse, cattle, or other animal, or suffering the same to enter upon any railway, and within the fences and guards thereof. 3 Edw. VII., c. 58, ss. 200 and 201.

In Dalziel v. Zastre, 1910, 19 M. R. 353, Perdue, J.A., said:—"In my view the municipality must as an essential condition define what is an unlawful fence within its boundaries before it proceeds to take away the right to recover damages occasioned by trespassing cattle."

There was a by-law which authorized cattle to run at large and provided that no one should be entitled to damages against the owner unless his lands were enclosed with a lawful fence as defined by by-law, but there was no by-law defining a lawful fence. The plaintiff recovered.

In Jack v. Stevenson, 1910, 19 M. R. 717, C.A., there was no by-law permitting animals to run at large, but there was a by-law restricting the right to recover damages in cases where the complainant's lands were enclosed by fences as prescribed in the by-law.

Animals running at large on the highway, entered the plaintiff's lands, and he was held entitled to recover, otherwise as Cameron, J., said: "We would have this result that whereas the cattle were unlawfully upon the highway they were unlawfully upon the plaintiff's premises."

In Watt v. Drysdale, 1907, 17 M. R. 15, the same situation was presented and discussed, but a decision was not necessary; because the by-law restricting the right to recover was found *ultra vires* under the then statute.

Rule at Common Law.—The owner of cattle is liable for their trespasses, except such as are due to defects in fences which the complainant is bound as between himself and such owner to keep up. Per Killiam, C.J., Garrioch v. McKay, 1901, 13 M. R. 404.

At common law the owner of cattle was bound to keep them from his neighbour's land, and the owner of lands was not required to protect his property from the depredations of wandering cattle, per Howell, C.J.M., in Watt v. Drysdale, 1907, 17 M. R. 18.

In Garrioch v. McKay, 1901, 13 M. R. 404, the Full Court of King's Bench for Manitoba upheld a claim for damages, where the defendant's cattle came through a line fence which was defective under a by-law, on to the plaintiff's land.

Under the Boundary Line Act, each of the parties was under a duty to keep up a just proportion of the line fence. There was no evidence to shew that the plaintiff was bound to keep up the portion of the fence where the cattle went through, or that he was not keeping up a just proportion of the fence. The Court adopted the New Hampshire rule laid down in Tewksbury v. Ruchlin, 7 N. H. 518, that "where two men own adjoining closes with an undivided partition fence, which both are equally bound to repair, each is bound to keep his cattle on his own land at his peril." This rule was apparently approved by the Court of Appeal for Ontario in Buist v. McCombe, 1882, 8 A. R. 600; also in Rust v. Low, 6 Mass. 90, and Barber v. Mensch, 157 Pa. 390.

Seeds—Purchase and Donation of.

(55*a*) For purchasing supplies of any or all kinds of vegetable and root seeds and donating them to residents of the municipality on such terms and conditions as may be fixed by the by-law for the purpose of promoting and aiding the production of crops from the planting of such seeds. 7 Geo. V. c. 42, s. 13.

Sewers—Extension of.

399.—(56) Where a local municipality is so situate that it is necessary, in order to procure an outlet for a sewer or to connect it with a sewage farm, to extend it into or through an adjacent municipality, for so extending it, or for extending and connecting it with any existing sewer of such adjacent municipality, upon such terms and conditions as may be agreed upon, or in case of failure to agree, as may be determined by arbitration.

(a) Where the council of the adjacent municipality objects to allow such extension or connection, the arbitrators shall determine not only the terms and conditions upon which the extension or connection is to be made, but also the location of the sewage farm, filtering plant or artificial means of sewage disposal which is contemplated, and whether the extension or connection should be allowed to be made.

(*b*) Nothing in this paragraph shall authorize the making of an open drain or sewer, or affect the provisions of *The Ditches and Watercourses Act,* or limit any of the powers conferred on townships by that Act. 3 Edw. VII. c. 19, s. 555; 4 Edw. VII. c. 22, s. 21, *redrafted;* 3 & 4 Geo. V. c. 43, s. 399 (56).

In re Arbitration Between Waterloo and Berlin. 1904, 7 O. L. R. 64, 8 O. L. R. 335, the town of B. was proceeding under ss. 554 and 555 of the Municipal Act, 3 Edw. VII., c. 19 (now as amended ss. 398 (7) and 399 (56), applied to the council of W. for consent, and being refused passed a by-law which after reciting the necessity for extending their sewer into W. and the refusal of W. and the need of having the question settled by arbitration provided for the appointment of an arbitrator, thereupon passed a by-law appointing an arbitrator, and these two appointed a third, and an award was made, giving B. power to enter and take any lands required in the extension in W. subject to compensation to persons injured. No other terms were imposed. Teetzel, J., set aside the award. The Court of Appeal upheld his order, saying that the award was bad for lack of certainty and finality in that no specific lands were mentioned which might be taken by B., and with which the necessary connections might be made with the sewerage system of W., and that the whole scope and trend of the Act made it a condition precedent that a by-law, defining the course in contiguous municipality of the proposed sewer, and the lands and roads to be affected, see Rose v. W. Wawanosh, 1890, 19 O. R. 294, should first be duly passed and notice given to the contiguous municipality, and that until this is done there is nothing to arbitrate upon, nor indeed anything upon which the

contiguous municipality is called upon to express either assent or dissent. The Court of Appeal also held that the total lack of any terms or conditions imposed upon Berlin, such as the statute contemplated, was a sufficient reason for remitting the matter for further consideration if not a sufficient reason to invalidate it.

Agreements Under s.-s. 56.—In the absence of an agreement, such as is authorized by s.-s. 56, a municipality has no right to pour sewage into an adjoining municipality unless such right exists by prescription. See Attorney-General v. Acton L. B., 1882, 22 Ch. D. 22, 52 L. J. Ch. 28. The Public Health Act, 1875 (Imp.), which provides for similar agreements with the approval of the Local Government Board. See also Metropolitan B. of W. v. London and N. W. Ry. Co., 1881, 17 Ch. D. 246, 50 L. J. Ch. 409, as to prescriptive right of drainage in respect of additional buildings. Section 28 of the Imp. Act provides that connections may be made in such manner and subject to such conditions as may be agreed on between the local authorities, or in case of dispute may be settled by the Local Government Board, and the Board leaves it to the authorities either to determine the terms and conditions or to leave them for the subsequent determination of the Board. See discussion on this point in C. A., in Re Waterloo v. Berlin, *supra*.

The municipality seeking the extension authorized by s.-s. 56 would not permit the sewage of other municipalities to pass into its sewers, so as to be discharged into the sewers of adjacent municipality referred to in s.-s. 56 without the consent of the latter. The agreement may provide against such a contingency as to this subject and the effect of subsequent regulation, enabling sewage so to be disposed of, on the agreement. See Newington L. B. v. Cottingham L. B., 1879, 12 Ch. D. 725, 48 L. J. Ch. 226.

Expropriation of Lands in Adjacent Municipality.—Under section where power to acquire land is conferred, the power to acquire by expropriating is included. In Barton v. Hamilton, *infra*, Osler, J.A., thought that land for sewer extensions under the then sections could only be acquired by agreement with the owners, while Maclennan, J.A., thought that once the "terms and conditions" were settled with the adjacent municipality, the lands needed could be taken compulsorily. Section 7 in its present form indicates that the lands needed can under it be expropriated.

The Ditches and Water Courses Act, R. S. O. 1913, c. 260, does not affect Acts relating to municipal drainage work. It provides for the construction on the initiation of private owners of drains, which may extend into adjacent municipalities, s. 19, *et seq*. The Act is intended to simplify and make as inexpensive as possible local drainage works, and to prevent litigation. Otto v. Roger, 1917, 39 O. L. R. 127, 35 D. L. R. 339.

The Plans and Jurisdiction of the Provincial Board of Health.—Specifications for any extension of a sewer, or sewerage system, must be submitted to the Provincial Board of Health for its approval, and construction must not be proceeded with without the previous approval of the Board. The Public Health Act, R. S. O. 1914, c. 218, s. 94.

The same section provides that no by-law shall be passed for raising money for any such purpose until the work has been approved by the Board, and any such by-law must recite the approval of the Board. The foregoing provisions apply to schemes initiated by municipalities. Under s. 96 of the same Act, when the Board has reported that a sewer or sewerage system should be extended, the council is required forthwith to pass all necessary by-laws, and immediately to commence the work on penalty under s. 98, of $100 for every day on which default continues.

Judicial Construction of s.-s. 56.—In Barton v. Hamilton, 1891, 18 Q. R. 199, 17 A. R. 346, 20 S. C. R. 173, an injunction was granted restraining the City of Hamilton from constructing a sewer through the Township of Barton, without the consent of the township, though the necessary land had been purchased from private owners. It was not

proposed to extend the sewer through any property belonging to the township. The then sections were held to make the exercise of the power to extend or make connection to depend upon an agreement being made between the municipalities. If the servient municipality objects to the extension or connection, and the arbitrators do not award that it may be made, the permission and power to extend or connect do not exist.

From the judgments in Barton and Hamilton, though they deal with the earlier sections, it would appear that s. 398 (7) and 399 (56), are in *pari materia* and must be read together, so that the conditional power conferred by the later section has the effect of limiting the wide general power conferred by the former.

Signs, Etc.

399.—(57) For prohibiting or regulating the erection of signs or other advertising devices, and the posting of notices on buildings or vacant lots.

(58) For prohibiting the pulling down or defacing of signs or other advertising devices and notices lawfully affixed. 3 Edw. VII. c. 19, s. 547, pars. 4-5; 3 & 4 Geo. V. c. 43, s. 399 (57-58).

Signs.—If the words (on buildings or vacant lots) had been omitted, the power conferred would have been wider. What is a vacant lot? Is the reference only to town lots not built on, or does the term include fields, so that townships can regulate or prohibit signs, etc., whether on buildings or elsewhere? Compare the provisions of the Advertisements Regulation Act (Imp.), 1907, Edw. VII., c. 27, which enables local authorities to make by-laws regulating, restricting or preventing the exhibition of advertisements in such places and in such manner and by such means as to affect injuriously the amenities of a public park or pleasure promenade, or to disfigure the natural beauty of a landscape. See also the Public Health Acts Amendment Act (Imp.), 1907, 7 Edw. VII., c. 53, s. 91, as to sky signs.

Defacing Signs.—Under s. 238 (L.) of the Criminal Code, every one who "tears down or defaces signs" is a vagrant and liable to the penalty provided by s. 239 of the Code. A person cannot be put in jeopardy twice for the same offence, and if found guilty under s. 238, cannot also be found guilty for the same offence under a by-law passed under ss. 58. See conflict between Criminal and Municipal Law.

Signs Projecting Into or Over Highways.—See s. 491 (2), similar legislation. Defacing signs. The Municipal Act, R. S. M., 1913, c. 133, s. 589 (dd), the Town Act, R. S. S. 1909, c. 85, s. 169 s.-ss. 53 and 54.

Slaughter Houses.

399.—(59) For establishing [and maintaining] public slaughter houses.

(60) For prohibiting or regulating and inspecting the erection or continuance of slaughter houses, and for pro-

hibiting the slaughter of animals intended for food, except in slaughter houses designated in the by-law.

(*a*) In towns, villages and townships this clause shall not apply to the slaughter of animals for the use of the person killing them or of his family. 3 Edw. VII. c. 19, s. 586, par. 4, *amended;* 3 & 4 Geo. V. c. 43, s. 399 (59-60).

Slaughter Houses.—The Public Health Act, R. S. O. 1914, c. 218, ss. 104, *et seq.*, gives power to cities and towns to establish slaughter houses, which, however, must be constructed, equipped and regulated in conformity with the regulations of the Provincial Board of Health. The Local Board of Health is given supervision and made responsible for inspection. By s. 84 a penalty is imposed on any person who without the consent of a local board of health, or of a municipal council, establishes a slaughter house. The effect of s.-ss. 59 and 60, is to confer on all local municipalities similar powers to those given to cities and towns by the Public Health Act.

By-laws of cities and towns under these sections may contain regulations in addition to those of the Provincial Board of Health, but cannot be in conflict therewith. See Public Health Act (Ont.), s. 11.

Closing Existing Slaughter Houses.—In view of the power of prohibition contained in s.-s. 60, a council can close private slaughter houses at any time: Virgo v. Toronto. The section gives express power to deal with existing slaughter houses. See Quinn v. Orillia, discussed under s. 400 (4). If a slaughter house has been established in accordance with existing by-laws and regulations and with the consent of the municipality, an amending by-law prohibiting the continuance of such slaughter house should not be passed in violation of the principles discussed, under the title "By-laws which cannot be repealed."

Structure of Slaughter Houses.—The power of regulating the erection of slaughter houses enables regulations directly affecting the structure of slaughter houses, to be made. For model by-law approved by the Local Government Board (Imp.), with respect to the structure and regulation of slaughter houses, see Mackenzie v. Handford's Model By-laws, Vol. 1, p. 247, and a memorandum issued by the Board lays down rules as to sites and structures. See Lumley's Public Health, 8th ed., p. 390.

The model by-law prohibits the keeping of dogs or fowl in slaughter houses to prevent, in the first case, the spread of a parasite disease highly injurious to man, and, in the second case, because fowl are liable to develop tubercle.

Snow and Ice—Removal of.

399.—(61) For requiring the occupants of buildings adjoining a highway in the municipality or in any defined area of it to clear away and remove the snow and ice from the roofs of such buildings and from the sidewalks adjoining their premises, and for regulating the times when and the manner in which the same shall be done.

(62) For clearing away and removing snow and ice from the roofs of unoccupied buildings adjoining a highway and from the sidewalks adjoining the premises and adjoining vacant land in the municipality or in any defined area of it at the expense of the owner, and for collecting or recovering the expenses incurred in so doing in the manner provided by section 500. 3 Edw. VII. c. 19, s. 559, pars. 1-2, *redrafted.* 3 & 4 Geo. V. c. 43, s. 399 (61-62).

Falling Snow.—The rule as to objects falling from buildings which is to be deduced from the cases is stated by Pollock in the Law of Torts, 9th ed., p. 534, as follows: "The occupier of property abutting on a highway is under a positive duty to keep his property from being a cause of danger to the public by reason of any defect, either in structure, repair or use and management, which reasonable care and skill can guard against." This rule has been adopted in express terms by the Supreme Court of Canada in Ferrier v. Trepannier, 1895, 24 S. C. R. 91 (falling window), and by the Court of Appeal for Ontario in Roberts v. Mitchell, 1894, 21 A. R. 433 (falling cornice). See also Earl v. Reid, 1910, 21 O. L. R. 545 D.C. (collapse of building).

When falling snow causes the injury, there must be evidence of negligence, or want of reasonable care, before the owner can be held liable. If there is a municipal by-law requiring the owner to remove snow, default under the by-law is evidence of negligence to go to the jury: Landerville v. Gouin, 1884, 6 O. R. 455, distinguishing Lazarus v. Toronto, 1859, 19 U. C. R. 9 (note dissent of Rose, J.); see also Skelton v. Thompson, 1883, 3 O. R. 14.

Falling Snow and Ice.—The Appellate Division dealt with the subject in Meredith v. Peer, 1917, 39 O. L. R. 271, 35 O. L. R. 592. The judgment of the Court was given by Meredith, C.J.O., who said, in part:—

> "This cases raises a very important question as to the liability of a land owner to his neighbour for injuries sustained by him, owing to the fall from the roof, of the land owner's building, of snow and ice which had been permitted to accumulate there; and there is a dearth of English or Canadian authority bearing directly on the question. . . .
>
> "I have been unable to find any reported English or Canadian case in which the question presented for decision in the case at bar has arisen. There are, however, some American cases, and cases both in Ontario and in the United States, in which the question of the liability of the owner or occupant of a building abutting on a highway for injuries caused to persons lawfully using it by snow or ice which had accumulated on the roof of the building into the highway has arisen; but the cases are conflicting."

After discussing Shipley v. Fifty Associates, 1869-70, 101 Mass. 251, 106 Mass. 194; Walsh v. Mead, 1876, 15 N. Y. S. C. 387; Garland v. Towne, 55 N. H. 55; Underwood v. Waldron, 33 Mich. 232; Barry v. Severen, 1883, 48 Mich. 263; Hurdman v. North Eastern, 1878, 3 C. P. D. 168, and the Ontario cases above mentioned, the judgment proceeded:—

> "After giving the question for decision my best consideration, my conclusion is, that the owner or occupant of a building, the roof of which is so constructed that from natural causes the snow or ice which falls or collects upon it will naturally and probably slide from the roof, is bound, apart from any obligation imposed upon him by a municipal by-law, to take all reasonable means to prevent the snow or ice from falling upon the adjoining property, or an adjoining high-

way and causing damage to person or property there, and that that is the extent of the obligation which the law imposes upon him."

Snow and Ice.—The removal of snow and ice from sidewalks may be done by the council and paid from out of general funds as part of the duty laid on the corporation by s. 460. This method will ensure a uniformly safe condition of the streets, free from steep declivities such as existed in Kingston by reason of the carrying out of a by-law requiring frontagers to remove snow, and gave rise to the leading case of Kingston v. Drennan, 1897, 23 A. R. 406, 27 S. C. R. 46. Sedgewick, J., referring to the dangerous declivity of a crossing, said:—

> "It seems to me that the evidence showed that the municipality were not only positively negligent in not removing the defect, but they were actively instrumental in creating it. They were not bound to pass a by-law compelling the removal of snow and ice from sidewalks, but having passed it, it became obligatory on them to take all proper precautions looking to the safety of those points where the crossing and sidewalks meet. Had there been no by-law both would have been on the same level or grade and there would have been no extraordinary slope and probably no accident. . . . It is the same case as if it (the city) was originally erecting a sidewalk and by defect of plan or specification or otherwise, a particular part of it was so much more sloping than the natural way, or necessity called for, that an accident followed."

By Michael Angelo Taylor's Act, 1817, 57 Geo. III. c. 29, s. 23, every occupant of a building in London was required during, and after, a fall of snow to sweep and clean once every day except Sunday before 10 a.m., the sidewalk in front of his premises. By the Highway Act of 1835, 5 & 6 Will. IV., c. 50, s. 26, the duty was cast on the surveyor of highways from time to time to remove any impediment or obstruction arising in a highway from the accumulation of snow.

As to the question of right of action, by The Public Health (London) Act, 54 & 55 Vict. c. 76, s. 29, the duty was cast on the local authority, and Michael Angelo Taylor's Act was repealed so far as it cast a duty on occupiers. The L. C. Saunders v. Holborn, D. B. of W. 1895, 1 Q. B. 64, 64 L. J. Q. B. 101, was an action for special damages resulting from the breach of the local authority of its duty under s. 26, and it was held that no action lay. Matthew ,J., said:—

> "Before the Act was passed, the public had no right of action in such a case. Why should it be said that the statute creates a new obligation? It imposes a penalty for default in the charge of the duty imposed and no further liability."

In Organ v. Toronto, 1893, 24 O. R. 318, Ferguson, J., held that the failure of an owner to remove snow or ice, as required by a by-law, did not give the city a remedy, and in the event of recovery by a person injured thereby, following St. Louis v. Connecticut Mutual, 17 S. W. R. 637, where it was said that a person injured had no action against the owner whose default in obeying a similar by-law caused the injury. There is a dictum by Hagarty, J., in Skelton v. Thompson, 1883, 3 O. R. at 15, that injury to a passer-by from non-compliance with a by-law, requiring the owner to remove snow from a roof be recoverable from the owner neglecting to obey the by-law; on this point, see Tompkins v. Brockville, 1900, 31 O. R. 124. (Action for damages for breach of building by-law).

Sparring Exhibitions, etc.

399.—(63) For prohibiting sparring exhibitions and boxing matches, where an admission fee is charged, without the written permission of the chief constable in a city

or town, or of the reeve in townships and villages. 3 Edw. VII. c. 19, s. 549, par. 9*a*; 3 & 4 Geo. V. c. 43, s. 399 (63).

Section 628 of the Code enables the sheriff to summon a posse to prevent a prize fight.

A sparring contest in a private room is not unlawful, but if death issues, it will be manslaughter; because a fight is a dangerous thing and likely to kill. R. v. Young, 1866, 10 Cox C. C. 371.

A mere exhibition of skill is not illegal, but if the parties meet, entrance money being paid, intending to fight till one gives in from exhaustion or injury, it is a prize fight whether or not gloves are used. R. v. Orton, 1878, 14 Cox C. C. 226.

One of the principals and two promoters were convicted for participation in a prize fight. The fight was announced in advance, and was in public for a stake or prize, and there was to be a knockout in fifteen rounds. The defence that it was not genuine but a fake was rejected, the magistrate saying that it must be taken as it appeared, and was intended to appear to the public. Steele v. Maher, 1901, 6 Can. Cr. Cases, 446.

A challenge or something tantamount to a challenge was considered a necessary precedent to a prize fight and because of the absence of evidence on this point the charge was dismissed. R. v. Littlejohn, 1904, 8 Can. Cr. Ca. 213.

The presence or absence of a prize has no significance whatever. This follows from the definition and s. 108. It appears that if the purpose is an exhibition or sparring or boxing on its scientific side, it is not within the definition and is unobjectionable, whereas if it is a contest in which one strives to conquer by blows and box the other accompaniments, it is a prize fight within the definition. There is nothing in the definition to warrant the conclusion that the contest must be of such duration as to show that the intention is to wear out one or both. The fight here was for ten rounds and no decision and no prize or money was dependent on the outcome. Per Harvey, C.J.A. R. v. Pelkey, 1913, 21 Can. Cr. Cas. 387.

The permission of the Chief Constable or the Reeve will not render the exhibition or match legal if it is really a prize fight. Harvey, C.J.A., in R. v. Pelkey.

A voluntary spectator at a prize fight by his mere presence must be deemed *prima facie* to be a person encouraging, aiding and abetting such fight, and guilty of assault. R. v. Coney, 1881, 8 Q. B. D. 534, 51 L. J. M. C. 66.

To constitute a prize fight there must be the intention of fighting till one is exhausted. R. v. Fleming, 30 D. R. 419, 36 Can. Cr. Cas. 182.

Money is not a necessary feature. R. v. Wildfong, 1911, 17 Can. Cr. Cas. 251.

See also R. v. Fitzgerald, 1912, 19 Can. Cr. Cas. 145; Steele v. Maher, 6 Can. C. C. 446, and R. v. Bradshaw, 14 Cox C. C. 83.

Distinction between Sparring Match and Prize Fight.—The Criminal Code, s. 2 (31), defines a prize fight as follows:—

> "Prize fight means an encounter or fight with fists or hands, between two persons who have met for such purpose by previous arrangement made by or for them."

Sections 104 to 108 of Code provide:—

> 104. Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding one thousand dollars and not less than one hundred, or to imprisonment for a term not exceeding six months, with or without hard labour, or to both, who sends or publishes, or causes to be sent or published or otherwise made known, any challenge to fight a prize fight, or accepts any such challenge, or causes the same to be accepted, or goes into training preparatory to such fight, or acts as trainer or second to any person who intends to engage in a prize fight. 55-56 V., c. 29, s. 93.

105. Every one is guilty of an offence and liable, on summary conviction, to imprisonment for a term not exceeding twelve months and not less than three months, with or without hard labour, who engages as a principal in a prize fight.

106. Every one is guilty of an offence and liable to summary conviction, to a penalty not exceeding five hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding twelve months, with or without hard labour, or to both, who is present at a prize fight as an aid, second, surgeon, umpire, backer, assistant or reporter, or who advises, encourages or promotes such fight.

107. Every inhabitant or resident of Canada is guilty of an offence and liable on summary conviction, to a penalty not exceeding four hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding six months, with or without hard labour, or to both, who leaves Canada with intent to engage in a prize fight without the limits thereof.

108. If, after hearing evidence of the circumstances connected with the origin of the fight or intended fight, the person before whom the complaint is made is satisfied that such fight or intended fight was *bona fide* the consequence or result of a quarrel or dispute between the principals engaged or intended to engage therein, and that the same was not an encounter or fight for a prize, or on the result of which the handing over or transfer of money or property depended, such person may, in his discretion, discharge the accused or impose upon him a penalty not exceeding fifty dollars."

Steam Transmission.

399.—(64) For authorizing any person supplying steam for heat or power to lay down pipes or conduits for transmitting steam under the highways or public squares, on such terms and conditions as the council may deem expedient.

(*a*) A by-law shall not be passed under the authority of this paragraph in violation of any agreement of the corporation. 3 Edw. VII. c. 19, s. 566*a*, *part;* 3 & 4 Geo. V. c. 43, s. 399 (64).

Vagrants, etc.

(65) For restraining and punishing vagrants, mendicants, and persons found drunk and disorderly in any highway or public place. 3 Edw. VII. c. 19, s. 549, par. 6, *part;* 3 & 4 Geo. V. c. 43, s. 399 (65).

Vice—Preventing.

(66) For preventing [vice, drunkenness, profane swearing, indecent, obscene, blasphemous or grossly insulting language, and other immorality and indecency,]

and the indecent public exposure of the person. 3 Edw. VII. c. 19, s. 549, pars. 2, 7; 3 & 4 Geo. V. c. 43, s. 399 (66).

In R. v. Justice of King's County, 2 Cart. 499 (regulation of saloons, etc.), Ritchie said provincial laws can make regulations which tend to preservation of good order and prevention of disorderly conduct, rioting and breaches of the peace; such matters have nothing to do with trade and commerce, but with good order and local good, and are matters of mere police and not of trade and commerce. See also Pillow v. Montreal, *supra*, p. 761.

In Ex parte Pelchat, 1915, 26 Can. Cr. Cas. 76, Flynn, J., in a case of public disturbance caused by drunkenness, held that unless there was a conflict Provincial Jurisdiction v. Dom. are convenient. See also Ex parte Ashley, 1904, 2 Can. Cr. Cas. 328.

Drunkenness.—Drunkenness is not within the Criminal Code under s. 238, Criminal Code. Every one is a vagrant who causes a disturbance in or near any street, road, highway, or public place . . . by being drunk. The essence of the crime is the disturbance in the public place. By laws under s.-s. 66, may therefore penalize simple drunkenness wherever found.

Profane Swearing, Indecent, Obscene, Blasphemous, or Grossly Insulting Language. — The word indecent has been added. Swearing, which causes a disturbance in a public place, in within the Criminal Code, s. 238 (f), but simple profane swearing, or indecent, etc., language, may be made an offence by by-law under this section. In R. v. Bell, 1894, 24 O. R. 274, the magistrate convicted the accused of using grossly insulting language in calling the complainant a "damned scoundrel and liar," but the conviction was quashed because the by-law aimed at offences committed in public places and the words were used in a private office.

Indecency.—Under the Criminal Code, s. 205, it is an offence wilfully in the presence of two or more persons, to do any indecent act, in any place in which the public have, or are permitted to have access, or to do any indecent act in any place, intending thereby to insult, or offend any person, *e.g.*, singing an obscene song with indecent gestures in a theatre: R. v. Jourdon, 1900, 8 Can. Cr. Cas. 337. Publicly exhibiting any disgusting object, or any indecent show, is an offence under the Criminal Code, s. 207. It is not sufficient to escape conviction for indecently exposing the person in a public place, to show that the place where the offence was committed was a place where the public had no right to go. For a conviction at common law, the publicity of the spot is probably not material. If the place is one where the public, in the ordinary sense of the word, go, the conviction is proper. Whatever place becomes the habitation of civilized men, there the laws of decency must be enforced. The principle is well laid down by Blackstone and Hawkins, that whatever openly outrages public morals is a misdemeanour at common law. Probably an act of indecent exposure in a private place before several persons is punishable at common law. The foregoing comments will be found in R. v. Wellard, 14 Q. B. D. 63; 54 L. J. M. C. 296. In view of the foregoing, it is probable that "indecent public exposure of the person" means more than indecent exposure of the person in a public place, and includes any exposure in a place which is public, in the sense that persons frequent it though not necessarily of right.

Conflict of Jurisdiction.—It is submitted that the Provincial Legislature has no jurisdiction to enable a municipal council to impose a punishment for a crime by by-law. But as pointed out by Killam, J., in R. v. Shaw, 1891, 7 M. R. 518, where this subject was discussed by the full Court of King's Bench for Manitoba, many things may be done for the suppression of crimes other than the imposing of punishment for them. See title "By-law overlapping Criminal Law."

Watercourses and Drains—Obstruction of.

399.—(67) For prohibiting the obstruction of any drain or watercourse, and for permitting and regulating the size and mode of construction of culverts and bridges which cross any drain or watercourse situate on a public highway. 3 Edw. VII. c. 19, s. 562, par. 11; 3 & 4 Geo. V. c. 43, s. 399 (67).

Definition of a Watercourse.—To constitute a watercourse, there must be water flowing in a fixed and definite channel, though the flow may be occasional, with defined banks which form a visible landmark: R. v. Oxfordshire, 1830, 1 B. & Ad. 301. The channel may be artificial: Beer v. Stroud, 1888, 19 O. R. at 17. The definition given in Beer & Stroud was adopted by the C. A. in Arthur v. G. T. R., 1894, 22 A. R. at 90. See also Graham v. Lister, 1908, W. L. R. 589 (Full Court, B.C.), in C. P. R. v. N. Dame de Bonsecours, 1899, A. C. 367. The municipality, under the authority of a Provincial Act, served a notice on the C. P. R. requiring them to clean out a ditch. The company refused. The Judicial Committee upheld the municipal authority, Lord Watson saying:—

> "It appears to their lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or otherwise, the structure of a ditch, forming part of the appellant company's authorized works, would be legislation in excess of its powers. If on the other hand the enactment had no reference to the structure of the ditch, but provided that in the event of its becoming choked with dirt or rubbish, so as to cause overflow and injury to other persons in the parish, it should be thoroughly cleared out by the appellant company, then the enactment would, in their lordships' opinion, be a piece of municipal legislation competent to the legislation of Quebec. Under a similar power, with the aid of a power similar to 500 *infra*, a municipality cleared out a watercourse and assessed the cost against the land: Danard v. Chatham, 1875, 24 C. P. 590. Damage resulted because of the accumulation of water, resulting from the work done, no cleaning having been done below the land. It was held that the municipality was not liable."

Private Action for Obstruction.—It is not every sensible interference with the bed of a stream or watercourse that will give rise to an action, but only one causing actual damage or a reasonable possibility of damage: Orr-Ewing v. Colquhoun, 2 App. Cas. 852; Belfort Rope Works Co. v. Boyd, 21 L. R. Ch. 560, followed West Kootenay v. Nelson, 1906, B. C. R. 34, 3 W. L. R. 239 (Full Court, B.C.).

See Re Clark and Howard, 1885, 9 O. R. 577.

See s. 411 (5), 456 and 457.

See s. 399 (67), 411 (5).

Sections 456 and 475 deal with streams, forming boundary lines, between municipalities, and impose an imperative duty on municipalities to keep them free from driftwood. The sub-section enables the causing of obstructions in streams within the municipality to be penalized, and to be removed if necessary, under s. 500. The by-law will not be in force on boundary streams on the principle of (s. 420 (6)).

Water Closets, Privy Vaults, etc.—Filling up.

399.—(68) For requiring owners, lessees and occupants of land in the municipality of any defined area of it to close or fill up water closets, privies, privy vaults,

wells or cess-pools, the continuance of which may, in the opinion of the council or the medical health officer, be dangerous to health. 3 Edw. VII. c. 19, s. 551, par. 4; 3 & 4 Geo. V. c. 43, s. 399 (68).

The Public Health Act, R. S. O. 1914, c. 218, s. 74 (b) and (c), provides that any water or earth closet, privy, cesspool so foul, or in such a state, or so situated as to be injurious or dangerous to health, and any well injurious or dangerous to health, is a nuisance within the Act. Section 75 provides for regular inspection by the Medical Officer of Health for the municipality. Section 79 provides for the giving of a notice requiring abatement, and for abatement at the expense of the municipality where the owner, or occupier, is not in fault. Section 82 provides for recovery of expenses in other cases, or for assessment of the same as municipal taxes. Section 113 provides that where any act or omission is a violation of any express provision of the Act, and is also a violation of a by-law of a municipality in respect of a matter over which the council of the municipality has jurisdiction, a conviction may be had under either the Act or the by-law, but a conviction shall not be made under both for the same act or omission.

Section 115 enacts a statutory by-law to be in force in every municipality as enacted by the council thereof, which may be amended with the consent of the Provincial Board of Health. This statutory by-law provides as follows:—

12. It shall be the duty of the owner of every house within this municipality to provide for the occupants of the same a sufficient supply of wholesome drinking water; and if any occupant of the house is not satisfied with the wholesomeness or sufficiency of such supply, he may apply to the Local Board of Health to determine as to the same; and if the supply is sufficient and wholesome, the expense incident to such determination shall be paid by such occupant; and if not, by the owner; and in either case such expense shall be recoverable in the same manner as municipal taxes.

13. All wells in this municipality which are in use, whether such wells are public or private, shall be cleaned out before the 1st day of July in each year, and if the Local Board of Health certifies that any well should be filled up, such well shall be forthwith filled up by the owner or occupant of the premises, and no well shall be used as a privy, privy vault or cesspool.

14. No privy vault, cesspool, or reservoir into which a privy, water-closet, stable or sink is drained, shall be established until the approval in writing of the medical officer of health has been obtained.

15. The next preceding section shall not apply to earth privies or earth closets without a vault below the surface of the ground, but sufficient dry earth, wood ashes or coal ashes to absorb all the fluid parts of the deposit must be thrown upon the contents of such earth privies and closets daily, and the contents when removed must be placed in a shed or box with rain-proof cover, and removed from the premises at least once a year on or before the 1st day of May.

16. If the exigencies or circumstances of the municipality require that privy vaults, cesspools or reservoirs shall be allowed in accordance with s. 14, they shall be cleaned out at least once a year, on or before the 1st day of May, and from the 1st day of May to the 1st day of November in each year they shall be thoroughly disinfected by adding to the contents of the vault, cesspool or reservoir, once a month, not less than two pounds of chloride of line, dissolved in two pailfuls of water.

17. Within the limits of this municipality no nightsoil or contents of any cesspool shall be removed, unless previously disinfected as provided by s. 16, and during its transportation the material shall be covered with a layer of fresh earth, unless the removal is by some odourless excavating process.

26. The construction of any closet or other convenience which allows of the escape from it or from the drain or soil-pipe into the house of air or gas is prohibited.

Closing Privies, Wells, etc. A change of system might also be brought about under the nuisance provisions of the Act. Section 399, s.-s. 46, or under the Public Health Act, R. S. O. 1914, c. 218, s. 73, *et seq.* (Under the Public Health Act (Imp.) 1875, s. 91 (2), it is provided that any pool, ditch, gutter, watercourse, privy, urinal, cesspool, drain or ash-pit, so foul as to be a nuisance or injurious to health, shall be deemed to be a nuisance and liable to be summarily dealt with under the Act. Section 92 makes it the duty of the local authority to inspect, while s. 98 enables the local authority, once an order has been obtained, to enter the premises and abate the nuisance at the expense of the offender and to recover the expense from him. Section 111 provides that the provisions of the Act as to nuisances are in addition to any other provisions and provides that no person can be punished twice for the same offence. Section 36 of the same Act gives an alternative procedure by enabling the local authority by written notice to require the owner to provide a sufficient watercloset, or privy, and if the notice is not complied with, enables the authority to do the work, and recover the expenses incurred, or assess it as a local improvement. Under these provisions, it has been held that the local authority cannot lay down a general rule requiring the closing of privies: Tinkler v. Wandsworth, 1858, 27 L. J. Ch. 342; Wood v. Widnes Corp'n, 1898, 1 Q. B. 463, 67 L. J. Q. B. 244. In Agnew v. Manchester, 1902, 1 O. R. 9, a series of notices were served pursuant to a general report; it was held that each case had been considered separately. See also Smith v. Greenwood, 1907, 2 K. B. 385, 76 L. J. K. B. 1129, dealing with a special clause on the Bradford Improvement Act.

Weeds.

399.—(69) For prohibiting the growth of Canada thistles and other weeds detrimental to husbandry and for compelling the destruction thereof; for appointing an inspector to enforce the by-law, and for prescribing his duties and fixing his remuneration. 3 Edw. VII. c. 19, s. 537, par. 4, *part;* s. 547, par. 2; 3 & 4 Geo. V. c. 43, s. 399 (69).

No Liability to Adjoining Owner at Common Law.—In Crowhurst v. The Amersham Burial Board, 1879, 48 L. J. Ex. 109, a burial board planted a yew tree on their own land, which grew so as to project over an adjoining meadow, and the plaintiff's horse ate of the overhanging part and died; the defendants were held liable. But in Giles v. Walker, 1890, 24 Q. B. 656, 59 L. J. Q. B. 416, the Court, Lord Coleridge and Lord Esher, distinguishing Crowhurst v. Amersham, set aside a verdict, given by the jury, who found that the plaintiff, an adjoining owner, was damaged by thistles grown on the defendant's land through his negligence, taking the view that the thistles were a natural product of the land, and that there was no duty upon the defendant to prevent the seed from being carried by the wind on to the plaintiff's land. In Smith v. Giddy, 1904, 2 K. B. 448, an injunction was granted against a person who allowed the branches of his trees to overhang his neighbour's land and damage trees. Kennedy, J., said:—

> "It seems to me that in principle, the action ought to lie, and I cannot myself differentiate this case in principle from the decision in Crowhurst v. Amersham Burial Board. It is the law, I think, that, as long as the yew tree is proved not so to overhang, and the yew tree

leaves have not been so cut by the owner as to fall on the neighbour's land, there is no right of action, although the neighbour's cattle may be hurt by eating leaves from the yew tree. I suppose no action would, under such circumstances, lie, because in a high gale (to take the simplest case) yew leaves are blown on to the adjoining land, and cause injury to animals which eat them. No action, I take it, would lie for that. If there are thistles growing naturally on a person's land, the mere fact that the thistledown is blown on to his neighbour's land and produces a crop of thistles there gives the neighbour no right of action. But here there is something which, as maintained by the defendant—on his land but not confined thereto—is visibly and actively doing damage to his neighbour, and creating money loss to him. Whether the principle applicable be that of Rylands v. Fletcher or not, it seems to me to be good law that a man has no right to maintain upon his own land, and instead of confining it within that land, thrust it, or allow it to thrust itself, from that land on to his neighbour's land, something which thereby does damage to his neighbour. I do not see any reason why an action should not lie in such a case. Where branches are overhanging and damage results, I do not see why the only right of the neighbour over whose land they hang should be to go to the expense and labour of lopping down the branches himself."

As between tenant for life and reversioner, the spread of weeds from natural causes, or by the action of cattle, and the failure to overcome their growth and spread by process of summer following, or by process of hand picking, is no evidence of waste, but only of ill-husbandry, and the Noxious Weeds Act does not make any difference: Patterson v. Central Canada L. & S. Co'y, 1898, 29 O. R. 134. The Noxious Weeds Act, R. S. O. 1914, c. 253, s. 3, casts a duty on occupants or owners if land is unoccupied, to cut down and destroy certain weeds. Section 4 permits the exemption of waste lands. Section 5 enables the council of any local municipality by by-law to extend the Act to any description of weed, or discard growing crop. Section 6 enables council to appoint an inspector and makes it obligatory to appoint at least one in certain cases. Section 7 defines duty of inspector, and gives him power to cut weeds on default by owner or occupant. Section 8 enables the inspector's expenses to be assessed against the land. Section 9 casts a duty on overseer of highways to cut weeds thereon. While ss. 10-14 impose penalties on persons who refuse to obey the inspector. Persons who sell seeds mixed with the seed of weeds. Persons who sell or sow smutty seed, and upon inspectors and overseers who neglect their duties.

In Osborne v. Kingston, 1893, 23 O. R. 383, the plaintiff's claim was to compel the city to cut down thistles, etc., growing in the streets and for damages. The corporation had not appointed an overseer of highways or an inspector, under the Act. On demurrer, Boyd, C., said that the municipality was not an owner or occupant within the meaning of the noxious weeds, and that the word "land" therein does not mean street or highway, and that no remedy existed at law apart from the Act, that under the Act, the duty was cast on inspectors or overseers, and that as none had been appointed redress must be sought by electing a new set of councillors who would appoint an overseer, or by petition under the Act. Scope of s.-s. 69. This sub-section provides an additional means of prohibiting the growth of weeds and compelling their destruction and enables a higher standard to be set up and maintained in any municipality than is called for by the Noxious Weeds Act. The municipality can, under c. 500, do the work on the land and assess it against the owner. Whether or not a breach of by-law would give a private right of action to a person injured thereby, has been discussed on general lines, *supra*.

Noxious Weeds in Manitoba, Alberta and Saskatchewan.—In the provisions of Manitoba, Saskatchewan and Alberta, the spread of noxious weeds, under the favourable conditions which exist in those provinces for their propagation, has compelled special legislative attention. The Manitoba Act is R. S. M. 1913, c. 145. See statutes Sask., 1912-1913, c.

39, as amended 1913, c. 67; 1916, c. 37; 1917, c. 34. Also statutes Alberta, 1907, c. 15, as amended 1910, 1911-1913, and (Office Cons., 1915, p. 412).

Private Action for Breach of Statutory Duty.—In Flitton v. Stange, 1913, 24 W. L. R. 275, Walsh, J., held that the defendant was liable to an adjoining land owner for breach of the statutory duty imposed on him to destroy all noxious weeds, under s. 4 of the Alberta Act, following Winterburn v. Edmonton Y. & P. R. W. Co., 1908, 1 Alta. L. R. 308, and White v. G. T. P. R. W. Co., 1910, 2 Alta. L. R. 546 (neglect of railway to provide hospital). Both judgments are by the Court. The latter judgment was reversed, 435 C. R. 627, on the ground that the statute in question there did not give a private right of action. See discussion of the principle involved, *supra*.

Assessing Expense of Destroying Noxious Weeds.—In re Municipality of Fertile Belt, 1915, 32 W. L. R. 265, Farrell, Dist. Ct. J., held that a notice addressed to the owner by wrong initial and not in other respects complying with the Sask. Act, was defective and was fatal to the enforcement of the expenses as a tax, following O'Brien v. Cogswell, 17 S. C. R. 420. In this case the meaning of "unoccupied" and "not under crop" was discussed.

Weeds on Highways.—Note provisions in Man., Sask. and Alta. Acts, requiring owners to clear to centre line, and special duties laid on municipalities as to highway weeds on railway lands. The principle of C. P. R. v. Notre Dame de Bonsecours, applies. But note that the Railway Act, s. 296, casts a duty on every company to cut down, root out and destroy thistles and weeds, growing on lands of the company, and s. 417 provides a penalty and enables municipal officers, on default, to do the work and recover the expenses and charges.

As to the private right of action of any for breach of the statutory duty, see Wood v. C. P. R. 1899, 30 S. C. R. 110, and G. T. R. v. Hainer, 1905, 36 S. C. R. 180, but the general discussion *supra*.

Wells and Water.

399.—(70) For establishing, protecting, regulating and cleaning public and private wells, reservoirs and other public and private conveniences for the supply of water; for prohibiting the fouling of them, or the wasting of the water, and for procuring an analysis of such water, and providing for the payment of the expense thereof, and for making reasonable charges for the use of public water.

(71) For the closing or filling up of public or private wells.

(72) For compelling the use within the municipality or any defined area therein, for drinking and domestic purposes, of water supplied from the water-works of the municipality or of a water-works company; and for pro-

hibiting the use within the municipality or such area of spring or well water for such purposes. 3 Edw. VII. c. 19, s. 550, pars. 5, 6, *amended;* 3 & 4 Geo. V. c. 43, s. 399 (70-72).

Under s.-s. 71, wells may be closed up on any ground which seems good as a matter of municipal policy, while under s.-s. 68 they can only be closed when deemed dangerous to health.

The Public Health Act, R. S. O. 1914, c. 218, contains the following provisions, which apply to wells, or other water supply; s. 74 (e) makes any well or water supply injurious or dangerous to health a nuisance, and the following sections provide for inspection and abatement and recovery of expenses. Section 90 provides that the Provincial Board of Health shall have general jurisdiction of all wells, etc., and shall examine the same from time to time for pollution. Section 115, which provides for a statutory by-law, and ss. 12 and 13 of the by-law given under s.-s. 68 *supra*, makes it the duty of every house owner to supply water for the occupants and to clean out wells, and s. 113 provides that the provisions of the Act and of municipal by-laws shall be cumulative, provided that a conviction may not be made under both for the same act or omission.

Under s. 89 of the Public Health Act, R. S. O. 1914, c. 218, all plans, municipal or company, for water supply must be approved by the Provincial Board of Health, and no works shall be undertaken without such approval, which must be for back source and mode of supply.

The power to establish water works is given to all local municipalities under Part I. of the Public Utilities' Act, R. S. O. 1914, c. 204, and the power to maintain and manage is conferred under Part III. Sub-section 70 enables municipalities to establish public and private sources of supply and protecting them, and is not sufficiently comprehensive to authorize a water works system. Under the Local Improvement Act, R. S. O. 1914, c. 193, s. 51 (1a), a township or village may construct waterworks as a local improvement, compel the use of a waterworks supply in any area.

Duty to Supply Water.—It is to be noted that under existing legislation in Ontario the duty to supply wholesome water rests upon owners of occupied premises, and there is no statutory duty cast on municipalities requiring them to supply water, and no means of compelling them to provide wells, reservoirs, or waterworks. The mere conferring of the power still leaves the corporation a discretion to act or not to act, and if action is desired, councillors must be elected who will act.

The Public Health (Water) Act (Imp.), 1878, 41 & 42 Vict. c. 25 (Imp.), s. 3, makes it the duty of every rural sanitary authority to see that every occupied dwelling house within their district has an amenable supply of wholesome water sufficient for the consumption and use for domestic purposes of the inmates of the house, and lays down a procedure for enforcing the duty by s. 11. The Local Government Board may invest any urban sanitary authority with the same duty, and by s. 299 of the Public Health Act, 1895 (Imp.), the Local Government Board may, on complaint, order the performance of the duty, and the order may be enforced by mandamus, or the Local G. B. may appoint some person to perform the duty, and the expenses are payable by the authority in default. Section 62 of the same Act, which is not repealed by the Public H. W. Bd., 1878, gives the local authorities power in certain cases to compel owners to supply water.

Water Supply.—See notes to s.-s. 68.

400. By-laws may be passed by the councils of urban municipalities.

Bathing and Boat-Houses—Inspection of.

(1) For inspecting public bathing-houses and boat-houses or premises wholly or partly used for boat-house purposes; and for prohibiting their use for illegal or immoral purposes. 3 Edw. VII. c. 19, s. 549, par. 10; 3 & 4 Geo. V. c. 43, s. 400 (1).

A municipal power of regulation, or of making by-laws for good government without express words of prohibition, does not authorize the making it unlawful to carry on a lawful trade in a lawful manner. Partial prohibition is still prohibition.

In R. v. Smith, 1899, 31 O. R. 224, a by-law was held *ultra vires*, because it did not contain the exception mentioned in the sub-section under which it was enacted.

Negativing the exception, a conviction, which did not, under a by-law for licensing hawkers, negative the exception, was held bad, and it was also held that it could not be amended unless there was evidence to show whether or not the defendant's acts came within it. R. v. McFarlane, 1897, 17 C. L. T. Occ. N. 29, and R. v. Smith, 33 C. L. T. 119. This rule is reversed by clause (c). See the earlier cases, R. v. Nunn, 1884, 10 P. R. 395, and R. v. Strauss, 1897, 1 Can. Cr. Cas. 103 B.C., where it was held that an exception in a proviso in a by-law need not be negatived.

Section 717 of the Criminal Code is as follows:—

> "If the information or complaint in any case negatives any exemption, exception, proviso or condition in the statute on which the same is founded it shall not be necessary for the prosecutor or complainant to prove such negative, but the defendant may prove the affirmative thereof in his defence if he wishes to avail himself of the same. 55-56 V., c. 29, s. 852."

This applies to summary convictions by the Ontario Summary Convictions Act, R. S. O. 1914, c. 10; s. 4 of which provides:—

> "Except where otherwise provided, Part IV. and ss. 1121, 1124, 1125 and 1142 of the Criminal Code shall apply *mutatis mutandis* to every such case as if the provisions thereof were enacted in and formed part of this Act. 10 Edw. VII., c. 37, s. 4."

And s. 5 provides:—

> "Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, by-law, regulation or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and if so specified or negatived no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant. 10 Edw. VII., c. 37, s. 5."

In R. v. Laforge, 1906, 12 O. L. R. 308, a conviction, which did not on its face negative the proviso in old s. 583 (14), now clause (a), was amended, as the evidence sufficiently showed the defendant was not within the proviso. No costs.

Public Bathing houses are those which the public are permitted to use, either for hire gratuitously, whether owned by the municipality and public or by private persons.

Under s. 398, s.-s. 3, all municipalities have power to establish bathing houses, or grant money to aid in the construction of public bathing houses, while the power of inspection is conferred on urban municipalities only. All local municipalities can, under s. 399, s.-s. 66, prohibit their use for illegal or immoral purposes.

Boathouses are those in which pleasure boats are kept for hire by the public. Only the premises are within the section, not the bathing or the boating.

For a similar use of the word "public," see the term "public conveyance" in the Public Health Act, 1875, ss. 126 and 127 (Imp.). See also Act R. S. O. 1914, c. 69, s. 62.

Begging.

400.—(2) For prohibiting common begging or persons from importuning, in the highways or public places, others for help or for aid in money, and deformed, malformed, or diseased persons from exposing themselves, or being exposed there, to excite sympathy or for the purpose of obtaining help or assistance. 3 Edw. VII. c. 19, s. 586, par. 10; 3 & 4 Geo. V. c. 43, s. 400 (2).

Begging.—Under s. 238 (a) of the Criminal Code, wandering about and begging, without a certificate, signed within six months, by a priest, or minister, or by two justices, constitute the offence of vagrancy. This section is directed against persons adopting a particular mode of life, and does not apply to those who beg for a particular occasion as to relieve distress caused by a strike, or the loss of a horse or cow by a poor man who was dependent on it for a livelihood. See Pointon v. Hill, 1884, 12 Q. B. D. 306, 53 L. J. M. C. 62. But a person who begs is *prima facie* within the section: Mathers v. Penfold, 1915, 1 K. B. 84.

Common Begging.—The word "common" indicates that the by-laws must be directed against a mode of life.

Borrowing Money for Certain Purposes Without Assent of Electors.

400.—(3) Where the corporation of an urban municipality has heretofore constructed, purchased or acquired, or hereafter constructs, purchases or acquires gas, electric light, power or water works or works for the development of a water power for generating, or works for producing, transmitting or distributing electrical power or energy or sewerage works or works for the interception, purification or disposal of sewage, at the expense of the corporation at large, or where any such corporation has undertaken the construction, purchase or acquisition of any such works, and it appears that the cost of such construction, purchase or acquisition has exceeded or will exceed the amount already provided for that purpose,—for borrowing such further sums as may be neces-

sary to extend, improve or complete such works or the purchase or acquisition of the same. 3 & 4 Geo. V. c. 43, s. 400 (3); 4 Geo. V. c. 33, s. 11; 9 Geo. V. c. 46, s. 14 (1).

(3) (*a*) The by-law shall not require the assent of the electors if it is passed by a vote of three-fourths of all the members of the council and is approved by the Municipal Board.

(*b*) Such approval may be given if it is shown to the satisfaction of the Board that the expenditure proposed to be made for such extension or improvement or for the completion of such works or such purchase or acquisition is necessary, and that a sufficient additional revenue will be derived therefrom to meet the annual payments in respect of such debt and the interest thereon, or in the case of the extension or improvement of sewerage works or works for the interception, purification or disposal of sewage, that such extension or improvement is approved of by the Provincial Board of Health. 6 Edw. VII. c. 34, s. 21; 7 Edw. VII. c. 40, s. 15; 9 Edw. VII. c. 73, s. 22, *redrafted;* 9 Geo. V. c. 46, s. 14 (2).

(*c*) This paragraph shall not apply to works required by the Provincial Board of Health to be established, improved, extended, enlarged, altered or renewed or replaced. *New.* 3 & 4 Geo. V. c. 43, s. 400 (3), *amended;* 4 Geo. V. c. 33, s. 11

(NOTE.—Sections 570-573, dealing with telephone service, struck out, as they have been incorporated in The Ontario Telephone Act.)

Buildings—Strength of Walls, Beams, etc.

(4) For regulating the size and strength of brick, stone, cement, and concrete walls, and of the beams, joists, rafters, roofs and their supports of all buildings to be erected, altered or repaired, and for requiring the production of the plans of all buildings, and for charging fees for the inspection and approval of such plans, and fixing the amount of the fees. 3 Edw. VII. c. 19, s. 541, par. 4; 6 Edw. VII. c. 34, s. 17 (1); 2 Geo. V. c. 40, s. 9; 3 & 4 Geo. V. c. 43, s. 400 (4).

(4*a*) For regulating the removing or wrecking of buildings and the spraying thereof during such work so as to prevent dust or rubbish arising therefrom. 5 Geo. V. c. 34, s. 24.

The Public Health Act, 1875 (Imp.), 157, provides that every urban authority may make by-laws with respect to the following among other matters:—"The structure of walls, foundations, roofs and chimneys of new buildings for securing stability and the prevention of fires and for purposes of health." All by-laws passed under this authority must be approved by the Local Board. In 1877 the Board issued a model series containing the following clause:—

> "Every person who shall erect a new building shall, except in such cases as are herein specified, cause the external and party walls thereof to be constructed of good bricks, stone, or other hard and incombustible materials, properly bonded and solidly put together—
>
> (i) With good mortar compounded of good lime and clean, sharp sand, or other suitable material; or
>
> (ii) With good cement; or
>
> (iii) With good cement mixed with clean, sharp sand."

This clause was considered in Bradley v. Cuckfield R. D. C., 1895, 64 L. J. Q. B. 571; Salt v. Scott Hall, 1903, 2 K. B. 245, 72 L. J. K. B. 627, and Pomeroy v. Malvern U. D. C., 1903, 89 L. J. 555.

In Salt v. Scott Hall, Alverstone, C.J., said:—

> "We are asked to say that the by-law in question, which requires every new building to be inclosed with walls of incombustible material, is unreasonable, and therefore void, because these by-laws do not contain a provision empowering the local authority to suspend its operation in exceptional circumstances. It would no doubt be more satisfactory if the by-laws contained such a provision, but we cannot hold that the fact that they do not is of itself sufficient to render the by-law unreasonable. These by-laws are identical in terms with those which were approved in Bradley v. Cuckfield Union 2, and if we held this by-law unreasonable our decision would be in conflict with that case. Moreover, it seems that these by-laws are the model by-laws which have been adopted in urban districts throughout the country with the sanction of the Local Government Board, and there must be many places in which such a by-law as this would be most salutary and prudent. The very statement that it would be desirable that the local authority should have a dispensing power in exceptional cases implies that this must be so. There are also no doubt districts in which, though the by-law may serve no useful purpose, the discretionary power has been conferred upon the local authority. If we held this by-law unreasonable, our decision would thus be too far-reaching in its application, and might be attended by very serious consequences."

And Channel, J., said:—

> "I am of the same opinion. It seems to me that all by-laws relating to the construction of buildings ought to contain a dispensing power enabling the local authority or their authorized officer to say that a particular building is of an exceptional character, and that the hard-and-fast rule laid down by the by-law ought not to apply to it. If, however, every set of by-laws which did not contain some such dispensing power were held unreasonable, and therefore invalid, it would follow that proceedings could not be taken under them, even in the case of buildings which were not of an exceptional character. Moreover, to hold such by-laws invalid would not be in accordance with the principle on which the Court now acts, of declining to set aside by-laws which a local authority has deliberately adopted, on the ground that the local authority are the best judges whether or not a particular by-law is required in the district. For these reasons it seems to me that it would be mischievous to hold that every set of

by-laws which purported to lay down a hard-and-fast rule for all buildings was necessarily invalid because it did not comprise a dispensing clause. It is true that if the by-laws be not set aside, they will still apply to the exceptional cases. But no injustice need result, for the local authority need not take proceedings, and if they do the justices have a discretion under s. 16 of the Summary Jurisdiction Act, 1879, when an exceptional case comes before them, if they think it of a trifling nature, to inflict no punishment, or a merely nominal punishment. As the justices have these powers, by-laws, which unfortunately omit to make special provision for exceptional cases, need not necessarily be set aside, because exceptional cases may arise."

In 1904 the Local Government Board issued a revised memorandum containing certain exemptions, and subsequently by-laws have been approved which exempt the erection of small buildings of various kinds.

The model by-laws also contain special provisions as to foundations.

Sub-section (4) is confined to regulating as "to size and strength" in order to insure stability and safety.

The by-law may provide that every person intending to erect, alter or repair a building shall give notice in writing of such intention, and, at the same time, deliver plans for inspection.

In 1912 the Local Government Board sent out a memorandum which contained the following:—

"It has also been alleged that, particularly in some rural districts, the requirements of the by-laws exercise an unduly restrictive effect upon the erection of small dwelling houses. By-laws with respect to new streets and buildings are intended to operate in the interest of the inhabitants and to prescribe reasonable standards to which building development may fairly be called upon to conform with a view to securing stability, protection from fire and healthy conditions, and it is obviously undesirable that the by-laws in any area should afford any ground for the suggestion that they are either unnecessarily restrictive or obsolete in character.

"New methods of construction and design will almost inevitably demand periodical revision of by-laws. For example, the earlier by-laws with respect to walls, which were framed with particular reference to brick constitution and imposed restrictive conditions as to thickness and the use of materials, are inappropriate to types of construction now in use, such as building with hollow blocks or slabs of terra cotta, concrete and the like material, reinforced brick work, or reinforced concrete; and many of the older by-laws do not provide for hollow and half-timbered walls and steel or other framed walls hung with tiles, slates, etc., filled in where necessary with incombustible materials. Certain relaxations are now frequently introduced in connection with wall construction where the use of piers is employed, and also in the thickness of the walls of outbuildings. . . . There are many in whose districts by-laws have been in force practically unaltered over a long period of years, by-laws which were framed before the modern method and materials came into vogue and which consequently are not so drawn as to allow or to regulate their use. It therefore behooves all local authorities from time to time to consider the terms of the by-laws in force in their areas, so as to see that they are sufficient to meet present day requirements. . . . The Board have also tentatively framed for working purposes a series intermediate in character between the urban and rural model codes suitable for rural areas which are beginning to assume urban characteristics. This series contains the same clauses with respect to the level, width and construction of new streets as the urban model, but includes only those clauses concerning the structure of walls, foundations, roofs and chimneys of new buildings which are the most important for securing stability and the prevention of fires, and for purposes of health. It also contains a special clause partially exempting small dwellings, where sufficiently isolated, from the structural requirements relating to walls."

Mandamus to Approve Plans.—See R. v. Preston R. D. C. 1912, 106 L. T. 37. In *Davis v. Bromley Corporation*, 1908, 1 K. B. 170, 77 L. J. K. B. 51, the local authority refused to approve plans. The plaintiff brought an action claiming that the refusal was wrongful and malicious and asking for damages. The C. A. upheld a judgment in favour of the defendants, Vaughan Williams, L J., saying:—

> "The only question we have to deal with in this case is whether an action will lie against the defendant corporation for their refusal to approve of certain building and drainage plans which have been submitted to them by the plaintiff. It is not contested that the legislature has given the power to this particular body to decide the question whether the plans are in accordance with the by-laws. It is admitted that the corporation in this matter were not exercising judicial functions, but were exercising a discretion which is vested in them by statute, and the whole object of bringing the action is to see whether the plaintiff cannot have the decision of the corporation to disapprove the plans overruled. His case is that the decision of the corporation is so unreasonable that it affords grounds for saying that they were actuated by motives by which they ought not to have been actuated—namely, by a feeling of bitterness against the plaintiff arising by reason of previous litigation. But even if the facts are such as to suggest that the corporation were actuated by any improper motive, it remains that the legislature has vested in this body the right and duty of deciding whether such plans should be sanctioned. And where a statute has vested in a local authority such a duty and power in my opinion no action will lie against the local authority for refusing to give their sanction, even though there were evidence to show that the members of the corporation were actuated in their decision by a feeling of bitterness or some other indirect motive against the plaintiff. It is not the intention of the legislature that a person who desires an opportunity of getting rid of such a decision should bring an action against the council. As has been pointed out by Mr. Justice Bigham, in the course of the argument, it is obvious that a jury would not be a convenient tribunal for trying such a question. If it is said that the result of our so holding is that a person in the position of the plaintiff will be left without a remedy, the answer is that—though no action for damages will lie—he still has a remedy in a case in which the facts are such that the Court would arrive at the conclusion that, though there was a pretence of expressing the power vested in the corporation, yet in truth and in fact, the corporation never did address their minds to the question before them. In such a case the King's Bench Division would grant a mandamus directing the corporation to perform their statutory duty. The appeal must therefore be dismissed."

A mandamus will not lie if the local authority in the *bona fide* exercise of their powers refuse approval of plans on the ground that they do not conform to the by-law. The principle which applies is that the exercise of its discretion by a tribunal in respect of a matter within its jurisdiction when that discretion has been honestly and *bona fide* exercised, cannot be called in question by mandamus. Smith v. Chorley D. C., 1897, 1 Q. B. 678; 66 L. J. Q. B. 427.

For a discussion of whether the application should be for a prerogative writ, or an action for a mandamus: see full discussion of the earlier authorities by Kennedy, J., in the same case in which he adopted the statement of Day, J., in Baxter v. London C. C., 63 L. T. 167, as follows:—

> "The true and only remedy which the plaintiff has for the purpose of enforcing the rights which I am of opinion he has got, is by a prerogative writ of mandamus. When I objected that this was a matter for a mandamus, I was answered that this was an action for a mandamus. It is an action for a mandamus based upon the Common Law Procedure Act, 1854, and the action for a mandamus is simply an attempt to engraft upon the old common law remedy a right in the nature of specific performance. When private persons had rights one against the other, the Court had power to grant a mandamus, or direct

specific performance, or something in the nature of an injunction, to command that the right claimed by the one party should be acceded to by the other. But it was never contemplated that the action for a mandamus was to supersede the prerogative writ of mandamus. In this case no action will lie. I am perfectly clear that this is not an action which will lie between the parties, or a case in which a statutable mandamus will be applicable because no action would lie, and a mandamus is only granted as ancillary to the action, and for the purpose of enforcing the private right in respect of which the private litigation has arisen. It was never contemplated that a private mandamus should be granted in cases in which a prerogative mandamus had, from time whereof memory does not run to the contrary, been alone the effective remedy."

In Frankel v. Winnipeg, 1913, 23 M. R. 296, 8 D. L. R. 219, 3 W. W. R. 405, 22 W. L. R. 597, a motion was made with leave of Macdonald, J., for a mandamus to compel the city of Winnipeg and the building inspector to issue a building permit. No action was commenced. The motion came before Galt, J., who considered the procedure irregular. He expressed the view that even if the motion had been for a prerogative writ on the relation of the prosecutor, the relief asked was in respect of merely a private right, and that the remedy was by an ordinary action, as in Holmes v. Brown, 1908, 18 M. R. 48. But see Smith v. Chorley D. C., *supra.*

The Plans, so far as this section is concerned, can only be objected to by reason of some non-compliance with a regulation dealing with "the size and strength of brick, stone, cement and concrete walls, and of the beams, joists, rafters, roofs and their supports." The plans are to be produced for the purpose of enabling these matters to be regulated. No power exists under this sub-section to regulate the size of rooms, windows, ventilation, sanitary arrangement, or any other matter.

So far as this section is concerned, if the plans show that the building conforms to the requirements of the by-law, authorized by the section, the person desiring to erect a building has a legal right to proceed with its erection, and cannot be held up because of arbitrary refusal to approve of the plans on other grounds: Loo G. Wing v. Amor, 1909, 10 W. L. R. 383 (refusal of building permit on grounds not authorized by the Act): R. v. Nunn, 1905, 15 M. R. 288 at 296 (power to require production of plans limited to cases of regulating under the enabling section).

The section now refers to both external and internal walls: See R. v. Copp, 1889, 17 O. R. 742.

Cab Stands and Booths.

400.—(5) For authorizing and assigning stands on the highways and in public places for motor vehicles not kept for hire, and for motor vehicles and other vehicles kept for hire, and regulating the use of the said stands, and for authorizing the erection and maintenance of covered stands or booths on the highways and in public places for the protection or shelter of the drivers of such motor vehicles and other vehicles kept for hire; but no such covered stand or booth shall be placed upon the sidewalk without the consent of the owner and occupant of the adjoining land. 8 Geo. V. c. 32, s. 6. 3 & 4 Geo. V. c. 43, s. 400 (5).

Public Health Amendment Act, 1890 (Imp.), s. 40, confers similar powers on urban authorities. For model by-law and regulations, see Mackenzie v. Handford Model By-laws, 1890, Vol. II., p. 170.

The standing of cabs or vehicles on the highways may amount to a nuisance: See Att.-Gen. v. Brighton, 1900, 1 Ch. 276, 69 L. J. Ch. 204. This section enables urban councils to authorize what would, unless so authorized, be illegal.

Consent of Owner and Occupant.—If a by-law is passed without such consent, the question arises, can any ratepayer maintain proceedings to quash or succeed in an action to have the by-law declared illegal, or can the owner or applicant of the adjoining land alone be heard to complain. In C. P. R. v. Toronto, 1902, 10 W. R. 255, a by-law was passed assigning Station street as a cab stand, although there was in existence an agreement between the city and the persons who dedicated the street, that the city would not assign any part of the street as a cab stand except on request of the dedicating owners, and this agreement had been confirmed by statute. Armour, C.J.O., raised the question of the right of any ratepayer to complain that the by-law had been passed in breach of the agreement, but did not decide it, as the Court held that the by-law which had been passed at the request of cab-owners, from whom the city had exacted an indemnity, was illegal on the ground that the city had attempted to exercise its powers not *bona fide*, and in the interest of the public generally, but at the request and in the private interest of a few members of the public, and upon being indemnified by them: Re Morton and St. Thomas, 1881, 6 A. R. 323, and Re Peck and Galt, 1881, 46 U. C. R. 211, were considered analogous cases.

The by-law may prohibit cabs, etc., from standing on any street while waiting for hire, except at the places authorized, as was the case in R. v. Maher, 1905, 10 O. L. R. 102 C. A. Where standing under an agreement with an hotel company, so to stand ready for immediate use by guests of the hotel, was held not to be a violation of the by-law.

Skinner v. Usher, 1872, L. R. 7 Q. B. 423; Curtis v. Embery, 1872, L. R. 8, 369, 42 L. J. M. C. 39 (Railway grounds; Bateson v. Eddy, 1874, 38 J. P. 598.

Marks v. Ford, 1881, 45 J. P. 157; Cocks v. Wagner, 1894, 70 L. T. 403; Jones v. Short, 1900, 64 J. P. 309; Cavill v. Amos, 1900, 64 J. P. 309; Hawkins v. Edwards, 1901, 2 K. B. 169.

Cellars—Plans of.

400.—(6) For requiring owners and occupants to furnish the council with the levels, with reference to a line fixed by by-law, of their cellars heretofore or hereafter dug or constructed, and for taking such other means as may be deemed necessary for ascertaining such levels.

(7) For requiring to be deposited with an officer named in the by-law, before the erection of a building is commenced, a ground or block plan of the building, with the levels of the cellars and basements, with reference to a line fixed by by-law. 3 Edw. VII. c. 19, s. 554, pars. 2-3, *amended*. 3 & 4 Geo. V. c. 43, s. 400 (6-7).

The Elevation of a Street throughout its course, as well as the levels of all cellars, may be fixed with reference to a datum line, which, so far as buildings are concerned, is to be established by by-law.

There is no power to approve or withhold approval by such plans. They are merely to be deposited.

The information called for has a value in respect to the effectual drainage of buildings.

Under s. 157 of the Public Health Act, 1878 (Imp.), referred to under s.-s. 4 *supra*, levels of cellars and basements may be regulated by by-law for the purpose of health. A similar power is conferred by s. 399, s.-s. 10. The Provincial Board of Health might deal with the matter by regulations under R. S. O. c. 218, s. 8.

Children Riding behind Vehicles.

400.—(8) For prohibiting children from riding on the platforms of cars, or riding behind or getting on waggons, sleighs or other vehicles while in motion, and for preventing accidents arising from such causes. 3 Edw. VII. c. 19, s. 540, par. 5.

Coasting and Tobogganing.

400.—(9) For prohibiting or regulating coasting or tobogganing on the highways. 3 Edw. VII. c. 19, s. 540, par. 6; 3 & 4 Geo. V. c. 43, s. 400 (8-9).

Dogs—Licensing of.

(9*a*) For licensing and requiring the registration of dogs and for imposing a license fee on the owners, possessors or harbourers of them, with the right to impose a larger fee in the case of bitches, or for each additional dog or bitch where more than one is owned, possessed or harboured by any one person, or in any one household:—

(*a*) Where the license fee is equal to, or exceeds the amount of the tax imposed by the Dog Tax and Sheep Protection Act, ss. 3 to 8 of that Act shall not apply while the by-law remains in force, and it shall not be necessary to enter any particulars as dog taxes on the collector's roll. 5 Geo. V. c. 34, s. 25.

Sections 3 to 8 of the Dog Tax and Sheep Protection Act, R. S. O. 1914, c. 246, are as follows:—

Tax on Dogs.—3. (1) Subject to the provisions of paragraph 2, s. 406 of the Municipal Act, and of s.-s. 3 of this section, there shall be levied annually in every local municipality, upon the owner of each dog therein, an annual tax of $1 for a dog, if only one, and $2 for each additional dog, owned by him, and $3 for a bitch, if only one, and $5 for each additional bitch owned by him.

(2) Upon the production of a certificate in writing of a veterinary surgeon that a bitch has been spayed, such bitch shall be taxed at the same rate as a dog.

(3) The owner of a kennel of pure bred dogs which are registered in "The Canada Kennel Register," may in any year pay to the treasurer of the municipality $10 as a tax upon such kennel for that year, and upon the production to the assessor of the treasurer's certificate of payment, the owner of such kennel shall be exempt from assessment and any further tax in respect of such dogs for that year. 2 Geo. V., c. 65, s. 3.

4. The assessors shall, at the time of making their annual assessment roll, in a column prepared for the purpose, opposite the name of every person assessed, and also opposite the name of every resident inhabitant not otherwise assessed, being the owner of any dog, the number of dogs, bitches and spayed bitches, distinguishing them, by him owned. 2 Geo. V., c. 65, s. 4.

5. The owner of any dog shall be required by the assessors to deliver to them, in writing, a statement of the number of dogs owned by him; and for any neglect or refusal to do so, and for every false statement made in respect thereof, he shall incur a penalty of $5. 2 Geo. V., c. 65, s. 5.

6. The collector's roll shall contain the name of every person entered on the assessment roll as the owner of any dog with the tax hereby imposed, in a separate column; and the same collector shall proceed to collect the same, and at the same time and with the like authority, and make returns to the treasurer of the municipality in the same manner, and subject to the same liabilities in all respects for paying over the same to the treasurer, as in the case of other taxes levied in the municipality. 2 Geo. V., c. 65, s. 6.

7.—(1) Where any person has been assessed for a dog and the collector has failed to collect the tax imposed by this Act, he shall report the same under oath to a Justice of the Peace, who shall, by an order under his hand and seal to be served by any constable, require such dog to be destroyed by the owner thereof, or by a constable.

(2) For the purpose of carrying out such order the constable may enter on the premises of such owner and destroy such dog.

(3) A collector who neglects to make such report within the time required for paying over the taxes levied in the municipality, shall incur a penalty of $10. 2 Geo. V., c. 65, s, 7.

8. The money collected and paid to the municipality under the preceding sections shall constitute a fund for satisfying such damages as arise in any year from dogs killing or injuring sheep in the municipality, and the residue, if any, shall form part of the funds of the municipality for the general purposes thereof; but when it becomes necessary in any year for the purpose of paying charges on the same, the fund shall be supplemented to the extent of the amount which has been applied to the general purposes of the municipality. 2 Geo. V., c. 65, s. 8 (1).

Claim against Municipality for Loss of Sheep.—Section 18 of the Dog Tax and Sheep Protection Act, R. S. O. 1914, c. 246, is as follows:

(1) The owner of any sheep killed or injured by any dog, the owner of which is not known, may within three months after the killing or injury apply to the council of the municipality in which such sheep was so killed or injured, for compensation for the injury; and if the council is satisfied that he has made diligent search and inquiry to ascertain the owner and keeper of such dog, and that he cannot be found, they shall award to the aggrieved party for compensation a sum not exceeding two-thirds of the amount of the damage sustained by him; and the treasurer of the municipality shall pay over to him the amount so awarded.

(2) The council may, before determining, examine parties and witnesses under oath.

In Re Hogan v. Township of Tudor, 1915, 34 O. L. R. 571, a writ of prohibition was granted to restrain a County Court Judge from giving judgment against the township in an action against the township for the value of sheep killed by dogs. Boyd, C., said:

> "The application for damages was made under the Dog Tax and Sheep Protection Act, R. S. O. 1914, c. 246, s. 18, to the municipal council, who refused to entertain the claim or give relief. The grounds on which the council acted do not appear—but that makes no difference in the result of the application. There is a statutory right or relief given to sheep-owners on an application satisfactory to the council. But nothing in the Act or otherwise makes the council liable in a court of law for the amount of such damage. The special relief vouchsafed by the Legislature cannot be transformed or enlarged into a legal right of action against this public body.
>
> "The further prosecution of the action should be inhibited."

Drainage Purposes—Acquiring Land in Another Municipality for.

400.—(10) For acquiring with the consent of the council thereof, land in any other municipality required for preventing such urban municipality or any part of it from being flooded by surface or other water flowing from such other municipality or for an outlet for such water; and for constructing, maintaining and improving drains, sewers and watercourses in the land so acquired. 3 Edw. VII. c. 19, s. 554, par. 4.

As distinguished from section 398 (1) and section 399 (56), this subsection does not refer to a drainage system within a municipality, although possibly extending without it constructed to carry off water from lands within the municipality. It refers to a system of drainage constructed in another municipality for the purpose of preventing water from that other municipality from entering into the municipality which is constructing the work. A preventive work of the kind authorized can only be undertaken with the consent of municipality in which the work is to be located.

The consent should be given by by-law. See section 249 (1). There is no provision as in 399 (56) for an arbitration to determine whether or not the work can be done and on which conditions. The consent can be supplied at the discretion of the council.

The powers conferred by the section may be compared with those conferred by section 285 of The Public Health Act, 1875 (Imp., which is as follows:—

> "285. Any local authority may, with the consent of the local authority of any adjoining district, do all or any of such works and things as they may execute and do within their own district, and on such terms as to payment or otherwise as may be agreed on between them and the local authority of the adjoining district; moreover, two or more local authorities may combine together for the purpose of executing and maintaining any works that may be for the benefit of their respective districts or any part thereof. All moneys which any local authority may agree to contribute for defraying expenses incurred under this section shall be deemed to be expenses incurred by them in the execution of works within their district."

In Jones v. Conway, 1893, 2 Ch. 603, 62 L. T. Ch. 767, a local authority having obtained the necessary consent, under section 285, above mentioned, was proceeding to execute works outside its district. North, J., said:—

"I think that section 285 is to enable the local authority acting under it to do certain things as within their powers, which, but for that section, would have been outside their powers. They can do certain things in an adjoining district without the imputation of acting *ultra vires* if they have got the consent of the local authority of that district; but, in my opinion that has not the effect of making the adjoining district, or that portion of it, their own district."

Drill Sheds and Armouries.

(11) For acquiring land in the municipality for a drill shed or armoury for any militia or volunteer corps having its headquarters in the municipality. 3 Edw. VII. c. 19, s. 534, par. 4, redrafted.

This section does not authorize the spending of money to construct a drill shed or armoury. See s.-s. 10, where in addition to power to acquire lands, the power to construct works is given.

The land may be expropriated. See s. 7.

Elevators, Hoists, etc.

400.—(12) Subject to The Ontario Factories Act and any other Act relating to cranes, elevators and hoists, for regulating the construction of and for inspecting cranes, hoists and elevators, and for regulating the manner in which elevators which are to be operated automatically or otherwise in buildings, shall be constructed and operated, and for licensing elevators and hoists used by the public or by employees. 3 Edw. VII. c. 19, s. 541, pars. 5, 6, *redrafted;* 3 & 4 V. c. 43, s. 409 (10-12).

The Ontario Factories Act.—The reference is to the Factory, Shop, and Office Building Act, R. S. O. 1914, c. 229, which contains the following provisions:—

58.—(1) Subject to the regulations in every factory, shop and office building:

(a) the opening of the hoistway, hatchway and wellhole used for every power elevator shall, at each floor including the basement, be provided with and protected by good and sufficient trap doors or self-closing hatches, or in the case of an elevator not operated by hand power, by gates closing automatically not less than five feet six inches high, which may be made in sections;

(b) the sides of the shafts on all floors including the basement, not guarded by gates, shall be protected by enclosures at least six feet high, approved by the inspector;

(c) where any elevator is enclosed in a tower having walls over six inches thick it may be provided with an extra operating rope outside the tower;

(d) in every case the elevator must be provided with a lock to secure the operating rope;

(e) where an elevator is operated by hand power the gates shall not be less than three feet in height and shall be automatic closing gates, and the sides not protected by gates shall be protected by enclosures not less than four feet in height approved by the inspector;

(f) a sign on which the word "dangerous" in letters not less than four inches in height is clearly painted shall be affixed or stencilled on the bottom rail of every gate where it will be plainly visible from the outside;

(g) the top of every elevator platform shall be provided with a sufficient guard to protect the occupants approved by the inspector;

(h) every elevator, whether used for freight or passengers, shall be provided with some suitable mechanical device to be approved by the inspector whereby the car or cab will be stopped and held in case of accident to the elevator or to the machinery, or appliances connected therewith.

(2) The Lieutenant-Governor in Council may by regulation prescribe such requirements in addition to or in substitution for the requirements of s.-s. 1 with respect to the use of elevators and hoists in factories, shops or office buildings, or in any class of factories, shops or office buildings.

(3) Every owner or employer who, after notice from the inspector, uses or permits to be used any elevator or hoist in respect of which the provisions of this section are not complied with, shall incur a penalty not exceeding $500, and in default of payment thereof shall be liable to imprisonment for any period not exceeding twelve months.

(4) Nothing in this section shall take away or interfere with the powers possessed by municipal councils under the Municipal Act in respect of hoists or elevators. 3-4 Geo. V., c. 60, s. 58.

The powers of urban councils are subject to the foregoing provisions, nevertheless these provisions are not to take away or interfere with the powers of councils. The effect seems to be that councils can by by-law impose additional safeguards and regulations, and may license all elevators and hoists used by the public or employees.

Cranes are not mentioned in the Act, but come within the requirements of s. 55 as to guarding machinery.

The provisions of c. 229 are for the protection of employees, and an employee injured by reason of any breach of statutory duty imposed by the Act has an action, but breach of a by-law dealing with the same subject matter aside from exposing the offender to a penalty, is only evidence of negligence. See discussion.

Fire Engines, etc.—Right of Way on Highways.

400.—(13) For providing that the reels, engines and vehicles of the Fire Department shall have the right of way on the streets and highways while proceeding to a fire or answering a fire alarm call. 1 Geo. V. c. 7, s. 11; 3 & 4 Geo. V. c. 43, s. 400 (13).

Right-of-way on Highways.—Travelling on highways is regulated by the Highway Travel Act, R. S. O. 1914, c. 206. This Act provides that the penalty or imprisonment under it shall be a bar to the recovery of damages by the injured person. Rules are laid down for vehicles meeting other vehicles turning to the right so as to allow the vehicle so met one-

half of the road (s. 3), and for vehicles overtaking others to turn to the left, while the vehicle overtaken is to turn to the right so as to leave one-half of the road free: s. 4.

Sub-section 13 enables urban councils to suspend by by-law these and other rules of the road laid down in the general Act, so as to give the vehicles of the Fire Department the right-of-way while proceeding to a fire or answering a call. The by-law may provide for all vehicles to stop and turn out till the fire appliances pass and may, of course, impose penalties.

While the right-of-way may be given by by-law to fire appliances, there is no law which relieves the drivers of these appliances of the duty to take every possible precaution to avoid injury to persons and vehicles on the highway even if they have failed to yield the right-of-way or have become excited and made a wrong turn. See the remarks of the Court of Appeal in Scudden County Council, 1909, The Times, 15th July, 31 Vic. c. 365. In Hesketh v. Toronto, 1898, 25 A. R. 449, the city was held responsible where the horses drawing a fire engine had not been kept under proper control.

The argument that protection from fire was a function of the public government and that the doctrine *respondeat superior* did not apply to firemen was rejected, the Court holding that negligence of firemen in the course of their employment is the negligence of their employers on the principle laid down in the leading case, Mersey Docks' Trustees v. Gibbs, 1866, L. R. 1 H. L. 93, and followed in every subsequent case. See notes to s.-s. 14.

Firemen, etc.

400.—(14) For appointing fire wardens, fire engineers and firemen and for promoting, establishing, and regulating fire, hook-and-ladder, and property saving companies. 3 Edw. VII. c. 19, s. 537, par. 6; 3 & 4 Geo. V. c. 43, s. 400 (14).

Fire Brigades—Salvage Corps.—Only urban municipalities are given power to appoint firemen and salvage corps. Townships must rely on volunteer brigades.

Appliances may be provided by all municipalities under s. 398 (15), and by towns and villages under 407 (1).

Lands and Firehalls, etc.—Under s. 322, by-laws may be passed for acquiring any land required for the purposes of the corporation and for erecting buildings thereon.

Powers of Firemen at Fires.—Under s.-s. 34 *infra*, by-laws may be passed for regulating the conduct and enforcing the assistance of persons present at fires. It is to be noted that s.-s. 14 provides only for appointing firemen while it provides for promoting, establishing and regulating salvage companies. The power to regulate the fire brigade must be implied. Power at fires may be conferred on the brigade under s.-s. 34.

The Town Police Clauses Act, 1847 (Imp.), s. 32, enables commissioners to employ firemen and to "make such rules for their regulation as they think proper."

A member of a brigade appointed under the power at the instructions of the foreman, refused to allow the foreman of a volunteer brigade to enter the premises. The latter struggled to get in and was charged with assault and convicted. The magistrate stated a case which came before Pollock, B., and Kennedy J. Pollock, B., after stating the facts and referring to s. 32, said:—

"This case raises a question of some importance, due to the overzeal of the member of a volunteer fire brigade, who was anxious to assist in putting out a fire. A house at Hounslow was on fire, and the local fire brigade, established under Act of Parliament, came to put out the fire. The first question to consider is the circumstances under which they come upon the premises, and their position when there. The answer to this depends partly on the construction of the Act of Parliament under which they were appointed and partly on the inference to be drawn from the circumstances of the case. The local fire brigade was established under the Public Health Act, 1875, with which is incorporated the 32nd section of the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 87), which enables the authorities, amongst other things, to employ a proper number of persons to act as firemen, and to make such rules for their regulation as they think proper.

"It seems to me that these powers may reasonably be held to include the power to exclude persons from entering the premises whose presence might cause inconvenience. Under these circumstances the assent of the owner may be reasonably inferred to the presence of the local brigade for the purpose of carrying out the provisions of the statute. That being so, the respondent is instructed by his foreman that he is not to allow anybody to come into the house. The appellant then presents himself with the object of obtaining an entrance to the premises in his capacity as a member of another brigade. All he did was no doubt done with perfect *bona fides;* but when told not to enter, he had no right to force his way in and to act as he did. As for as I can judge, he had no right at all to demand entrance to the premises. It has been urged that because the appellant's foreman was there helping to assist, the appellant was there with the same rights: but I cannot draw any such inference. It seems to me that the magistrates have come to a very sound conclusion, and have put a very reasonable construction on the Act of Parliament to which I have referred. The conviction must be affirmed." Carter v. Thomas, 1893, 1 Q. B. 673, 62 L. J. M. C. 104.

The Kettering Improvement Act, 1904 (Imp.), 4 Edw. VII., p. 23, provides:—

"111. **Power to Police Constable, etc., to Enter and Break Open Premises in Case of Fire.**—Any police constable acting under the orders of his superior officer, and any member of the fire brigade of the council being on duty, and any officer of the council may enter, and, if necessary, break into any building in the district, being or reasonably supposed to be on fire, or any building or land adjoining or near thereto without the consent of the owner or occupier thereof respectively, and may do all such acts and things as they may deem necessary for extinguishing fire in any such building or for protecting the same or rescuing any person or property therein from fire."

Captain of Fire Brigade or Other Officer to have Control of Operations.—"(1) The captain or superintendent of the fire brigade of the council or other officer of such fire brigade for the time being in charge of the engine or other apparatus for extinguishing fires attending at any fire within the district shall from the time of his arrival and during his presence thereat have the sole charge and control of all operations for the putting out of such fire, whether by the council or any other fire brigade, including the fixing of the positions of fire engines and apparatus, the attaching of hose to any water pipes or water supply and the selection of the parts of the building on fire or of adjoining buildings against which the water is to be directed.

"(2) The officer in charge of the police at any fire in the district shall have power to stop or regulate the traffic in any street whenever in his opinion it is necessary or desirable to stop or regulate such traffic for the purpose of extinguishing the fire or for the safety or

protection of life or property, and any person who wilfully disobeys any order given by such officer in pursuance of this section shall be liable to a penalty not exceeding five pounds."

Firemen, etc.—Medals, Rewards and Gratuities to.

400.—(15) For providing medals or rewards for persons who distinguish themselves at fires; and for granting gratuities to the members of the fire brigade who have become incapacitated for service on account of injuries or ill-health caused by accident or exposure at fires, or from old age or inability to perform their duties, and for granting pecuniary aid or other assistance to the widows and children of persons killed by accident while in the discharge of their duties at fires, or who die from injuries received or from illness contracted while in the service of the corporation as firemen. 3 Edw. VII. c. 19, s. 592, par. 2; 3 & 4 Geo. V. c. 43, s. 400 (15).

Pensions for Firemen.—These powers are wide enough to authorize the establishment of a pension scheme. Such a scheme involves the incurring of a debt, payment of which can not be provided for in the estimates of the current year and must be submitted to vote of the electors: Sec. 289 (1).

Sending Brigade and Appliances into Another Municipality.—The Town Police Clauses Act, 1847 (Imp.), provides:—

"33. The commissioners may send such engines, and their appurtenances, and the said firemen, beyond the limits of the special Act, for extinguishing fire in the neighbourhood of the said limits; and the owner of the lands or buildings where such fire shall have happened shall in such case defray the actual expense which may be thereby incurred, and shall also pay to the commissioners a reasonable charge for the use of such engines with their appurtenances, and for the attendance of such firemen; and in case of any difference between the commissioners and the owners of the said lands or buildings, the amount of the said expense and charge, as well as the propriety of sending the said engines and firemen as aforesaid for extinguishing such fire (if the propriety thereof be disputed), shall be determined by two justices, whose decision shall be final; and the amount of the said expenses and charge shall be recovered by the commissioners as damages."

In Janes v. Staines U. C., 1900, 83 L. J. 426 (d), it was held that the superintendent of the fire brigade of an urban district has, in the absence of express regulations, an implied authority to call in where necessary another brigade, which is entitled to remuneration for the work done and the use of the engine.

Closing Streets to Traffic and Fires.—By-laws under s. 400 (49) may enable the police or the fire brigade to do this.

Breaking into Houses on Fire.—By-laws under s. 400 (32), (33) and (35) may authorize the police or fire brigade to do this.

Fires—Prevention of.

400.—(16) For regulating the construction, alteration or repairs of buildings. 3 Edw. VII. c. 19, s. 542, par. 1, cl. (*a*); 1 Geo. V. c. 57, s. 9.

(17) For prohibiting the erection of wooden buildings or wooden additions, and of wooden fences, or the removal of any such building or fence from one place to another in defined areas of the municipality.

See R. v. Chisholm, 1910, 15 W. L. R. 650.

(18) For prohibiting the erection or placing within defined areas of buildings or additions to them with main walls other than of brick, [cement, concrete] iron or stone, and roofing of other than incombustible material.

(19) For regulating the repairing or alteration of roofs or the external walls of existing buildings within such areas, so that the buildings may be as nearly as practicable fireproof.

(20) For authorizing the pulling down or removal, at the expense of the owner, of any building or erection constructed, altered, repaired or placed in contravention of the by-law. 3 Edw. VII. c. 19, s. 542, par. 1, cls. (b-e); Edw. VII. c. 34, s. 17 (2-3).

(21) For authorizing the pulling down or repairing or renewing, at the expense of the owner, of any building, fence, scaffolding or erection, which, by reason of its ruinous or dilapidated state, faulty construction or otherwise is in an unsafe condition as regards danger from fire or risk of accident. 2 Geo. V. c. 40, s. 11.

(22) For prohibiting or regulating the use of fire or lights in factories, stables, cabinet makers' shops, carpenters' shops, paint shops, dye and cleaning works, and places where their use may cause or promote fire.

(23) For prohibiting or regulating the carrying on of manufactures or trades [which may be deemed] dan-

gerous in causing or spreading fire. 3 Edw. VII. c. 19, s. 542, pars. 2, 3.

(24) For regulating and inspecting wires and other apparatus placed or used for the transmission of electricity for any purpose in or along any highway or on or in any building, and for requiring any such wire or other apparatus which is deemed unsafe or dangerous to be removed or repaired at the expense of the person to whom it belongs or who is using it. 3 Edw. VII. c. 19, s. 542, par. 3a; 9 Edw. VII. c. 73, s. 19.

(25) For regulating the construction of chimneys, flues, fireplaces, stoves, ovens, boilers or other apparatus or things which may be dangerous in causing or promoting fire, [and for removing at the expense of the owner any of them constructed in contravention of the by-law].

(26) For regulating the construction as to dimensions and otherwise, and for enforcing the proper cleaning of chimneys.

(27) For regulating the mode of removal and safe keeping of ashes.

(28) For regulating and enforcing the erection of party walls.

(29) For requiring the owners and occupants of buildings to have scuttles in the roof, with approaches, or stairs or ladders leading to the roof.

(30) For requiring buildings and yards to be put in a safe condition to guard against fire or other dangerous risk or accident.

(31) For requiring each inhabitant to provide as many fire buckets, in such manner and at such time as may be prescribed; and for regulating the inspection of them and their use at fires.

(32) For authorizing appointed officers to enter at all reasonable times upon any property, in order to

ascertain whether the provisions of the by-law are obeyed, and to enforce or carry into effect the same.

(33) For suppressing fires, and for pulling down or demolishing buildings or other erections when deemed necessary to prevent the spread of fire.

(34) For regulating the conduct and enforcing the assistance of persons present, and for the preservation of property at fires. 3 Edw. VII. c. 19, s. 542, pars. 4-13.

(35) For making such other regulations for preventing fires and the spread of fires as the council may deem necessary. *New.* 3 & 4 Geo. V. c. 43, s. 400 (16-35).

Oak Bay v. Gardner, 1914, 27 W. L. R. 960, was an action for a mandatory injunction requiring the defendant to pull down a wooden structure erected contrary to a building by-law. The Court of Appeal for British Columbia, McPhillips, J.A., dissenting, held that the action could not be maintained by the corporation but must be brought in the name of the Attorney-General. Tompkins v. Brockville Rink Company was followed. Atty.-Gen. v. Campbell, 1872, 19 Gr. 299, was approved. Most of the cases referred to in Part XVII. *supra*, were discussed.

The Prevention of Accidents by Fire in Hotels Act, R. S. O. 1914, c. 237, contains regulations as to fire escapes in hotels. Section 11 provides:—

> "11. Nothing in this Act shall affect any by-law relating to the matters mentioned herein lawfully passed by a municipal council, or the authority of a municipal council to pass any such by-law imposes additional or more stringent requirements than those imposed by this Act. 3-4 Geo. V., c. 63, s. 11."

Regulating the Construction, etc., of Buildings.—The by-law may provide that the building shall not be constructed, altered or repaired without a permit which may be refused if the work does not conform in all respects to the requirements of municipal by-laws or any of the general Acts, dealing with the construction or location of buildings.

It is the duty of an architect to be familiar with all statutes and by-laws regulating buildings. James v. Masters, 1893, 1 Q. B. 355. It is also the duty of the architect to submit plans and give notices when required, and even if the contractor has undertaken to do so the architect, if the contractor makes default, should either notify the owner, or act himself. Lee v. Walker, 1872, L. R. 7 C. P., p. 121; 41 L. J. C. P. 91.

Requirements of By-laws Cannot be Waived.—In Yobbicum v. King, 1899, 1 Q. B. 444, 68 L. J. K. B. 560, the respondent was charged with unlawfully erecting a house, contrary to the requirements of a by-law, made under s. 157 of the Public Health Act, 1875 (Imp.). The plans had been approved by the local authority notwithstanding their non-compliance with the by-law. The magistrate dismissed the information, but on appeal his decision was reversed, following In re Macintosh and Pontypridd Co., 1891, 61 L. J. Q. B. 164. In holding that by-laws have the effect of law, which it is not within the power of any body which exercises public or quasi-public authority for the time being to dispense with, Day, J., pointed out that "such bodies are no more

entitled than private persons to dispense with the law of England: they have no dispensing power whatever, and are bound by the law like everybody else."

Deviations may be permitted in cases of over 100,000, under the express powers conferred by s. 410 (2). See Toronto v. Rogers, 1914, 31 O. L. R. 167 (App. Div.).

Approval of Plans.—Under s.-s. (4) power is given to require the submission of plans for approval. A by-law under s. 157 might require all plans to be in conformity with all laws, by-laws, rules and regulations in force in the municipality and make approval conditional on such conformity. Approval must mean "legal and lawful approval," and not simply an approval in fact, and an approval of plans which do not so conform will be of no effect. Yobbicomb v. King, 1899, 1 Q. B. 444, 68 L. J. K. B. 560.

A public body cannot bind themselves by tacit acquiescence even if they stand by and know that what is being done is being done illegally, and that they have power to interfere: Kerr v. Preston Corporation, 1876, 6 Ch. D. 464, 46 L. J. Ch. 409; Baxter v. Bedford Corporation, 1885, L. T. L. R. 424, was a case where a corporation waived its powers without having any right to do so.

As to Public Building.—See powers conferred by 399 (15) and the egress from Public Buildings Act, R. S. O. 1914, c. 235.

As to the Erection of Theatres.—The Lieutenant-Governor-in-Council may make regulations.

Under 400 (4) the Size and Strength of Walls, Beams, Joists, Rafters, Roofs and Their Supports.—All buildings to be erected, altered or repaired, may be regulated under s.-s. 16. The construction, alteration and repairs of buildings, may be regulated for the purposes of fire prevention. Regulation for any other purpose is not authorized by the section, *e.g.*, no power is conferred as in s. 157 of the Public Health Act, 1875 (Imp.), to regulate for purposes of health. See notes to s.-s. (4). This is a matter within the province of the Provincial Board of Health, under s. 8 of the Public Health Act, R. S. O. 1914, c. 218. The statutory by-law in force in every municipality under s. 115 of c. 218, deals with many matters of building construction, relating to health. Thus:—

"22. No house shall be built upon any site, the soil of which has been made up of any refuse, unless such soil has been removed from such site, and the site disinfected, or unless the soil has been covered with a layer of charcoal or ashes, covered by a layer of concrete at least six inches thick and of such additional thickness as may be requisite under the circumstances to prevent the escape of gases into such proposed house.

"23. The drain of every house connected with a sewer or cesspool shall be properly ventilated by means of a pipe extending upward from the highest point of the main soil or waste pipe, and also by a pipe carried upward from the drain outside the walls of the house. Such pipes shall be of the same dimensions as the main soil or waste pipe, and shall be constructed of the same material or of stout galvanized iron, and trap shall intervene between the ventilating pipes. If a trap intervenes between the sewer or cesspool and the ventilating pipes, then a four-inch ventilating pipe of such material shall be carried from a point between such trap and the sewer. Every ventilating pipe shall be carried above the roof of the house, and shall open above at points sufficiently remote from every window, sky-light, chimney or other opening, leading into any house to prevent the escape into it of gases from such ventilating pipes.

"24. No pipe from any drain or soil pipe shall be connected with any chimney in a dwellinghouse."

"25. Every house drain shall be constructed of vitrified earthenware or iron pipe; and every soil and waste pipe of iron pipe shall be rendered impervious to gas or liquids, by the joints being run with lead and caulked or constructed of lead pipe, weighing at least six pounds to the square foot; and the waste pipe from every closet, sink, tub, wash-basin, or other service shall have as near as possible to the point of junction with such service a trap so constructed, vented and furnished, that it shall at no time allow of the passage of gas into the house. And all joints shall be so constructed as to prevent gas escaping through them.

"26. The construction of any closet or other convenience which allows of the escape from it, or from the drain or soil pipe into the house of air or gas, is prohibited.

"27. No pipe supplying water to a water-closet or urinal shall be directly connected with a pipe supplying water for drinking purposes.

"28. Every person who erects or causes to be erected any building shall within two weeks after the completion thereof deposit with the local Board of Health plans of the drainage and plumbing of the same as executed; and in the case of any alteration of any such plumbing or drainage it shall be the duty of the owner of the house, within two weeks of the making of alteration, to deposit in the same manner a plan of any such alteration; if such alteration is made by an occupant it shall be his duty to deposit or cause to be deposited the plan."

These provisions may be amended by any council to meet special circumstances of the Provincial Board of Health consent.

Additional regulations as to buildings under the Factory Shop and Office Building Act, R. S. O. 1914, c. 229, should be noted. Nothing in Part I. of this Act is to, in any way, conflict with the power and duties of local Boards of Health, or the officers appointed under the Public Health Act. See s. 3.

What are not buildings?—A lean-to, conservatory, Hibbert v. Acton L. B., 1889, 5 T. L. R. 274. An enclosure round a boiler: Gery v. Block Iron Brewery, 1891, 55 J. P. 711; Meadow v. Taylor, 1890, 24 Q. B. D. 717, 59 L. J. M. C. 99. A shelter for machine: Southend-on-sea v. Archer, 1901, 70 L. J. K. B. 328. Sample made to order house: London County Council v. Humphreys, 1894, 2 Q. B. 755, 63 L. J. M. C. 215, in which Mills, J., said:—

"The things in question . . . are . . . in a sense structures; but they are clearly not things with which the Act was intended to deal . . . " The question still remains as to what things the Act did in reality intend to deal with—whether the buildings were to be used as buildings partially or otherwise; for in such a case any summer-house or structure of like character composed of wood and corrugated iron might fall within it. It seems to me impossible to draw any logical line as to the application of the Act, but I cannot think that s. 13 was ever intended to deal with the way.

"It seems to me that the question is to be answered in each case as it arises by considering the purpose for which each structure is erected and the object of placing it where it is placed. Using the test applied in Hall v. Smallpiece, 22 Law Times Rep. 752, and in the London County Council v. Pierce, 48 Law Times Rep. 675, we must ask ourselves what was the object for the erection of this particular structure? Was it intended for habitation or for use? Or was it merely intended for exhibition, so that it could be shewn to a possible customer, and purchased for removal and erection for habitation or use elsewhere? The latter is in my opinion the true object for its being erected where it was. It was placed there with a view to removal when a purchaser could be found. The principle laid down by the cases cited therefore, applies, and the structure being exposed solely for the purposes of exhibition and sale is a *fortiori* outside the provisions of the Act."

N.B.—The special statutory provisions under which the above cases were decided.

Private Right of Action in Respect of Breach of Building By-law.—Such an action was brought in Tompkins v. Brockville Rink Co., 1899, 31 O. R. 124. Meredith, C.J., after discussing Atkinson v. Newcastle, 1877, 2 Ex. D. 441; Groves v. Lord Wimborne, 1898, 2 Q. B. 402, said:—

"Looking then at the purview of the Legislature in the present case, it appears to me that the prohibition authorized to be enacted and which was enacted by the by-law is legislation not in the interest of any particular class of property owners, but of the public at large; and that it was not intended that any such right as the plaintiff asserts should be conferred, but that the intention was that the remedy for a breach of the municipal regulation was to be found within the four corners of the by-laws which the municipal council might see fit to pass.

"It is not without significance, I think, that the Legislature for the first time in 1873, conferred upon municipal councils power to legislate for the pulling down and removal of buildings which should be erected in contravention of its by-laws passed under the authority of the provisions of the Municipal Act, to which reference has been made, thus indicating, as it appears to me, that it was not intended that any one suffering injury from a contravention of the by-law should have the right which the plaintiff claims, but rather to leave the municipal councils to act as they deemed best in the public interests.

"When one looks at the number of acts lawful to be done at common law which municipal councils are by the Municipal Act permitted to prohibit or to regulate, and the number of duties which do not exist at common law which they are permitted to impose in respect of persons and property within their jurisdiction, one is startled by the proposition that in each case a duty is imposed for the failure to perform which an action lies by one who is injured owing to the non-performance of it.

"The by-law in question seems to me not to have been designed primarily or at all to keep down the fire insurance rates which the owners of property, whether adjacent or near to a building proposed to be erected, should be required to pay upon their property, but to have had a broader and more public purpose in view, namely, to prevent the spread of a conflagration in the more thickly built up parts of the municipality, the danger of which would be increased by the erection of wooden buildings and buildings constructed of material easily ignited by contact with fire.

"Nor can it have been intended, I think, that one who had erected a building in contravention of the provisions of such a by-law, the erection of which had excited no apprehension of danger from fire, nor led to any steps being taken for its pulling down or removal, should be liable to compensate every one who should be injured by fire communicated to his property owing to the inflammable character of the building erected, involving, it may be, the loss of many thousands of dollars . . .

"I have dealt with the case as if the prohibition of the erection of wooden buildings had been contained in the Municipal Act itself, for I can see no difference, as far as the questions involved are concerned, between that which is prohibited by direct enactment of the Legislature: Russ v. Rugge-Price (1876), 1 Ex. D. 269."

Fire Limits.—If the council desire to authorize the erection of a wooden building, within an area in which such erection is prohibited by by-law, the by-law must be amended so as to exclude the site. Such an amending by-law may be held bad if passed at the instance and for the benefit of particular persons. See C. P. R. v. Toronto, as not passed in good faith.

Under the power contained in s.-s. 17, there being at the time no power as given in s.-s. 18, a by-law which, instead of prohibiting the erection of wooden buildings, provided that buildings in the fire limits should be of stone, brick, iron, or other materials of an incombustible nature, was held *ultra vires*, as beyond the power in prohibiting build-

ings of combustible materials other than wood. Att.-Gen. v. Campbell, 19 Gr. 299. At the next session the original of s.-s. 18 was passed, which as originally passed did not include cement and concrete, and read as follows:—

"For prohibiting the erection or placing of buildings other than with main walls of brick, iron, stone, and roofing of incumbustible material, within defined areas" in city.

In Toronto v. Rogers, 1914, 31 O. L. R. 167, App. D., the city brought an action for an injunction to restrain a breach of the building by-law, which contained provisions which the corporation maintained were good under then s. 542 (b) and (c), now s.-ss. 17 and 18, omitting concrete and cement from the latter clause. Magee, J.N., thus discussed the by-law:—

"First, the by-law does not allow 'iron' to be used unless approved of, even though incombustible. Presumably the approval is to come from the inspector, without whose permit under s. 2 of the by-law no building can be commenced, but this is not made very clear. Nowhere in the by-law do I find iron approved of for walls. Section 48 declares that a roof covering of iron or other substances shall be considered incombustible if put on as prescribed. As the statute does not allow restriction upon the use of iron, the by-law exceeds in this respect the powers given, and, under the principle in Attorney-General v. Campbell, is invalid. In that case the defendant's building was of wood thickly plastered; that sort of construction, so far as regards stables, is in this by-law placed alongside of iron sheeting, such as the defendants proposed to use.

"Second clause (c) would apply to wooden buildings equally with others prohibitable thereunder. The by-law does not prohibit all wooden buildings, but expressly permits wooden sheds and, what it calls a 'wooden stable' if the latter be covered with roughcast or iron sheeting, and wooden sheds.

"Third, the statute allows prohibition of buildings other than with main walls of brick, iron or stone, and roofing of incombustible material. The by-law (ss. 140 and 48) permits roofs of shingles if laid on asbestos paper.

"Fourth, the statute refers to 'main walls,' the by-law only speaks of 'outside and party walls.' The latter term is defined in s. 5 (b) of the by-law. There may be many main walls which would not come under either of the terms in the by-law, and I do not find them dealt with elsewhere in the by-law. Therefore, the by-law does not give the protection which the statute intended.

"Fifth, the by-law permits walls of 'concrete' which was not mentioned in the statute of 1903, and also permits 'other approved of incombustible material." The Legislature has, since the by-law, added 'cement' and 'concrete' to the list of non-prohibitable materials, by the Municipal Act of 1913, 3 & 4 Geo. V., c. 43, s. 400 (18), but that amendment cannot affect the validity of the existing by-law. If the council had no right under clause (c) to except from prohibition walls of wood, the fact that concrete is incombustible does not make the by-law any more valid than if oak were mentioned instead of concrete.

"In respect of each of these last four matters, as well as the first, the by-law is, I think, invalid.

"These powers with regard to fire limits are intended for the benefit of the community, and should, I think, receive fair and reasonable interpretation, although it is said in Dillon on Municipal Corporations, 5th ed., s. 727, that, being in derogation of common right, they must be strictly construed in favour of the owners of buildings.

"The power to prohibit given by this statute, did not, however, in my opinion, give power to discriminate so as to prohibit some things while permitting others over which the power extended. If a municipal council were authorized to prohibit the sale of intoxicating liquors, it would not, I venture to think, forbid the sale of whisky while permitting the sale of beer and wine, nor could it permit the sale in a certain

class of building while forbidding it in others. So if the council were empowered, as it is under clause (b) to prevent the erection of wooden buildings, it could not forbid buildings of pine and permit those of oak or maple; nor could it say: 'We will permit workshops or stables of wood, but not residences or shops.' The power need not be exercised, but if it be, it is prohibition which is to be affected.

"If this be so, then where the power is to prohibit buildings not of a class having certain qualifications, then equally the prohibition, if any, must be general outside of the class; and, even if that were not so as a general proposition, the wording of clause (c) indicates that such was the intention in this case.

"Here the Legislature left it to the council to say whether any and what district needed protection from fire; but if such protection were declared needful, then the Legislature, and not the council, fixed the measure of it, and it was not left to the latter to say that it would not be so strict as the Legislature and would admit some buildings not of the class, or not having all the qualifications which the Legislature specified.

"The object of the enactment must be considered. If it were power to prohibit within a particular district buildings other than of Gothic architecture, the object would manifestly be not the prohibition of buildings, but the ensuring of Gothic buildings; and so here the object is not to give power to prohibit buildings, but to prohibit buildings lacking certain characteristics, and to ensure those characteristics. But, if the power is to be considered selective, a council might, under this clause, permit wooden buildings, and prohibit all others not of brick, stone, or iron, which would be the very opposite of the intention of the Legislature.

"The statute says the council may prohibit 'buildings, other than with main walls of brick, iron, or stone, and roofing of incombustible material.' By the change of conjunction from 'or' to 'and' coupling the roof with the walls, the intention of making a specification as it were for the ratepayers' protection and of preventing a council from allowing in a district needing fire protection brick walls with combustible roofs or incombustible roofs and wooden walls.

"Had it been intended to give the council such a wide discretion and power of selection, such intention could easily have been clearly expressed. It cannot readily be inferred that it was thought necessary to withhold from a discretionary power the very class of walls which a council exercising the least discretion would hardly think of prohibiting, or to save incombustible roofs from the exercise of a power given for the prevention of fires.

"The frame of the clause prohibiting buildings other than with such walls and roofs, leads me to conclude that the Legislature was not giving a power of discrimination. The words mean in effect 'buildings other than this class' or 'buildings without walls and roofs of this character.' If such a discretionary power was intended, then a council could under clause (c) in addition to brick, iron, and stone, allow roughcast or even wooden buildings, and exclude concrete or cement, or the converse. If the discretionary power was not intended, then the council would not permit, for instance, buildings of concrete as well as those of brick, iron or stone while forbidding all others, including wooden buildings. The council need not establish a limit at all under that clause, and could still resort to clause (b) to keep out wooden buildings from the same district, or any district not necessarily co-terminous with it.

"In the Municipal Act of 1913, s. 400, clause 18, which came in force on the 1st July, 1913, three months after the date of this by-law, there is a notable transposition of the words of clause (c), but making, as I think, even more plain my reading of it as a specification of the sort of buildings which alone could be erected in a fire limit. The addition therein of 'cement' and 'concrete' has already been referred to.

"This latter amendment can hardly have been made to prevent councils from disallowing walls of cement or concrete within fire

limits in these days when such buildings are so common, but would be more likely intended to take those two materials also out of the necessary totality of prohibition in a by-law under clause (c) and add them to the specifications adopted by the Legislature.

"The Municipal Act gives councils power to prohibit very many things, but I have not discovered any instance of the use of the word 'prohibit' alone, where discretion as to the extent of prohibition would manifestly be intended.

"There are some dicta in some American cases to the effect that a general power of prohibition will authorize partial prohibition, but in any of those which I have seen there were other words combined with 'prohibit,' and the discrimination was not such as here, and the difference between prohibition and mere restriction is pointed out in State v. Fay (1882), 44 N. J. Law 474.

"Even if I am wrong as to the power to permit other materials in the walls, there was not, I think, any power to permit roofs which did not come within the term 'incombustible' nor was there any power to prevent one land-owner from erecting a wooden or roughcast dwelling and allow his neighbour to erect such a stable or shed close by; nor was there any intention to permit the council to waive the requirement as to any main walls: nor was there any power to subject the use of iron to the approval of any one.

"I am, therefore, of opinion that the by-law was invalid."

Construction, Alteration or Repairs.—Under a power to regulate the erection of buildings and prevent the erection of wooden buildings or additions thereto in specified areas, a by-law was passed which provided that no roof of any building already erected in the fire limits should be relaid or recovered except in shingles laid in hair mortar not less than half of an inch in thickness, or with some other incombustible material. This provision was held *ultra vires*: R. v. Howard, 1884, 4 O. R. 377.

Under s.-s. 19, the original of which was passed in the next session after the decision in R. v. Howard, the necessary powers to regulate repairs to existing buildings in fire limits is conferred.

Under s.-s. 16, special regulations made under that sub-section must apply to all buildings wherever situated.

This section does not authorize a by-law, requiring all buildings damaged by fire, if rebuilt, or partially rebuilt, to be made fire-proof. Quinn v. Orillia, 1897, 28 O. R. 435. Referring to the power now found in 554, Street, J., said:—

"The statute only authorizes the regulating of the repair or alteration of the roof or external walls, and a by-law under it, could not provide that the repair or alteration of an interior wall should enable the council to insist upon the exterior walls and roof being replaced by fire-proof materials."

Existing Buildings.—The power to regulate repairs to existing buildings for fire protection purposes, is expressly given by s. 400 (9). In the absence of express power to regulate repairs to existing buildings a by-law which attempts to do so is *ultra vires*, and a conviction under it will be quashed. See R. v. Howard, 1883, 4 O. R. 377. The power was given after this decision. See R. v. Copp, 1889, 17 O. R. 738. The power to regulate the construction of buildings is a strong interference with the rights of property, considered necessary for the public good, and must not be carried farther than the ordinary measure of the words used by the Legislature will warrant.

A by-law cannot allow buildings, otherwise forbidden, to be erected with the consent of other land-owners: Re Kiely, 1887, 13 O. R. 451, or the consent of an officer of the corporation: Re Nash and McCracken, 33 U. C. R. 181 (slaughter houses): R. v. Webster, 1888, 16 O. R. 187 (manufactories dangerous in causing fire).

Pursuant to the power, the following by-law has been approved by the Local Government Board:—

"If any work to which any of the foregoing by-laws may apply be begun or done in contravention of any such by-law, the person by whom such work shall be so begun or done, by a notice in writing, which shall be signed by the clerk to the council, and shall be duly served upon or delivered to such person, shall be required on or before such day as shall be specified in such notice by a statement in writing under his hand or under the hand of an agent duly authorized in that behalf, and addressed to and duly served upon the council, to shew sufficient cause why such work shall not be removed, altered or pulled down; or shall be required on such day and at such time and place as shall be specified in such notice to attend personally or by an agent duly authorized in that behalf before the council and show sufficient cause why such work shall not be removed, altered, or pulled down.

"If such person shall fail to show sufficient cause why such work shall not be removed, altered, or pulled down, the council shall be empowered, subject to any statutory provision in that behalf, to remove, alter, or pull down such work."

Making of Demolition Order a Judicial Act.—The Courts in England have ruled that the Act of ordering buildings to be demolished is a judicial act, and that a person affected by any such order is entitled to a proper notice of the time and place of the meeting of the local authority. The principle involved was thus discussed by the Court of Common Pleas in Cooper v. Wandsworth D. B. of W., 1864, 14 C. B. N. S. 180, 32 L. J. C. P. 185. The facts appear in the extracts given. Erle, C.J., said:—

"I am of opinion that this rule ought to be discharged. The action was in trespass for demolishing the plaintiff's house, and the defence put forward by the defendants is, that they were justified in so doing under s. 76 of the Metropolis Local Management Act. That section provides that when a person is about to build a house, before doing so he shall give notice to the Board, in order that they may see that certain matters having reference to general convenience are complied with, and if such notice be not given, it is declared to be lawful for the Board to order the house to be demolished. The defendants say that no notice of his intention to build was given by the plaintiff, before he commenced building, wherefore they demolished the house in accordance with the provisions of this section. The plaintiff, on the other hand, contends that the powers conferred upon the Board by this section are subject to this implied qualification, that no person is to be deprived of any part of his property by the exercise of these powers until he has been first heard to shew cause against it. I am of opinion that the plaintiff is right, and that the powers of the Board in this respect are subject to the qualification contended for. This power of demolishing houses carries with it consequences of very great moment. When once exercised, it is irrevocable, and it extends to the destruction of a whole house, or any number of houses of whatever value they may be. Moreover, the limitation which this Court is about to put on the exercise of this power is warranted by numerous cases, and is required by the very nature of the power itself which is to be exercised. It is quite possible that if the plaintiff had been heard, his default in not sending the proper notice might have been explained. The notice might have miscarried by no default of his, in which case the Board would not, if they acted rationally, have ordered the house to be demolished. Or upon inquiry, it might have turned out that all the requirements of the Board as to the construction had been complied with, in which case also they never could have made this order. I can see no necessity whatever for giving to the Board the large powers which they claim without any qualification whatever, and I do see very strong reasons of public order and convenience, why they should be subject to the reasonable limitation, that a person's property should not be destroyed until he has been heard to shew cause to the contrary That is a qualification which has been recognized in numerous cases, but it was said in the course of the argument to be limited to judicial proceedings, and that the defendants

were not here acting judicially. I do not quite agree that they were not acting judicially, but even if they were not, the rule has been applied to cases other than those which are in the strictest sense judicial. Such is The King v. The Chancellor, Masters and Scholars of The University of Cambridge, 1 Str. 559, referred to in the judgment of Parke, B., in the case of The Hammersmith Rent Charge, 4 Exch. Rep. 87 (see p. 96), where all the cases are collected, and which shew that the rule is to be applied to proceedings not in any respect more strictly judicial than those of a District Board of Works, exercising the powers conferred upon them by this.

"It is said that there is an appeal to the General Board given by the 211th section and, therefore, if the plaintiff felt aggrieved he was not without remedy; but I think that provision is rather in favour of the plaintiff, for it is clear that the legislature contemplated that on the hearing of the appeal both parties would be present, and that the matter would be there decided according to judicial forms.

"For these reasons, I am of opinion that the rule should be discharged."

In Dr. Bentley's case (The King v. The Chancellor, etc., of The University of Cambridge), referred to by Erle, C.J., Mr. Justice Fortescue gave a quaint reason for the principle. He said:—

"The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam' (says God) 'where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also."

The principle of Cooper v. Wandsworth was applied to a local authority, proceeding under a by-law passed, under the Public Health Act, 1875, in Masters v. Pontypool L. B., 1878, 9 Ch. D. 677, 47 L. J. Ch. 797, and again in Hopkins v. Smethwick L. B., 1890, 24 Q. B. D. 712, 59 L. J. Q. B. 250 C. A., where Lord Esher, M.R., said:—

"The power which the Local Board in this case assumed to exercise—namely, to enter upon the property of the plaintiff and pull down a house built on his land—is a power affecting the property of the plaintiff in the most highly penal way possible. When that is so, those who have such a power must take every care to follow each necessary step in the strictest manner, and the Court will look with great care to see whether these steps have or have not been followed out. The cases of Cooper v. The Wandsworth Board of Works (2) and Masters v. The Pontypool Local Board (3) are authorities to shew that where a local board have the power, after and in consequence of the misconduct of a building owner, to enter upon his property and pull down the offending building, and charge him with the expenses of so doing, it is a necessary implication, by the fundamental principles of justice, that they must give him notice of their intention to do so, in order that he may have an opportunity of shewing that, although he may have disobeyed previous orders, they should not take that severe course. The cases which have been cited are decided upon the ground that justice requires that such a notice should be given before the Board exercise so penal a power. We are not asked to overrule those cases. In my opinion they were rightly decided, and apply exactly to the present case. The defendants acted wrongly in going on to the plaintiff's land without having given the notice, and therefore committed a trespass."

What is Notice?—In James v. Institute of Chartered Accountants, 1908, 98 L. T. 225, it was held that a man had an opportunity of being heard though a letter addressed to him was through the dead letter office.

Sufficiency of Notice.—See Dickinson v. Forsyth, 1904, 90 L. T. 30.

Recovery of Expenses.—See Lumley, p. 354.

Power to Withdraw Approval.—See Slee v. Bradford Corporation, 1863, 4 Giff. 262.

Repeal of By-law.—Effect on plans approved under old by-law. See White v. Mayor of Sunderland, 1903, 88 L. T. N. S. 592.

In Contravention of the By-law.—This clause until the revision of 1913, "in contravention of any by-laws." It is assumed that the change was the result of a clerical error, and "the" must be read "any" to give meaning to the clause.

Demolition of Buildings.—Section 157 of the Public Health Act, 1875, after giving power to urban authorities to make by-laws as to new buildings as given above, provides:—

> "And they may further provide for the observance of such by-laws by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets, or to construct buildings, as to inspection by the urban authority, and as to the power of such authority (subject to the provisions of this Act) to remove, alter, or pull down any work begun or done in contravention of such by-laws."

Section 158 provides: "Where a notice, plan, or description of any work is required by any by-law, made by an urban authority (a) to be laid before that authority, the urban authority shall, within one month, (b) after the same has been delivered or sent to their surveyor or clerk, signify in writing (c) their approval or disapproval (d) of the intended work to the person proposing to execute the same; and if the work is commenced after such notice of disapproval, or before the expiration of such month without such approval, and is in any respect not in conformity with any by-law of the urban authority, the urban authority may cause so much of the work as has been executed to be pulled down or removed (e).

"Where an urban authority incur expenses in or about the removal of any work executed contrary to any by-law such authority may recover in a summary manner (f) the amount of such expenses either from the person executing the works removed or from the person causing the works to be executed, at their discretion (g).

"Where an urban authority may under this section pull down or remove any work begun or executed in contravention of any by-law, or where the beginning or the execution of the work is an offence in respect whereof the offender is liable in respect of any by-law to a penalty, the existence of the work during its continuance in such a form and state as to be in contravention of the by-law, shall be deemed to be a continuing offence (h), but a penalty shall not be incurred in respect thereof after the expiration of one year from the day when the offence was committed or the by-law was broken."

In Andrews v. Wirral, R. C., 1916, 1 K. B. 853, 85 L. J. K. B. 853, the local authority after giving notice to W. R. Andrews pulled down a building. In the meantime after the notice was given and before it was pulled down, W. R. A. sold the building to S. who sold it to A. Andrews, the plaintiff, who was the owner at the time of the demolition. The action was for damages in respect of the destruction of the building. The council failed to justify their action under the by-law because they relied on a copy of the notice, which had been mailed to A. R. A. without serving W. R. A. with a subpœna to produce the document itself. Secondary evidence of the notice was held inadmissible in the circumstances. As

the notice was not a document between the parties, the defendants could not therefore bring themselves within the exception to the general rule. The defendants succeeded on the point that, as the building was a temporary building, the steps they had taken could be justified without notice under another Act.

In Oak Bay v. Gardner, 1914, 27 W. L. R. 960, the corporation brought an action for a mandatory injunction requiring the defendant to pull down a wooden structure, erected by him contrary to the provisions of a building by-law. The Court of Appeal, McPhillips, J., dissenting, dismissed the action. Irving, J.A., said:—

"The affidavits filed by the plaintiff set up: (1) That the building in question has been erected in defiance of the by-law; and (2) the building amounts to a menace to the public.

"The affidavits, in my opinion, would not justify an injunction on the *quia timet* principle: see Fletcher v. Bealey (1885), 28 Ch. D. 688, 54 L. J. Ch. 424; and the injunction, therefore, if supportable at all, must be so by virtue of the by-law.

"The case of Tompkins v. Brockville Rink Co. (1900), 31 O. R. 124, shews that this action could not be maintained by a private person. Mr. McDiarmid contends that it cannot be brought by the corporation, or by any person other than the Attorney-General, assuming that the Supreme Court has jurisdiction in the premises.

"We have not been referred to any direct authority which will support the right of the plaintiff corporation to maintain an action where there has been an infringement of its by-laws. Attorney-General v. Campbell (1872), 19 Gr. 299, was a case very similar to this. The defendant, having been twice fined under the by-law, persisted in building in violation of the by-law. Application was made to the Court of Chancery for an injunction. Strong, V.-C., expressed a doubt as to whether the infraction of a municipal by-law constituted a nuisance, but he refused the application on the ground that the by-law was in excess of the legislative powers conferred upon the council. That case is a precedent for bringing the action in the name of the Attorney-General.

"Attorney-General v. Tod Heatley (1897), 1 Ch. 560, shews that the Attorney-General is a proper party under the Public Health (London) Act, 1891, to represent the public where the defendant neglects to perform the duty which lies upon him, notwithstanding that power is given by the statute to the corporation to remove the nuisance and charge the cost to the defendant.

"Under that statute, although the local authority is empowered to cause proceedings to be taken in the High Court, it has been held that this power does not, in the absence of a particular interest, justify them, in proceeding in their own name: Wallasey Local Board v. Gracey (1887), 36 Ch. D. 593; Tottenham Urban District Council v. Williamson & Sons, Limited (1896), 2 Q. B. 353. These cases confirm the decision of Romilly, M.R., in Vestry of Bermondsey v. Brown (1865), L. R. 1 Eq. 204.

"In Attorney-General v. Logan (1891), 2 Q. B. 100, the right of the local board to bring an action in their own name in respect of a nuisance affecting property of which they were the owners was upheld; so, too, where a statute gave the local board a special protection, and breaches of that statute were being committed: Mayor, etc., of Devonport v. Plymouth, Devonport and District Tramways Co. (1884), 52 L. T. R. 161. That case was relied upon by Mr. Mayers; but I think that there is a plain distinction between the specific rights that were there conferred, and the breach of the duty to the public which is being dealt with in this action. In the Devonport case the right might also be regarded as falling within the principle of the Logan case.

"In my opinion, this case falls within the general rule that requires that all actions in respect of public nuisance must be brought in the name of the Attorney-General."

In Re v. Webster, a by-law restricting and preventing the carrying on of manufacturing within 300 feet of any other building, was amended by the condition of a proviso that the restriction should not exist if the owners of building within 300 feet consented. This delegation was held bad following Re Kiely, 13 O. R. 457, and Re Nash and McCracken, 1873, 33 U. C. R. 181, because it delegated in part the exercise of the judgment and discretion that should be exercised by the council.

Chimneys, Flues, etc.—The model by-laws under the Public Health Act (Imp.), 1875, s. 157, approved by Local Government Board, provides for the solidity of the foundations of chimneys, the lining of the flues, the thickness of the backs, the support and thickness of the chimney breasts, the width of the jambs of chimney openings, the height of chimney shafts are to be carried above the roof. The placing of woodwork in or near chimneys is forbidden, and pipes conveying smoke or products of combustion can be fixed within nine inches of any combustible substance.

Party Walls.—The London Building Act, 1894, ss. 87 to 101, contains an elaborate code for regulating the erection of party walls. A party wall is defined in s. 5 (16) and s. 58, the Act as follows:—

"16. The expression 'party wall' means:—

"(a) A wall forming part of a building and used, or constructed to be used, for separation of adjoining buildings belonging to different owners, or occupied or constructed or adapted to be occupied, by different persons; or

"(b) A wall forming part of a building, and standing to a greater extent than the projection of the footings on lands of different owners."

"58. In either of the following cases:—

"(a) When a wall is, after the commencement of this Act, built as a party wall in any part; or

"(b) Where a wall built before or after the commencement of this Act becomes, after the commencement of this Act, a party wall in any part; the wall shall be deemed a party wall for such part of its length so used."

In London v. Morley, 1911, 2 K. B. 257, 80 L. J. K. B. 908, it was held notwithstanding s. 58, that a wall might be a party wall for part of its height, and cease to be a party wall for the rest of its height.

No power is given to enforce the building of a party wall on an unwilling owner, but the building owner is given the right after notice to place the footings of his external wall on the land of the adjoining owner. A building owner is given the right to make good, underpen, repair, and to cut into party walls after notice, and upon giving security, the adjoining owner may by notice require the building owner to build chimneys, flues, or other work likely to be required by him. Elaborate rules are given for the apportionment of expenses and machinery is provided for settling all differences by arbitration.

The Act gives wide powers of entry for the purpose of doing work on party walls, but unnecessary inconvenience is not to be caused. There are many cases under the Act as to notices.

In Watson v. Gray, 1880, 14 Ch. D. 192, 49 L. J. Ch. 243, an owner of two adjoining premises, granted one subject to a provision that the wall between should be a "party wall." The plaintiff raised one end of the wall, with a view to resting the roof of a shed on it. The defendant knocked off the new brickwork. The plaintiff claimed an injunction and damages. Fry, J., refused both, and thus discussed the meaning of the term party wall:—

"There is an express provision with respect to that wall that it should be deemed to be a party wall. The question then is, what is the meaning of the word party wall? The term is rather a popular one than a legal one. It seems to me it may be used in four different senses. It may express a wall standing on land belonging to the owners of adjoining premises as tenants in common, as the term is used in Wiltshire v. Sidford, 8 B. & C. 259 (n), and Cubitt v. Porter, 8

B. & C. 257, or secondly, it may be used to describe a wall divided as to ownership longitudinally; one vertical half belonging to the owner of the premises on one side, the other to the owner on the other, as in the case of Watts v. Hawkins; or it may denote a wall entirely the property of the one, but subject to rights vested in the other. In that sense the word is used in many of the building Acts; or, lastly, it may mean a wall owned in longitudinal sections, as in the second case, but where the moiety of each owner is subject to easements vested in the owner of the other moiety."

Scuttles in Roofs.—For a similar requirement, see the London Building Acts (Amendment) Act, 1905, ss 12-14.

This power enables accumulation of combustible rubbish to be prevented.

Harbours, Wharfs, Waters, etc.—Removal of Obstructions from.

400.—(36) For requiring and regulating the removal from any public wharf, dock, slip, drain, sewer, shore, bay, harbour, river or water, of all sunken, grounded or wrecked vessels, barges, crafts, cribs, rafts, logs or other obstructions or incumbrances, by the owner, charterer or person in charge, or any other person who ought to remove the same. 3 Edw. VII. c. 19, s. 562, par. 10; 3 & 4 Geo. V. c. 43, s. 400 (36).

This enactment first appeared in 1884, presumably in consequence of Hood v. Commissioners of Harbour of Toronto, 1876, 34 U. C. R. 87, 37 U. C. R. 72, where the plaintiff's vessel was injured by striking a sunken pier which was not within the limits of the harbour, and which the defendants could not compel the owner of the soil to remove. The action was dismissed. The case was distinguished from Mersey Docks Trustees v. Gibbs, 1869, L. R. 5 C. P. 93, on the ground that the harbour was a natural one.

An indictment does not lie at common law when an obstruction to navigation is caused by accident: R. v. Watts, 1798, 2 Esp. 675, but an indictment will lie for causing an obstruction; R. v. Russell, 1854, 3 F. & B. 942, or an action may be brought for abatement, by the Atty.-Gen. for the public, or in the name of the Attorney-General at the relation of some person. Atty.-Gen. v. Wright, 1897, 2 Q. B. 318, 16 L. J. Q. B. 834 C. A. Where special damage is sustained, a private action will lie, as for any other public nuisance: Rose v. Miles, 1815, 4 M. & S. 101.

Proceedings may, in some cases, also be taken under the Criminal Code, s. 222, for committing a common nuisance which endangers the lives, safety, or health of the public, or which occasions injury to the person of any individual.

The sub-section enables councils to make it the duty of persons causing obstructions, even when they do not amount to nuisance, or arise by accident, to remove the same under penalty, and performance of the duty may be enforced under s. 500.

Vessels Sunk in Navigable Waters.—The rule as to the responsibility of the owners was stated by the Judicial Committee in "The Utopia," 1893, A. C. 492.

"The owner of a ship sunk, whether by his default or not (wilful misconduct probably giving rise to different consideration), has not, if he abandon the possession and control of her, any responsibility either to remove her or to protect other vessels from coming into colli-

sion with her. It is equally true that so long as, and so far as possession, management and control of the wreck be not abandoned or properly transferred, there remains on the owners an obligation in regard to the protection of other vessels from receiving injury from her. But in order to fix the owners of a wreck with liability two things must be shewn—first, that in regard to the particular matters in respect of which default is alleged, the control of the vessel is in them—that is to say, has not been abandoned or legitimately transferred; and, secondly, that they have in the discharge of their legal duty been guilty of wilful misconduct or neglect."
See s. 398 (19-26.)

Milk and Bread Tickets, etc.

400.—(37) For regulating the use of tickets, checks or coupons by vendors of or dealers in milk, bread, or other articles of food. 3 Edw. VII. c. 19, s. 586, par. 11. 3 & 4 Geo. V. c. 43, s. 400 (37).

This power in conjunction with the power to regulate the size of loaves enables the number of tickets to be sold for a dollar to be fixed by by-law. It also enables the reissue of tickets to be prevented.

Naming and Surveying Streets.

400.—(38) To provide for surveying, settling and marking the boundary lines of highways and giving names to them or changing their names, and for affixing the names at the corners thereof, on public or private property:

(*a*) A by-law for changing the name of a highway shall not have any force or effect unless passed by a vote of at least three-fourths of all the members of the council, or until a copy of it certified under the hand of the clerk and the seal of the corporation has been registered in the registry office of the proper registry division.

(*b*) A by-law for changing the name of a highway in a city or town shall state the reason for the change, and shall not be finally passed until it has been approved by a Judge of the County or District Court of the County or District in which the municipality is situate.

(*c*) The Judge, on the application of the council, shall appoint a day, hour and place for considering the by-law, and for hearing those advocating and opposing the change.

(*d*) A copy of the by-law and of the appointment shall be served on the registrar of the registry division in which the municipality is situate at least two weeks before the time appointed, and a notice of the application in such form as the Judge may approve shall be published once in the *Ontario Gazette* at least two weeks before the time so appointed, and at least once a week for four successive weeks in such other newspaper or newspapers as the Judge may direct.

(*e*) If the Judge approves of the change he shall so certify, and his certificate shall be registered with the by-law, and the change shall take effect from the date of the registration. 3 Edw. VII. c. 19, s. 532, par. 2; 9 Edw. VII. c. 73, s. 16; 3 & 4 Geo. V. c. 43, s. 400 (38).

The survey which may be authorized, under this sub-section, must be made in accordance with the provisions of the Survey's Act, R. S. O. 1914, c. 166. This sub-section merely enables the councils of urban municipalities to authorize the survey to be made.

The following sections are material:—

"14.—(1) Where the municipal council of any township, city, town, or village, adopts a resolution, on application of one-half the resident landholders to be affected thereby, or upon its own motion, that it is desirable to place stone or other durable monuments at the front or at the rear, or at the front and rear angles of the lots in any concession or range or block in their township, city, town or village, such council may apply to the Lieutenant-General-in-Council in the same manner as is provided by the next preceding section to cause a survey of such concession or range or block, or part thereof, to be made and such monuments to be placed under the authority of the Minister.

"(2) The surveyor making such survey shall accordingly place stone or other durable monuments at the front, or at the rear, or at the front and rear angles of every lot in such concession, range or block, or part thereof, and after confirmation of the survey in the manner provided by the next preceding section the limits of each lot so ascertained and marked shall be the true limits thereof.

"15. All expenses incurred in making any survey or placing any monument under the provisions of ss. 10 and the following sections, shall be paid by the treasurer of the municipality which made the application for the survey to the person employed in such services on the certificate and order of the Minister. 1 Geo. V., c. 42, s. 15 *a*.

"16. All boundary lines of townships, cities, towns and villages, all concession lines, governing points, and all boundary lines of concessions, sections, blocks, gores and commons, and all side lines and limits of lots surveyed, and all trees marked in lieu of posts, and all posts or monuments marked, placed or planted at the front or rear angles of any lots or parcels of land, under the authority of the executive Government of the late Province of Quebec or of Upper Canada, or of Canada, or under the authority of the executive Government of Ontario, shall be the true and unalterable boundaries of all and every such townships, cities, towns, villages, concessions, sections, blocks, gores, commons and

lots or parcels of land, respectively, whether the same upon admeasurement be found to contain the exact width or more or less than the exact width mentioned or expressed in any letters patent, grant or other instrument in respect of such township, city, town, village, concession, section, block, gore, common, lot or parcel of land. 1 Geo. V., c. 42, s. 16."

"19. In every city, town or village, or any part thereof, which has been surveyed by the authority mentioned in s. 16, all allowances for any road, street, lane or common, laid out in the original survey of such city, town or village, or any part thereof, shall be public highways and commons; and all posts or monuments placed or planted in the original survey of such city, town or village, or any part thereof, to designate or define any allowance for a road, street, lane, lot or common, shall be the true and unalterable boundaries of every such road, street, lane, lot and common, and every surveyor employed to make a survey in such city, town or village or any part thereof, shall follow and pursue the same rules and regulations in respect of such survey as are by law required of him when employed to make a survey in a township. 1 Geo. V., c. 42, s. 19."

Numbering Houses and Lots.

400—(39) For numbering the buildings and lots along the highways and for affixing numbers to the buildings, and for charging the owner or occupant with the expense incident to the numbering of his building or lot.

(*a*) Such expense may be collected in the same manner as taxes, and if paid by the occupant, subject to any agreement between him and the owner, may be deducted from the rent payable to the owner.

(Note.—Last part of old s. 532, par. 2, fixing fee of registrar at $1.00, struck out, as it would seem reasonable that the registrar should get the usual fee of $1.40, which apparently is the fee he would be entitled to under the Registry Act.)

Numbers and Record of Streets.

(40) For keeping (and every such council shall keep) a record of the highways and of the numbers of the buildings and lots, and for entering therein (and every such council is hereby required to enter therein) a division of the streets with boundaries and distances for public inspection. 3 Edw. VII. c. 19, s. 532, pars. 3, 4.

Pits and Quarries.

(41) For prohibiting the making of pits and quarries in the municipality or regulating the location of them.

(*a*) The making or locating of a pit or quarry in contravention of the by-law in addition to any other remedy may be restrained by action at the instance of the corporation. 8 Edw. VII. c. 48, s. 9.

Runners.

(42) For prohibiting persons from importuning on a highway or in a public place others to travel in or employ any vessel or vehicle, or to go to any tavern or boarding house, or for regulating persons so employed. 3 Edw. VII. c. 19, s. 583, par. 27; 3 & 4 Geo. V. c. 43, s. 400 (39-42).

See R. v. Verral, 1889, 18 O. R. 117.

A similar nuisance in the case of Emigrant Runners has been dealt with under the Merchant Shipping Act, 1894 (Imp.), s. 345 *et seq.*, under which the term "emigrant runner" is defined, and such runners are required to take out licenses and wear badges.

Section 24, makes it an offence to induce persons to take passage by misrepresentation. A person who intends to be an emigrant runner must get certain recommendations in writing before he can be granted a license.

Prohibiting or Regulating.—If the council elect to prohibit it, it must prohibit entirely. See remarks of Magee, in Toronto v. Rogers, s.-s. 18, *supra*.

Sewer Rents.

400.—(43) For charging all persons who own or occupy land drained, or which by by-law of the council is required to be drained, into a common sewer, a reasonable rent for the use of it; for regulating the time and manner in which the rent is to be paid; for providing for the payment of a commutation of such rent or charging a gross sum in lieu of rent and for the payment of such commutation or gross sum either in cash or by instalments with interest. 3 Edw. VII. c. 19, s. 539, par. 2.

(*a*) This paragraph shall not apply to a sewer constructed as a local improvement. *New.*

(*b*) All sewer rents shall form a lien and charge upon the real estate upon or in respect of which the same have been assessed and rated or charged, and shall be collected in the same manner and

with the like remedies as ordinary taxes on real estate are collected under the provisions of the Assessment Act. 3 & 4 Geo. V. c. 43, s. 43; 6 Geo. V. c. 39, s. 5 (*b*).

Sidewalks—Horses and Cattle upon.

(44) For prohibiting the leading, riding or driving of horses or cattle upon sidewalks or in other places not proper therefor. 3 Edw. V. c. 19, s. 599, par. 9.

Smoke Prevention.

(45) For requiring the owner, lessee, tenant, agent, manager or occupant of any premises in, or of a steam boiler in connection with which a fire is burning and every person who operates, uses or causes or permits to be used any furnace or fire, to prevent the emission to the atmosphere from such fire of opaque or dense smoke for a period of more than six minutes in any one hour, or at any other point than the opening to the atmosphere of the flue, stack or chimney.

(*a*) This paragraph shall not apply to a furnace or fire used in connection with the reduction, refining or smelting of ores or minerals or the manufacture of cement, or to dwelling houses, except apartment houses;

(*b*) No person shall incur a penalty for an infraction of the by-law until 90 days after notice from the corporation of the existence of such by-law, and such notice may be given by publication of the by-law in *The Ontario Gazette* and in a daily newspaper published in the municipality for four successive weeks. 3 & 4 Geo. V. c. 43, s. 400 (44-45); 5 Geo. V. c. 34, s. 26.

Smoke Prevention.—In R. v. C. P. R., 1914, 33 O. L. R. 248, Middleton, J., dealt with a by-law of the City of Ottawa, passed under the authority of this sub-section, under which the company had been convicted for permitting the emission of smoke from locomotives as follows:—

"But I am of opinion that the railway company, in its operation, is not subject to the municipal by-law, but is subject to the regulations of the Dominion Railway Board. That Board, by its order No. 5678,

the validity of which is in no way attacked, regulates the discharge from locomotive engines with a view of preventing unnecessary and unreasonable emission therefrom, and in consequence fouling the atmosphere. This regulation does not differ widely from the by-law in question.

"'The Dominion authorities having undertaken to pass regulations dealing with this question, the jurisdiction of the municipality, if it ever had any, is, I think, ousted. So long as the railway company interferes with the direction of the Board, the municipality cannot interfere. For a violation of the Board's directions, the appropriate prosecution must follow.

"That is, I think, something incident to the operation of the railway, and forms part of the railway legislation over which the Dominion alone has control, and it cannot be regarded as mere municipal legislation, within the jurisdiction of the province."

And he referred to and distinguished C. P. R. v. Bonsecours, 1899, A. C. 367; Madden v. Nelson, 1899, A. C. 626, and C. P. R. v. The King, 1907, 39 S. C. R. 476. On appeal, this order was upheld without expressing any opinion as to the reasons assigned below, on the ground that the opening to the atmosphere, in that case, was from the top of the smoke-stack of an engine, and not from a flue, stock, or chimney within the meaning of the section.

Smoke Emitted by Locomotive in Round-house.—A railway company cannot be convicted under a municipal by-law for smoke emitted by locomotives from round-houses. R. v. Grand Trunk R. W. Co., 1916, 37 O. L. R. 457, following R. v. C. P. R. 1915, 33 O. L. R. 248.

But note that in Tough v. Hopkins, 1904, 1 K. B. 804, 73 L. J. K. B. 628, D. C., a funnel of a steamship was held to be a chimney within the meaning of an Act identical with s. 91 of the Public Health Act, 1875, Imp.

The Public Health Act, R. S. O. 1914, c. 218, s. 74 (j and k), provides:—

"(j) Any fireplace or furnace the fires of which do not, so far as practicable, consume the smoke arising from the combustible matter used therein for working engines, or used in any mill, factory, dye-house, brewery, bakehouse or gas works, or in any manufacturing or trade process whatever;

"(k) Any chimney emitting smoke in such quantity as to be injurious or dangerous to health;

"Without restricting the general application of the next preceding section and for greater particularity it is declared that the following shall be deemed nuisances within the meaning of this Act."

The provisions of the Public Health Act, 1875 (Imp.), 91 (7):—

"7. Any fireplace or furnace which does not as far as practicable consume the smoke arising from the combustible used therein, and which is used for working engines by steam, or in any mill, factory, dye-house, brewery, bakehouse or gas works, or in any manufacturing or trade process whatsoever; and

"Any chimney not being the chimney of a private dwellinghouse sending forth black smoke in such quantity as to be a nuisance.

"Shall be deemed to be nuisances liable to be dealt with summarily in a manner provided by this Act, provided:

"That where a person is summoned before any Court in respect of a nuisance arising from a fireplace or furnace which does not consume the smoke arising from the combustible used in such fireplace or furnace, the Court shall hold that no nuisance is created within the meaning of this Act and dismiss the complaint, if it is satisfied that such fireplace or furnace is constructed in such manner as to consume as far as practicable, having regard to the nature of the manufacture or trade, all smoke arising therefrom, and that such fireplace or furnace has been carefully attended to by the person having the charge thereof."

Note s. 113, which provides that where any act is a violation of any provision of the Public Health Act, and also of a municipal by-law, there cannot be a conviction under both. And that under s. 11 orders

and regulations of the Provincial Board of Health supersede any municipal by-law dealing with the same subject-matter and suspend inconsistent by-laws.

Smoke alone, though not injurious to health, may constitute a nuisance at common law, if the annoyance produced is such as materially to interfere with the ordinary comfort of human existence. Crump v. Lambert, 1867, L. R. 3 Ey. 409, 15 L. T. 600, 17 L. T. 133, and an indictment will be at common law, R. v. White, 1757, 1 Barr. 333.

For Nuisance Generally under the Criminal Code, see s. 399 (46).

The difficulties incident to proceeding at common law or under the Code where a common nuisance must be proven and those incident to proceeding under the Public Health Act where injury or danger to health must be shewn, or that the smoke is consumed as far as practicable, can be avoided by a by-law under s.-s. 45, which can penalize where opaque or dense smoke issues for a period of more than six minutes in any one hour.

As far as Practicable.—The words "as far as possible" in a similar Act were construed to mean as far as possible consistently, and the carrying on of the ordinary trade for which the furnace was used: Cooper v. Wooley, 1867, L. R. 2 Ex. 88, 36 L. T. M. C. 27.

Abatement of Smoke Nuisance.—Note the machinery for abatement provided in the Public Health Act, R. S. O. 1914, c. 218, ss. 79, 81.

Spitting on Sidewalks, etc.

400—(46) For prohibiting spitting on sidewalks and pavements, and in the passages and stairways of and entrances to public buildings, and in buildings, halls, rooms and places to which the public resort, in street cars and public conveyances, and in such other public places as may be designated in the by-law. 3 Edw. VII. c. 19, s. 553, par. 4. 3 & 4 Geo. V. c. 43, s. 400 (46).

Stables, etc.

(47) For regulating the location, erection and use of stables, garages, barns, outhouses and manure pits. 9 Edw. VII. c. 73, s. 18, *amended;* 3 & 4 Geo. V. c. 43, s. 400 (47).

Trading Stamps, Coupons, etc.

(48) For prohibiting the giving, selling, or distributing of or the dealing with trading stamps, coupons, or other similar devices, by any person engaged in trade or business or the receiving of them.

(*a*) The by-law shall not apply to a merchant or manufacturer who places in or upon packages of goods, or delivers to purchasers of goods sold or manufactured by him at the time of the purchase, tickets or coupons, which state upon their face the place of delivery thereof, and the cash or merchantable value of them, and are redeemable at any time, but only by the merchant or manufacturer giving them and at the place where such goods were sold or purchased. 3 Edw. VII. c. 19, s. 583, par. 41; 5 Edw. VII. c. 22, s. 27; 3 & 4 Geo. V. c. 43, s. 400 (48).

Traffic on Highways, etc., Driving of Cattle, etc.

(49) [For regulating traffic in the highways and the width of the tires and wheels of all vehicles used for the conveyance of articles of burden, goods, wares or merchandise;] and for prohibiting heavy traffic and the use of traction engines and the driving of cattle, sheep, pigs and other animals during the whole or any part of the day or night in certain highways and public places named in the by-law, and for prohibiting traffic in any but one direction in highways which in the opinion of the council are too narrow for the passing of one vehicle by another. 3 Edw. VII. c. 19, s. 559, par. 5; 3 & 4 Geo. V. c. 43, s. 400 (49); 8 Geo. V. c. 32, s. 7.

Regulating Traffic.—In Milligan v. Thorn, 1914, 32 O. L. R. 195, Middleton, J., said in part:—

"The main contention is, that the municipal by-law No. 5770, intituled 'A By-law to Regulate Traffic in the Public Streets,' and which, *inter alia*, enacts that 'no vehicle shall be driven upon any street in the city in charge of any driver less than sixteen years of age,' was violated by entrusting the horse and waggon in question to the plaintiff . . .

"I have, however, come to the conclusion that this finding of fact does not entitle the plaintiff to succeed. Undoubtedly the violation of a statutory obligation may often confer a right of action, and, as is said by Sir Charles Moss in Fahey v. Jephcott (1901), 2 O. L. R. 449, 461, whether this liability is to be classed as negligence, or as breach of a statutory duty resulting in an injury, does not appear to be material. In each case it is necessary to establish that the damage in respect of which relief is sought was within the mischief against which the law intended to provide In Fahey v. Jephcott, it was plain that the provision of the Factories' Act prohibiting the employment of a girl under eighteen to work between the fixed and traversing parts of a self-acting machine while in motion, was a

statute passed primarily for the protection of young and inexperienced workers. The injured girl had no difficulty in shewing that the accident which befell her was the very mischief against which the law intended to provide.

"So in Hagle v. Laplante (1910), 20 O. L. R. 339, there was no difficulty in determining that an action would lie to recover damages resulting in death occasioned by a breach of a statute requiring hotels to be equipped with fire escapes. The object of the Act was to benefit and protect the occupants of hotels.

"So, again, where the law prohibited the selling of an air-gun to a minor under sixteen years of age, one injured by a shot from an air-gun in the hands of a minor to whom it had been sold was held entitled to redress: Fowell v. Grafton (1910), 22 O. L. R. 550, D.C. The protection of persons from such accidents was the thing aimed at by statute.

"Here, however, the object of the legislation is entirely different. Under the Municipal Act, now R. S. O. 1914, c. 192, s. 400, s.-s. 49, a municipality is authorized to pass by-laws to regulate traffic in the public streets. The by-law in question purports to be passed under this authority. The prohibition of the driving of vehicles by those under sixteen years of age is not for the protection of the driver, but for the protection of the public.

"The action, therefore, fails."

Regulating Traffic.—Any by-law regulating traffic must be subject to the rules laid down in the Highway Travel Act, R. S. O. 1914, c. 206; The Motor Vehicles Act, R. S. O. 1914, c. 207, and the Traction Engines Act, R. S. O. 1914, c. 212. Section 285 of the Criminal Code provides:—

"Every one is guilty of an indictable offence and liable to two years' imprisonment who, having the charge of any carriage or vehicle, by wanton or furious driving, or racing or other wilful misconduct, or by wilful neglect, does or causes to be done any bodily harm to any person."

Regulations may deal with the line to be kept at crossings; may require heavy and slow-moving vehicles to keep to the right; may enable policeman to regulate traffic at crossings, processions, funerals, rejoicings and obstructions likely to be caused thereby, or by theatre queues, or other assemblages of persons, and may enable the police to stop traffic where advisable, and may forbid the wilful interruption of any crossing, or wilful obstruction of any highway, and may limit the time which vehicles may be permitted to stand on streets. The regulations may prevent minors from driving horses, and may provide for due control of horses and may penalize obstructing or wilfully preventing others from passing and may fix conditions under which one person may at one time drive two vehicles, and may require loads having projecting beams, rods or planks to mark the same in some conspicuous manner.

Traffic in the neighbourhood of places of worship, during hours of worship, may be regulated.

Vehicles on certain streets may be given the right of way over vehicles on intersecting streets.

Obstructing highways may be prohibited or regulated by all municipalities under s. 491 (1).

Prohibiting Heavy Traffic, etc.—Note that in addition to the power to regulate all traffic, there is the concurrent power to prohibit certain kinds of traffic.

Compare s.-ss. 22 and 23, where the power given is either to prohibit, or to regulate, and see remarks of Magee, J., in Toronto v. Rogers, *supra*, p. 813.

Imperial Legislation and Cases.—The Highway Act, 1835, s. 78. Town Police Clauses Act, 1847, s. 28. The Public Health Acts Amendment Act, 1907, ss. 78-80.

In the absence of other traffic, the driver of a vehicle is entitled to go on any part of the road he desires; nor is it an offence to be on the wrong side of the road, if the only other vehicle on the road is asked and consents to pass on the wrong side: Nuttall v. Pickering, 1913, 1 K. B. 14, 82 L. J. K. B. 36 (D.C.); Bolton v. Everett, 1911, 105 L. T. 830.

For conviction for failure to obey a constable's order to stop, made pursuant to regulations under s. 21 of Town Clauses Police Act, see Dudderidge v. Rawlings, 1913, 108 L. T. 802.

Section 28 of Town Police Clauses Act, 1847, is as follows:—

"Every person, who by means of any cart, carriage, sledge, truck, or barrow, or any animal, or other means (u) wilfully causes any obstruction in any public footpath or other public thoroughfare."

The same language occurs in the Metropolitan Police Act, 1839, ss. 4, 556, and the following decisions on these sections may be of value in cases arising under by-laws containing similar provisions.

A vacuum cleaner remained seven hours on a street, while cleaning a house; there was room for vehicles to pass, and no evidence that any one was incommoded. Held not an obstruction: Dunn v. Holt, 1904, 73 L. J. K. B. 341. Kennedy, J., said in part:—

"I think that from the very fair and full way in which the case is stated, we have the means of seeing that there was nothing which ought to have led to this conviction on the facts. The learned magistrate has given us some reasons which do not, I confess, seem to be applicable. I do not think the noise of the machinery used, which might possibly cause discomfort and inconvenience to occupants of neighbouring houses, can be treated as an element in the creation of an obstruction of a highway. Of course, if it caused a crowd, the case would be different. Nor do I think it is a relevant consideration that this system of carpet cleaning is not necessary to the ordinary comfort or exigency of life.

"Whether a conviction for wilful obstruction of a highway is justified, must be a matter of degree and of locality. In a city reasonable allowance ought to be made for the conduct of business. There are persons who in selling things, stop their trucks or carts in many of the streets in London, and, if they do not stop too long, I do not think they should be condemned because, while a customer comes to them, they are using the street for their trade. This is a novel machine, and might be a nuisance if used in a manner different from that in which the magistrate has stated it has been used on this occasion in this place."

Where three persons walked abreast, compelling persons to go into the road, it was held that a conviction could not be sustained: R. v. Long, 1888, 59 L. T. 33; R. v. Williams, 1891, 55 J. P. 406 (four walking abreast).

Attracting a crowd by pictures: R. v. Carlile, 1832, 6 C. & P. 636. Street preacher attracting a crowd: Homer v. Cadman, 1886, 55 L. J. M. C. 110, provided there is no interference with regulations and no obstruction. A meeting held in a highway is not unlawful: Burden v. Bigler, 1911, 1 K. B. 337, 80 L. J. K. B. 100.

Crowds assembled by reason of the performance of Charley's Aunt dispersed by the police, after action commenced, the plaintiff getting costs only: Barber v. Penley, 1893,. 2 Ch. 447, 460; 62 L. J. Ch. 623.

Theatre crowd obstructing highways: Lyons v. Gulliver. Theatre company restrained, 1914, 1 Ch. 631, 83 L. J. Ch. 281 C. A.

Cozens-Hardy, M.R., said in part:—

"The substance of the grievance from which the plaintiffs say that they suffer is that the theatre doors are not opened until about a quarter of an hour, or sometimes a half an hour before the performance commences; that before they are opened, there is a queue, sometimes extending beyond the plaintiffs' house right down to Argyll Place, and frequently extending right in front of the plaintiffs' premises; and that the queue is some three, four, five, or, on occasions, six deep. The

queue remains there for a very considerable portion of time, until indeed the doors of the theatre are opened, when, of course, those who can do so go in and fill the place, and those who cannot get in go away. Another peculiarity of the present case is that the queue which is formed is not to any appreciable extent in front of the Palladium Theatre premises. The defendants keep their own front clear and leave the queue to stretch down to and in front of the plaintiffs' property. Then there is this to be mentioned, which seems to me not to be unimportant. The queue is sometimes on the footpath and sometimes on the roadway itself. It is said that anybody that wants to come to the plaintiffs' premises can make his or her way through the queue, and the obstacle is perhaps a more important consideration to the female than to the male sex. The customers can elbow their way through the crowd or politely ask them to make way, or invite the able assistance of the policeman who may happen to be there, but they have otherwise to go round and get in, if they can, at the back of the queue. I cannot bring myself to doubt that this is a serious nuisance and annoyance, by which the plaintiffs are specially affected, and that this is not a case in which it is at all necessary for them to prove that they have lost £1, £2, or £3, by reason of the defendants' acts. There is the evidence of some of the plaintiffs' customers themselves that they avoided going to the plaintiffs' shop because of the inconvenience and trouble caused by this long queue standing twice a day in front of the plaintiffs' house. I really think that, on that part of the case, the evidence speaks for itself. One must take one's own common knowledge of the world in a thing of this kind. And I say deliberately that I think that it is quite obvious that a queue of a more or less permanent character, lasting not a few minutes, but for sometimes more than an hour, and standing in front of the plaintiffs' house, must be calculated to deter the plaintiffs' customers from coming to their shop. I should have come to that conclusion, I think, even in default of any evidence. But there is the evidence of the plaintiffs' customers and the evidence also of the plaintiffs' managers and representatives that many complaints have been made to them by customers.

"But then it is said that the defendants are not responsible for what goes on in the streets; that it is the duty of the police to keep the street clear; and that if the police do not do that, the plaintiffs' remedy is to make a complaint to the police and not to attack the defendants. The defendants, it is said, do not want the queue there, but only invite the audience to come in at the time when the doors of the theatre are open, and it is altogether unreasonable that the defendants should be attacked because a large number of people choose, without any invitation from the defendants, permanently to obstruct the roadway or the pathway for a considerable period of time. Now is that the law? In my view it is not. . . .

"I confess I am unable to appreciate how the defendants can escape from liability for that which, in my view, is according to the settled law a wrong, by saying that it was the duty of the police to do what was necessary to prevent the wrong. In my opinion on the facts of this case, and on the facts of this case alone, there was at the date when this action commenced an actionable wrong in respect of which the plaintiff was entitled to an injunction unless something had since happened.

"Now, what has happened here? The learned Judge suggested at an early stage that an arrangement should be made for opening the doors of the theatre earlier, both at the morning and afternoon performances. That, no doubt, involved the defendants in some extra expense, but its effect coupled with the exertions of the plaintiffs to induce the police to be a little more energetic, has been so satisfactory that for a period of some six, seven, or eight months, matters have gone on in such a way that the plaintiffs have not had any right to complain. Of course, if there was no actionable wrong at first, the learned Judge had no right to bring any pressure to bear on the defendants to induce them to give an undertaking. I do not treat it as a voluntary undertaking, and the defendants are entitled to say that they ought not to have had any such undertaking imposed on them.

They preferred to give an undertaking rather than to have an absolute injunction granted against them, and the learned Judge accepted their undertaking in that sense only. In my opinion that was an undertaking which will not interfere with the reasonable enjoyment by the owners of the Palladium Theatre of such rights as they possess, and will at the same time protect the plaintiffs from that which, in my opinion, was a distinct actionable wrong in respect of which they were entitled to relief at the commencement of the action."

Phillimore, L.J., dissented, holding that:—

"I believe that every trader has a right to make his shop window as attractive as possible, and that he is not responsible for crowds assembling to gaze at that shop window, and that it is for the police to regulate the traffic, and to make those persons move on when they stand longer than they have a right to stand on the highway. If that be the case with regard to attractions which require people at the moment to stop, it is *a fortiori* the case when the attraction is in the future, and the people are not invited to be here and stop at all, but only to come at a particular hour, and when, in order to be certain to get access at that hour, they come beforehand and loiter about.

"In my opinion—I am sorry to have expressed it at considerable length, but in my view this is a serious case—there was no actionable nuisance in this case, and the defendants ought not to have put upon any undertaking, and ought not to have been made to pay the costs of the action."

A very full review of the earlier authorities will be found in the judgment in this case.

Watchmen.

400.—(50) For employing and paying one or more watchmen to patrol at night, or between certain hours of the night, any highway or part of a highway, to be defined by the by-law, and to guard and protect property.

(*a*) For levying and collecting in the same manner and at the same time as taxes are levied and collected, by special rate, according to its assessed value, upon the land abutting upon such highway or part of a highway within the limits defined by the by-law, except vacant lots, the expenses of or incidental to the employment of such night-watchmen.

(*b*) The by-law shall not be passed except upon petition of two-thirds of the assessed owners and tenants of the land liable to be charged with the expenses, representing at least two-thirds of the assessed value of such land.

(*c*) A petition shall not be acted on unless the signatures to it, and that the contents of it were made known to each person before signature, are proved by affidavit.

(*d*) As between the landlord and tenant, in the absence of any express agreement to the contrary, the tenant shall be liable for the expenses for the period of his occupation. 3 Edw. VII. c. 19, s. 548, par. 2.

(*e*) When land is occupied by a tenant the owner shall not be entitled to petition. *New.* 3 & 4 Geo. V. c. 43, s. 400 (50).

Vacant Lots—Enclosures of.

(51) For requiring vacant lots to be properly enclosed. 3 Edw. VII. c. 19, s. 545, par. 1; 3 & 4 Geo. V. c. 43, s. 400 (51).

Water Tanks and Towers.

(52) For regulating the construction, erection, alteration or repairing of water tanks and water towers whether on buildings or elsewhere, and for prohibiting the construction, erection, altering or repairing of same contrary to such regulations.

Markets, etc.

401.—Subject to the next succeeding section by-laws may be passed by the councils of urban municipalities.

(1) For establishing [maintaining and regulating] markets.

(2) [For prohibiting or regulating the sale by retail in the highways or on vacant lots adjacent to them of any meat, vegetables, grain, hay, fruit, beverages, smallwares and other articles,] and for regulating traffic in and preventing the blocking up of the highways by vehicles or otherwise.

(3) For regulating the place and manner of selling and weighing grain, meat, vegetables, fish, hay, straw, and other fodder, wood, lumber, shingles, farm produce,

smallware and all other articles exposed for sale, and prescribing the fees to be paid therefor.

(4) For prohibiting criers and vendors of smallwares from practising their calling in the market place, or on the highways, or on vacant lots adjacent to the market place or to a highway. 3 Edw. VII. c. 19, s. 580, pars. 4-6.

(5) For prohibiting the forestalling, regrating or monopoly of grain, wood, meat, fish, fruit, roots, vegetables, poultry, dairy products, eggs and all articles for family use, which are usually sold in the market, and for prohibiting or regulating the purchase of such things by hucksters, grocers, butchers, runners or wholesalers, or by persons who directly or indirectly purchase or acquire them for re-sale.

(*a*) Farmers and other producers may nevertheless sell such things at stores and shops at any time. 3 Edw. VII. c. 19, s. 580, pars. 7, 8; 9 Edw. VII. c. 73, s. 23.

(6) For regulating the measuring or weighing of lime, shingles, laths, cordwood, coal and other fuel.

(7) For imposing penalties for light weight or short count or measurement in anything marketed. 3 Edw. VII. c. 19, s. 580, pars. 9, 10.

(8) For seizing and forfeiting any articles, except bread, of light weight or short measure. 8 Edw. VII. c. 48, s. 13.

(9) For regulating vehicles, vessels, and other things in which anything is exposed for sale or marketed and for imposing a reasonable duty thereon, and establishing the mode in which it shall be paid.

(10) For selling, after six hours' notice, butchers' meat distrained for rent of a market stall. 3 Edw. VII. c. 19, s. 580, pars. 12, 13; 3 & 4 Geo. V. c. 43, s. 401 (1-10).

(11) For purchasing, leasing, erecting, maintaining and operating weighing machines and weighing houses, for appointing weighmasters and for prescribing their duties.

(12) For imposing, levying and collecting fees for the use of such weighing machines, not being contrary to the limitations prescribed by sub-section 8 of section 402.

(13) With the approval of the Municipal Board, and within the limitations and restrictions, and under the conditions prescribed by Order of the Board for requiring all persons who shall, after a sale thereof, deliver coal or coke within the municipality, by a vehicle, from any coal yard, storehouse, coal-chute, gas house or other place:

(*a*) To have the weight of such vehicle and of such coal or coke ascertained prior to delivery, by a weighing machine established as provided by paragraph 11.

(*b*) To furnish the weighmaster in charge of such weighing machine, and to surrender to each purchaser, at the time of delivery, a weigh-ticket, upon which has been printed or written the name and address of the vendor, and the name of the purchaser, and to have such weigh-ticket dated and signed by such weighmaster, and to have him enter thereon the weight of such coal or coke.

(14) Nothing contained in the next preceding paragraph shall authorize a municipality to require the weighing of coal or coke sold in car lots at shippers' weights.

(15) For requiring all persons offering, or exposing cord wood or fire wood for sale upon the market, loaded in or upon any vehicle:

(*a*) To have such wood measured by a market inspector or by some other official of the municipality

appointed for that purpose, who shall mark such measurement in a conspicuous place upon the load or vehicle, before the wood is offered for sale;

(*b*) To procure from such inspector or official a measurement ticket signed and dated by him, upon which he has entered the quantity of cordwood or firewood loaded in or upon such vehicle, and the name and address of the vendor;

(*c*) To surrender such measurement ticket to the purchaser at or before the time of delivery;

(*d*) To pay such fee for measuring as may be imposed, not exceeding that prescribed by sub-section 8 of section 402.

(16) For requiring all persons who shall, after a sale thereof, except upon the market, deliver cordwood or firewood within the municipality, by a vehicle, to surrender to the purchaser thereof, when making delivery, a ticket signed by, or on behalf of, such person, upon which shall be legibly written or printed his name and address, the quantity of wood delivered from such vehicle, expressed in terms of a cord of 128 cubic feet, and the price at which the same has been sold.

(17) No by-law shall require kindling wood, mill waste, or mill cuttings to be measured. 8 Geo. V. c. 32, s. 8 (1).

402.—(1) No market fee shall be imposed, levied or collected, in respect of wheat, barley, rye, corn, oats, or any other grain, hay or other seed, wool, lumber, lath, shingles, cordwood or other firewood, dressed hogs, cheese, hay, straw, or other fodder, brought to market, or upon the market place, for sale or other disposal.

(2) No market fee shall be imposed, levied or collected in respect of butter, eggs, poultry, honey, celery, small fruits or other articles in hand baskets, brought

to market or upon the market place, for sale or other disposal, unless a convenient and fit place affording shelter in summer, and shelter and reasonable protection from the cold in winter, in which to expose them for sale, is provided by the corporation.

(3) Where the vendor of an article brought within the municipality in pursuance of a prior contract for the sale of it proceeds directly to the place of delivery, without hawking it upon the highways or elsewhere in the municipality, no market fee shall be imposed, levied, or collected in respect of it.

(4) No market fee shall be imposed, levied or collected in respect of any article brought into the municipality after ten o'clock in the forenoon, unless it is offered or exposed for sale upon the market place.

(5) No by-law shall require hay, straw or other fodder to be weighed, where neither the vendor nor the purchaser desires to have it weighed or measured.

(6) A person who has exposed or offered for sale an article in the market place and has paid the prescribed fee, if any, in respect of it may, after nine o'clock in the forenoon, between the 1st day of April and the 1st day of November, and after ten o'clock in the forenoon, between the 1st day of November and the 1st day of April, sell such article elsewhere than in the market place.

(7) No market fees may be imposed, levied or collected higher than those contained in the following scale:—

On a motor vehicle or a vehicle drawn by more than one horse or other animal in which articles are brought to the market place	10 cents.
If the vehicle is drawn by one horse or other animal	5 cents.

Upon a vehicle propelled or drawn by hand or a basket or vessel in which articles are brought to the market place..	2 cents.
Upon the person bringing articles to the market place by hand and not in a vehicle, basket, or vessel	2 cents.

Upon live stock brought to the market place for sale:—

A horse, mare, or gelding	10 cents.
A head of horned cattle	5 cents.
A sheep, calf, or swine	2 cents.

(8) No fees may be imposed, levied or collected for weighing or measuring, greater than those contained in the following scale:—

For weighing a load of hay	15 cents.
For weighing slaughtered meat, or grain, or other articles exposed for sale, if weighing less than one hundred pounds	2 cents.
If weighing more than one hundred and less than one thousand pounds	5 cents.
If weighing more than one thousand pounds	10 cents.
For weighing live animals, other than sheep or swine, per head	3 cents.
For weighing sheep or pigs, if more than five, per head	1 cent.
If less than five, for the lot	4 cents.
For measuring a load of wood	5 cents.

3 Edw. VII. c. 19, s. 579 (1-8), *redrafted.*

(9) Subsection 1 shall not apply to a municipality in which there is in force a by-law providing that vendors of articles in respect of which under the provisions of subsection 3 of section 401, a market fee may be imposed, may, without paying market fees, offer for sale and sell or otherwise dispose of such articles, at any place within the municipality, excepting only at the market place.

(10) Subject to subsection 2, the council of a municipality to which subsection 9 applies, may by by-law provide for imposing, levying and collecting market fees from such vendors who voluntarily use the market place for selling such articles or from any person who or whose vehicle remains upon that part of a highway which is within 100 yards of the market place, for purpose of selling any of such articles other than grain, seeds, dressed hogs or wool upon such highway, but driving through or across such part of a highway, shall not authorize the imposition of any market fee; nor shall any market fee be imposed in respect of an article sold to a person carrying on business and having a *bona fide* store, shop or other similar place of business on such part of a highway. 3 Edw. VII. c. 19, s. 579 (10-13), *redrafted.*

(11) Where a highway is used as a market place or market, or part of a market place or market, no market fees shall be imposed, levied or collected upon articles brought to that part of the highway which is so used, but the subsection shall not apply to so much of a highway as adjoins or abuts upon a market square established as a market place.

(12) Subsections 9 to 11 shall not apply to any municipality where no market fees were charged or imposed on the 10th day of March, 1882, but subsections 1 to 8 and 13 and 14 of this section shall apply to such municipality in the event of market fees being thereafter charged or imposed therein.

(13) Nothing in the preceding subsections contained shall prevent any municipality wherein no market fees are imposed or charged from regulating the sale and the place of sale of any articles within the municipality to the same extent as it might do before the 10th day of March, 1882;

(*a*) Market fees within the meaning of this subsection shall not include fees for weighing or measuring;

(*b*) After nine o'clock in the forenoon, between the 1st day of April and the 1st day of November, and after ten o'clock in the forenoon between the 1st day of November and the 1st day of April, no person shall be compelled to remain on, or resort to, any market place with any articles which he may have for sale, but may, after the expiration of such hour, sell or dispose of such articles elsewhere than in or on said market places.

(14) Whenever subsections 1 to 8 or subsections 9 to 12 of this section are in force in any municipality, so much of any Act or law as may be contrary to, and as conflicts with the same, shall not be in force in or apply to such municipality.

(15) A corporation may sell or lease its market fees with the right to collect them. 3 Edw. VII. c. 19, s. 579 (15-19), *redrafted.* 3 & 4 Geo. V. c. 43, s. 402 (1-15). *amended;* 8 Geo. V. c. 32, s. 8 (2).

(NOTE.—Section 579 (20) giving power to a corporation which has abolished market fees to re-establish them struck out as unnecessary.)

In Steeves v. Moncton, 1914, 17 D. L. R. 560, it was held that statutory authority to continue the present market, coupled with power to establish markets, did not prevent the corporation from changing the location of the established market to another location.

A gardener while in a butcher's stall in a market, agreed to sell certain vegetables to the butcher, to be delivered at the stall later. The gardener was convicted for not paying tolls for the goods sold and otherwise doing what the by-law required to be done by those offering goods for sale in the market; but the conviction was quashed by the Full Court on the ground that the transaction was not within the intention and scope of the by-law: R. v. Manchester, 1908, 38 N. B. R. 424.

A by-law that no huckster, etc., shall buy any meat . . . on the roads, streets, or any other place within the town, on any day before 9 a.m., which was passed under powers identical with s.-s. 5, omitting the words "who directly or indirectly purchase, or acquire them for resale," was held bad, Galt, J., saying:—

> "It is said that the intention of the legislature was to prevent hucksters from forestalling, regrating, or monopolizing the articles mentioned, for the purposes of their respective trades, and was not intended to apply to those persons as individuals."

The fees of a wood market, established on a highway, were leased, the corporation covenanting against interference by themselves or their licensees. Subsequently a lessee of lands from the corporation which

abutted on the highway on which the market was held, placed building materials temporarily so as to interfere with the market, and thereupon the lessee of the market fees brought an action, but he was non-suited on the ground that the market was subject to the acts complained of, as being merely lawful user of the highway: Reynolds v. Toronto, 1865, 15 U. C. C. P. 277.

A. Wilson, J., said: "It is not clear how far the corporation had the right to create the market in the public highway for stationary wagons, during the whole period of daylight; probably it had such power, but it must be subordinate to other higher and more indisputable rights."

Attempt to Compel Fuel Dealers to Use Vehicles of Prescribed Size and Construction.—In R. v. Smith, 1884, 4 O. R. 401, a conviction was made under a by-law which prohibited the delivery of stove wood, except from a wagon or sleigh of a standard size and construction, was quashed by Hagarty, C.J., on the ground that the by-law was *ultra vires*, who said in part:—

"It is to be noted that the word used in the s.-s. 6 (now 3), is weighing not measuring.

"Sub-section 9 (now 6), allows them to regulate the mode of measuring or weighing (as the case may be), certain of the articles mentioned in s.-s. 6 (now 8). We may assume therefore that they may provide for the ascertaining of the true quantity sold by some process of weighing or measuring.

"Having done this can they do more in the way of directing delivery to the purchaser, whether living near or far, in any vehicle except one of a prescribed size and kind?

"I am not concerned to discuss whether the by-law is wise, or unwise, whether it may or may not be the best way to ascertain measurement for the protection of customers.

"Viewed in any light it involves a very formidable exercise of power, and if legal would enable a similar rule to be applied to the large interests in the trade in coal, cordwood, lime, shingles, laths, particularly mentioned in s.-s. 9 (now 6), if it might not also be extended to the largest interests in the country, as to the grain trade, etc., under s.-s. 6 (now 3).

"In interpreting an enactment of the Legislature we may have to consider the extent to which a particular construction of it may be pushed.

"This defendant is convicted for this, that having sold some cordwood he did unlawfully use for the measurement and delivery thereof a waggon not constructed as the by-laws provide, and did deliver it to the purchaser therefrom.

"This is the offence charged.

"With the strongest desire to uphold all regulations reasonably made by the municipalities, I am unable to see how this conviction can be supported.

"For the purposes of the case I concede their right to provide for the weighing or measuring of the wood sold by defendant, but when he has sold it I do not see how they can force carriage and delivery in a specially sized and constructed vehicle, to be provided by the vendor as a means of ascertaining the weight and measurement.

"It is not necessary here to decide that they could lawfully compel a vendor to provide a box of named dimensions at his wood yard, where all wood sold by him could be measured. That would be, in effect, making him provide the means of measurement; but such a course would fall far short of compelling all deliveries in the city to be made in prescribed vehicles.

"If it can be done with stove wood, it can without question be done with coal . . .

"It is hardly necessary to discuss s.-s. 11 (now 9), as it is clear this conviction is not affected by its words. The vehicle here used was not one in which the goods were exposed for sale or marketed."

Market Fees.—A right to market fees is not incident to a market or fair, but is an independent right which must be based on a statutory power in the case of a statutory market. So long as the maximum fee is not exceeded, the market authority may remit all or a part of the fee whenever they please. See Newcastle v. Workshop U. C., 1902, 2 Ch. 145, 71 L. J. Ch. 487, where Farwell, J., said:—

"The reasoning in the case of Hungerford Market Co. v. City Steamboat Co., 1860, 30 L. J. Q. B. 25, 31; 3 E. & E. 365, 380, applies, in my opinion, to the present case. In that case the plaintiff company were authorized by statute to take tolls in return for services to the public, and Lord Chief Justice Cockburn, in delivering the judgment of the Court (consisting of himself and Mr. Justice Hill and Mr. Justice Blackburn), says this:—

"'We have therefore to consider whether a company entitled to take tolls in return for public service is bound, independently of express provision, to exact the same tolls from all persons alike, or is at liberty, if so minded, to remit the tolls, or any portion of them, to particular individuals at its pleasure and discretion. No authority has been adduced for the former of these propositions. In Lees v. Manchester and Ashton Canal, 1809, 11 East. 645, the observations of Lord Ellenborough go no further than to shew that, on grounds of public policy, it may be desirable that such an obligation should attach to the power of a public company to take toll. Yet authority would certainly seem to be required to establish a proposition directly at variance with the well known axiom that every one is at liberty to renounce a right established in his favour. The power to take the tolls is conferred on the company in consideration of service to be rendered, and accommodation afforded, to the public. If the service be rendered and the accommodation afforded, the obligation of the company is fulfilled. If it omit to exact the toll which is the consideration for the service, the shareholders would seem to be the only persons who can have a right to complain. The argument sought to be drawn from the fact that it has been the habit of the Legislature in modern times, when conferring on companies powers to construct great public works and to take tolls in respect of them, to introduce provisions for insuring that such tolls shall be levied equally on all, is only available to establish that, in the opinion of the Legislature, it is, as a matter of public policy, desirable that this equality should be observed. Such express enactment seems, on the other hand, to amount to a legislative recognition of the fact that, in its absence, a power to take tolls does not necessarily imply an obligation to exact them uniformly from all persons alike.' The justification for the grant of tolls in a market or fair is the same as that in Hungerford Market Co. v. City Steamboat Co., 1860, 30 L. J. Q. B. 25, 31; 3 E. & E. 365, 380—namely, services to the public. The principle that any one may waive an advantage to himself applies as much to the owner of market tolls as to a railway or steamboat company, and I see no more ground on which the variation of tolls within the due limits can be said to be a wrong to any one."

In Peters v. London, 1846, 22 U. C. R. 543, a by-law prohibiting the vending of butchers' meat at or within market hours, at any other places than the public market, was held valid, but only on the supposition that there was a market established under a power to fix days and hours for the purpose of selling butchers' meat and "to make other orders and regulations relative thereto as they shall deem expedient."

In Re Kelly and Toronto, 1864, 23 U. C. R. 425, a by-law provided that no butcher's shop should be granted to be opened, kept or used, which was not in a proper public market, or which was less than 600 yards from any proper public market.

This was justified under a power to regulate markets, and under a power to regulate the place or manner of selling and weighing butchers' meat. Draper, C.J., said:—

"Regulation must of necessity include the appropriation of one or more parts of the market for one purpose, and other part or parts for other purposes, and of providing for free passage through the market being kept open for ready access to shops. . . . We are not prepared to say that there is anything unreasonable in requiring that fresh meat shall only be sold in the market, in the shops and stalls, provided for the purpose, when reasonable accommodation is provided . . .

"There is no duty on the corporation to a stall for every man who wants to set up as a butcher, and that trade is not restricted to the market alone, as it may be carried on in places more than 600 yards from the market.

In re Fennell v. Guelph, 1865, 24 U. C. R. 238, it was held that a power to prevent or regulate the sale by retail in the public streets of certain articles combined with a power to prevent or regulate the sale of articles exposed for sale or marketed in the open air, does not warrant a by-law which restrains the sale of such articles to the market place, unless a certain fee is paid, and thus, in effect, to levy a tax on all such sales.

The Court also pointed out that the power to regulate the place and manner of sale was limited to specified articles, that the power to prevent or regulate sales by retail in the public streets, was also limited to certain articles, and that the general power to prevent and regulate the sale of certain other articles was limited to those exposed for sale, or marketed in the open air, and that the power to prohibit or regulate purchase by hucksters and runners was limited to such persons only, and accordingly by-laws which included other articles than those mentioned in the statute, and referred to; other persons than those referred to, was *ultra vires.*

In re Kinghorn and Kingston, 1866, 26 U. C. R. 130, a by-law which was wider than the statute, was also quashed, Morrison, J., saying in part:—

"The statute gives no authority for the passing of a by-law of so wide and general a character as the one now in question, or containing such conditions as it does. The provisions of the statute are specific and limited, and the by-law should be restricted in its operation to the purposes and articles mentioned in the different sub-sections."

In R. v. Woollatt, 1906, 11 O. L. R. 544, D.C., a by-law passed under old s. 580 (9) now s.-s. 6, provided a tariff of fees payable to the clerk "for all animals, coal, hay, straw, or produce, or thing of any kind weighed upon the market scales, and ordained that all coal bought, sold, or delivered in the said city shall be weighed upon the market scales, and be subject to the fees."

The whole delivery in question except where delivery took place outside of the municipality. The defendant was convicted for delivering a ton of coal, without having had it weighed on the market scales and without having paid the fee. Meredith, C.J., in quashing the conviction, said in part:—

"It seems to me that this provision (s.-s. 9), must be limited to such articles as are marketed or exposed for sale within the limits of the municipality, and it cannot have been intended by the Legislature that where such articles have been the subject of a completed contract of sale made beyond the limits of the municipality and the only act within it is the delivery, there should be the right to impose what is practically a tax upon the vendor of the articles.

"I think the applicants are entitled to invoke the rule that power to impose a tax is not given by legislation of this kind unless it appears in plain and unmistakeable terms that it is intended to confer that power.

"Now it seems to me that all that the legislature intended to accomplish in passing this sub-section will be attained if the sub-section is restricted in its application to cases in which the transaction takes place within the limits of the municipality. I do not say, and I should

desire to take further time to consider whether it is even as wide as that in its application, and ought not to be confined to cases in which the articles are exposed for sale within the limits of the municipality.

"I think the by-law is bad and that the conviction ought to be quashed, and there is no reason why it should not be with costs."

In Godden v. Toronto, 1908, 12 O. W. R. 708, a by-law contained a clause that North St. Lawrence Market should be used only by farmers, gardeners and others, selling produce from their waggons, and for holding exhibitions, etc., permitted by the council. A ratepayer's action was brought for a declaration that the use for exhibitions could not be authorized, and the Att.-Gen. was not a party.

The use of the market in question was held to be governed by 1 Wm. IV., c. 10, vesting the market in trustees, for the benefit of the inhabitants of York, and 4 Wm. IV., c. 23, incorporating the City of Toronto, and vesting the market in the city to, and for, the public uses of the city. Under these statutes, it was held that the city had power to pass the by-law, and the action was dismissed. (Hamilton v. Morison, 18 C. P. 228. There can be no dedication as a highway of lands conveyed to a city for market purposes): Atty.-Gen. v. Goderich, 1856, 5 Gr. 402, 539); (Att.-Gen. v. Toronto, 1903, 6 O. L. R. 159, 2 O. W. R. 539); Peck v. Galt, 1881, 46 U. C. R. 217. Irrevocable dedication of lands for market or park purposes; Wood v. Hamilton, 1913, 28 O. L. R. 214; R. v. Myers, 1903, 6 O. L. R. 120; R. v. Woollatt, 11 O. L. R. 544.

401 (4).—This clause was held *intra vires* of the Provincial Legislature as a provision of municipal government, and not a regulation of trade and commerce.

In re Harris v. Hamilton, 1879, 44 U. C. R. 641.

A by-law which provided that no vendor of small wares should practice his calling in a certain market specified, or in the public streets adjacent thereto, is not defective for not defining small wares more particularly, but is bad for uncertainty in not specifying the street intended. *Ibidem.*

Adjacent thereto, means adjacent to the public streets. *Ibid.*

402 (5).—Exception not mentioned in by-law or conviction: R. v. Smith, 1884, 4 O. R. 401. As to negativing exception, see s. 416 (1).

401 (9).—This section, even when combined with 3, does not cover bringing in wood for the purpose of sale, though neither exposed for sale or marketed in any street, or public place, or in any market, but placed at once on private premises, and left there at the pleasure and convenience of the proprietor to be sold.

It is one thing to restrain the selling of wood to particular places and enforcing that restraint by penalty; it is another and very different thing to levy a tax on wood, brought into private premises for sale, or to prohibit the sale of wood, unless the vendor took out and paid for a license: Farquhar v. Toronto, 71 U. C. C. P. 397.

402 (10). Vendors who Voluntarily use the Market Place for Selling.—In R. v. Reed, 1886, 11 O. R. 242, a by-law which imposed a fee on "any person or persons who shall voluntarily come upon the said market place for the purpose of selling upon such market place so as to obtain the advantage of said market place," was held to be broader and more comprehensive than the statute because: (1) All such persons are not vendors, and (2) they might not use the market place though they may come on it for the purpose.

402 (13).—In R. v. Gravelle, 1886, 10 O. R. 735, O'Connor, J., thought a well drafted by-law would shew on its face the fact that no market fees are imposed or charged in the municipality, but he did not think the by-law would be invalid for want of the statement.

403. By-laws may be passed by the councils of counties, cities and towns.

Educational Institutions—Aid to.

(1) For making grants in aid of the University of Toronto or of Upper Canada College, or of any other University or College in Ontario, or of any historical, literary, or scientific society.

(*a*) Such grants may be made from time to time, and may be either by one payment, or by an annual payment for a limited number of years, and upon such terms and conditions as may be agreed upon and may include supplying Upper Canada College with water from the waterworks of the City of Toronto, without charge.

Endowing Fellowships.

(2) For endowing fellowships, scholarships or exhibitions, and other similar prizes, in the University of Toronto, or in Upper Canada College, or in any other university or college in Ontario, for competition among the pupils of the collegiate institutes and high schools in the municipality. 3 Edw. VII. c. 19, s. 587, pars. 5-8.

(3) For granting aid to art schools, approved by the Department of Education. 3 Edw. VII. c. 19, s. 587, par. 12.

(4) For granting aid for the erection, establishment or equipment of an industrial school, to any philanthropic society, within the meaning of *The Industrial Schools Act,* upon the board of which the council is represented. 9 Edw. VII. c. 73, s. 26.

Supporting Pupils at High Schools, Universities and Colleges.

(5) For making permanent provisions for defraying the expenses of the attendance at the University of Toronto, at Upper Canada College, or at any other university or college in Ontario, of such of the pupils of any

collegiate institute or high school of the municipality as are unable to incur the expense, but are desirous of, and in the opinion of the head master thereof possess competent attainments for, competing for any scholarship, exhibition or other similar prize offered by such University or College.

(6) For making similar provision for the attendance at any collegiate institute or high school, for the like purpose, of pupils of public schools of the municipality; 3 & 4 Geo. V. c. 43, s. 403 (1-6).

404. By-laws may be passed by the councils of towns, villages and townships.

Education.

(1) For making grants in aid of, or to build, preserve, enlarge or improve any collegiate institute or high school in another municipality. 3 Edw. VII. c. 19, s. 587, par. 4. 3 & 4 Geo. V. c. 43, s. 404.

405. By-laws may be passed by the councils of counties and cities.

Horse Thieves.

(1) For paying on the conviction of the offender and on the order of the Judge or Police Magistrate before whom the conviction is had a reward of not less than $20 to any person who pursues and apprehends, or causes to be apprehended, any person horse stealing within the municipality.

(*a*) The amount payable as the reward shall be in the discretion of the Judge or Police Magistrate, but shall not exceed the amount fixed by the by-law. 3 Edw. VII. c. 19, s. 595; 9 Edw. VII. c. 73, s. 28; 3 & 4 Geo. V. c. 43, s. 405.

See section 398 (6).

Rewards for Apprehension of Horse Thieves.—The express power given by this section negatives the existence of a power to offer rewards for the apprehension of other classes of criminals, unless given expressly.

The Reward Shall be in the Discretion of the Judge.—For a similar provision authorizing a Court in the case of certain offences, including horse-stealing, to make an order for the payments to a person who has been active in the apprehension of the offender of such sum as seems reasonable and sufficient to compensate for his expenses, exertions and loss of time, see an Act for Improving the Administration of Criminal Justice in England, 1826, 7 Geo. IV., c. 64, s. 28.

406. By-laws may be passed by the councils of cities and towns.

Bicycles, etc.

(1) For regulating the use on the highways of bicycles and other vehicles not drawn by horses, but not including motor vehicles. 3 Edw. VII. c. 19, s. 540, par 7, *amended.*

Under s. 438 (4) every council may pass by-laws setting aside bicycle paths. This sub-section refers to the use of tricycles, and enables regulations to be passed, as the use of bells and lights, speed, and generally any matters conducive either to the safety of the public or the riders.

(2) Repealed. 5 Geo. V. c. 43, s. 27. (See now par. 9*a* of sec. 400.)

Drunk and Disorderly Person.

(3) For providing that the chief constable or any member of the police force in charge of a police station to which a person is brought charged with being drunk without being disorderly may release him without bringing him before a Justice of the Peace or Police Magistrate. 3 Edw. VII. c. 19, s. 549, par. 6, *part;* 3 & 4 Geo. V. c. 43, s. 406 (1-3.)

Causing a Disturbance in a Public Place.—Is an offence under the Vagrancy Provision of the Criminal Code. See 238 (f), but merely being drunk is not an offence, unless made so by a municipal by-law.

A person cannot be arrested for an offence against a municipal by-law, though he may be for failure to pay a fine under a by-law.

Authority to arrest involves the right to detain for such time as may be reasonably necessary to allow the process of law to be enforced, except where the arrest is under s. 652 of the Criminal Code: R. v. Cloutier, 1898, 12 M. R. 183, 2 Can. Cr. Cas. 43. If a person is arrested for drunkenness only, possibly with a view to his own safety, in the absence of a by-law giving authority to release him, a constable in charge of a gaol would probably consider it his duty to bring the offender before a magistrate. See s. 399 (66).

(4) Repealed. 7 Geo. V. c. 42, s. 12 (1). (See now 399 (39*a*.)

Garbage Collection.

406.—(5) For establishing and maintaining a system for the collection, removal and disposal at the expense of the corporation [of garbage or of garbage and other refuse or] of ashes, garbage and other refuse, and with the approval of the Provincial Board of Health for erecting and maintaining such buildings, machinery and plant as may be deemed necessary for that purpose, or for contracting with some person for the collection, removal and disposal by him of the ashes, garbage and other refuse upon such terms and conditions and subject to such regulations as may be deemed expedient.

(*a*) Where the amount required for the erection of such buildings, machinery and plant and for acquiring the requisite land exceeds $5,000, the by-law shall not be finally passed without the assent of the electors entitled to vote on money by-laws. 3 Edw. VII. c. 19, s. 552 (2), (6), *part;* 10 Edw. VII. c. 85, s. 11, *redrafted.*

The words in brackets were added by the Municipal Amendment Act of 1917, s. 14 (1), to take effect as and from the first of January, 1914 (s. 14 (3)).

(6) For the collection, removal and disposal by the corporation [of garbage or of garbage and other refuse or] of ashes, garbage and other refuse throughout the whole municipality or in defined areas of it at the expense of the owners and occupants of the land therein, and for imposing upon such land according to its assessed value a special rate to defray the expense of such collection, removal and disposal.

(*a*) Subject to clause (*c*). No land shall be exempt from the special rate, anything in any general or special Act or in any by-law to the contrary notwithstanding.

(*b*) Subject to clause (*c*), the special rate may be collected or recovered in the manner provided by section 500. 3 Edw. VII. c. 19, s. 552 (7-8); 5 Edw. VII. c. 22, s. 25, *part redrafted.*

(*c*) In the case of a place of worship the council may by by-law provide that the special rate shall be imposed upon the land according to its assessed value exclusive of the assessed value of the buildings.

3 & 4 Geo. V. c. 43, s. 406 (5-6); 7 Geo. V. c. 42, s. 4 (1-2), s. 15.

The words in brackets were added by the Municipal Amendment Act of 1917, s. 14 (2), to take effect as and from the first of January, 1914 (s. 14 (3).

Section 552 (5) conferred a power to establish a system within the municipality, while s. 512 (6) read that in lieu of establishing a system as provided in s.-s. 2 the corporation shall contract, etc. While the sections stood thus, the City of Ottawa by the by-law established a system of collecting garbage, which involved its accumulation at certain designated places in the city, and contracted with certain persons to remove the garbage so collected to a place outside the municipality.

In re Jones and Ottawa, 1907, 9 O. A. R. 323, 660 D. C., the by-law was attacked on the ground that the city could not both establish a system, and contract, that there was no power to contract for the removal of garbage from the municipality, and that the by-law constituted an interference with the contracted rights, was in restraint of trade and created a monopoly.

Within the rules laid down in R. v. Johnson, 1876, 38 U. C. R. 549, and Virgo v. Toronto, the by-law was upheld in all respects but one, namely, in so far as it assumed to prohibit householders from disposing of their productive table waste to dealers.

On the point of removing the garbage to a place outside the municipality, it was held that this could be done, so long as a nuisance was not created.

In re Knox and Belleville, a delegation of authority in connection with garbage collection to a sanitary inspector, and the Board of Health, with respect to matters purely ministerial, was legal.

Laundrymen.

406.—(7) For licensing, regulating and governing laundrymen and laundry companies and for inspecting and regulating laundries;

(*a*) The by-law shall not apply to or include women carrying on a laundry business in private dwelling houses, and employing female labour only, or to such dwelling houses.

(*b*) The by-law may provide that a license shall not be granted, if it is deemed that the location of the laundry is an undesirable one. 3 Edw. VII. c. 19, s. 583, par. 39; 7 Edw. VII. c. 40, s. 16; 3 & 4 Geo. V. c. 43, s. 406 (7).

The Factory, Shop and Office Building Act, R. S. O. 1914, c. 229, s. 6 provides:—

(1) Every shop, building or room, in which one or more persons are employed doing public laundry work by way of trade, or for the purpose of gain, shall be deemed a factory to which this part applies.

(2) This section shall not apply to a dwelling in which a female is engaged in doing custom laundry work at her home for a regular family trade.

The Factory and Workshop Act (Imp.), 1907, 7 Edw. VII., c. 39, extends the Factory and Workshop Act, 1901, to laundries carried on by way of trade or for the purpose of gain, or carried on as ancillary to another business or incidentally to the purposes of any public institution, and s. 3 provides:—

"3. In every laundry—

"(a) If mechanical power is used, a fan or other efficient means shall be provided, maintained, and used for regulating the temperature in every ironing room, and for carrying away the steam in every washhouse.

"(b) All stoves for heating irons must be sufficiently separated from any ironing room or ironing table, and gas irons emitting any noxious fumes must not be used; and

"(c) The floors must be kept in good condition and drained in such manner as will allow the water to flow off freely."

A laundry carried on by an hotel, although no guests' washing is done, is within the Act as "ancillary to the hotel business": Sadler v. Roberts, 1911, 105 L. T. 106.

Scope of s.-s. 7. The exception contained in sub-clause (a) would indicate that all laundries are within the scope of the by-law, excepting only those in dwelling-houses which are expressly excepted. The persons or companies operating hotel laundries of the kind, considered in Sadler v. Roberts, *supra*, or laundries in connection with restaurants or white-wear factories, cannot be considered to be "laundrymen, or laundry companies," and are not subject to licensing, regulating, and governing, though their laundries may be inspected and regulated.

Laundrymen and laundry companies are those who, by way of trade, or for the purpose of gain, carry on laundries.

Undesirable Location for Laundry.—Sub-clause (b) may be inserted in the by-law. Even without such a provision in the by-law, the granting or regulating of a license is in the discretion of the council, which is not bound to give any reason for its action, and the action taken is not open to question or review in any Court, s. 253 (4). The decision as to the undesirability of the location is a judicial matter which cannot be delegated by the council. See Delegation, *supra*.

Pang Sing v. Chatham, 1909, 14 O. W. R. 1161, 16 O. W. R. 338, D.C., the corporation passed a by-law, fixing the license fee for laundries at $50, and prescribing that laundrymen should live elsewhere than in their laundries.

One Chinese laundryman moved to quash the by-law, on the ground that their profits were so small that they could not carry on business under the terms of the by-law.

The defendants sought to shew that the profits were large, but this evidence was held irrelevant, on the ground that the true test was not the profitable, or unprofitable nature of the business, but whether or not the by-law was passed in the *bona fide* exercise of the powers conferred by the Act.

The Court upheld the by-law on that ground, the provision that laundrymen should live elsewhere than in their laundries, was held to be justified to safeguard public health.

Regulation of Location, Erection and Use of Laundries by cities. See s. 400 (2).

Lavatories, etc.

406.—(8) For constructing and maintaining lavatories, urinals, water closets and like conveniences, where deemed requisite, upon the highways or elsewhere, and for supplying them with water, and for defraying the expense thereof and of keeping them in repair and good order. 3 Edw. VII. c. 19, s. 552 (1); 3 & 4 Geo. V. c. 43, s. 406 (8).

In British Can. v. Victoria, 1911, 11 B. C. R. 441, 19 W. L. R. 242, the conveniences were held not to amount to a nuisance.

In re Brown and Toronto, 1916, 36 O. L. R. 189, the official arbitrator awarded compensation for the injury done to the lands opposite which the corporation had erected lavatories on, and on appeal was dismissed, the Court being equally divided.

Lennox, J., said in the App. Div., in part:—

"I am of opinion that the award should stand.

"(1) That, but for the statute, what the council of the City of Toronto has done would be an unlawful obstruction of the highway, a common law nuisance and an indictable offence.

"(2) That, by reason of what has been done, the claimants have suffered financial injury differing in kind and extent from the injury and inconvenience occasioned to others, and but for the statute would have a cause of action against the city.

"(3) That the statute gives the company an absolute right to compensation, the extent to which their property is injuriously affected, without shewing a common law right of action—that the right of the city to injure the company's property is conditional upon making compensation.

"(4) And that the assumption that fair compensation is to be made for injury to property affected is the only basis upon which it can reasonably be inferred that the city had the right to exercise their powers to the prejudice of owners or occupiers of properties; and, if otherwise, the statute conferred no power to execute the work where it has been executed, and the city could have been, and can be, restrained by injunction."

Meredith, C.J., said in part:—

"The compensation (s. 325), is for land expropriated for the purposes of the corporation, or injuriously affected by the exercise of its powers: that is, its powers affecting land directly. There has been no change in the law in this respect, and so there can be, in my opinion, no excuse for altering the practice upon this subject, and the less so in view of the recent cases of Grand Trunk Pacific R.W. Co. v. Fort William Land Investment Co., 1912, A. C. 224, and Holditch v. Canadian Northern Ontario R. W. Co., 1915, A. C. 536, which are quite in point, and, in my judgment, conclusive against this award. . . . In the Fort William case there was the gravest kind of an obstruction to the right of way, a steam railway line down a city's street, yet the abutting land-owners were not entitled to compensation: see Hislop v. Township of McGillivray (1890), 17 S. C. R. 479, and Ormsby v. Township of Mulmur (1916), 10 O. W. N. 133, to be reported in these reports.

"Then the injury the landowners complain of, and for which they have been awarded compensation, is really an injury to their business, not their property: it is interference with their 'plate glass front' benefits, not their land or any property right connected with it."

Where Deemed Requisite Upon the Highways, or Elsewhere, a similar provision in the Public Health (London) Act, 1891, s. 44, provides that sanitary authorities may provide and maintain public sanitary conveniences in situations where they "deem the same to be required." In Westminster Corporation v. London & N. W. Ry. Co., 1905, A. C. 426, 74 L. J. Ch. 629, the plaintiffs sought an injunction to restrain the corporation from erecting the conveniences opposite their property, on the ground that the location was not chosen in good faith, but for an ulterior purpose, namely: To provide a subway. The chairman of the Works Committee declared that his committee considered with very great care for a couple of years or more the question of the conveniences, and that the primary object of the committee was to provide the conveniences. The trial Judge accepted this statement and refused the injunction. The Court of Appeal discredited his testimony, but on appeal to the House of Lords, the judgment of the trial Judge was restored. Lord McNaghten said in part:—

> "It seems to me that when a public body is exercising statutory powers conferred upon it for the benefit of the public, it is bound to have some regard to the interest of those who may suffer for the good of the community. I do not think it is right—I am sure it is not wise—for such a body to keep its plans secret and carry them into execution without fair and frank communication with those whose interests may possibly be prejudiced or affected."

Section 39 of the Public Health Act (Imp.), 1895, provides:—

> "39. Any urban authority may, if they think fit, provide and maintain, in proper and convenient situations, urinals, water-closets, earth-closets, privies and ashpits, and other similar conveniences for public accommodation."

Under this section and a corresponding section in the Metropolis Management Act, 1855, there have been many cases in which the local authority's discretion as to the site of conveniences has been called in question. Under the last mentioned Act, the local authority erected a convenience adjoining the wall of Buckingham Palace. Every owner or occupant of houses in Grosvenor Place, in which the structure was to be placed, signed a memorial prohibiting for the following reasons:—

> "1. That it would depreciate the value of their property; 2, that the offence to them, as occupiers, could not be measured by pecuniary compensation; 3, that the accommodation of the public did not require its construction at the above spot any more than the construction of a similar work in front of Buckingham Palace; 4, that there might be found in the neighbourhood various situations where such a place, instead of creating, would diminish offence; 5, that the Act of Parliament before mentioned (one of the objects of which was the suppression of nuisances), did not legalize the creating of a nuisance, which the proposed resort in the situation in question would be; 6, that the defendants had no right to establish such a place without the consent of the person or persons interested in the soil; whereas the right of soil on the vacant ground between the highway and the Palace garden wall, as well as in the highway itself to the centre, was vested in the Crown, and the Commissioners of Her Majesty's Works and Public Buildings were not consenting; and 7, that the memorialists were advised by counsel that the selection of the site could not be deemed a proper exercise of the discretion given by the above statute to the vestry."

This having no effect, an action was commenced and an interim injunction was granted which on appeal was dissolved. Turner, J., saying:—

> "It is not contended on the part of the vestry that this Act of Parliament does confer upon them the right to create either a private or a public nuisance, and it is impossible to assume that the mere fact

of a urinal being erected will, of itself, be a nuisance, when we find power given by Parliament to erect such accommodation. Certainly it is not proved that the erection must be such as will constitute a nuisance, either public or private; therefore the first part of the argument drops to the ground. But then it is said that the powers of this Act of Parliament are being exercised injuriously to private property, and that the exercise of them is not necessary. Now, I am very far from thinking that this Court has not power to interfere with public bodies in the exercise of powers which are conferred on them by Act of Parliament. I take it that it would be within the power and the duty of this Court so to interfere in cases where there is not a *bona fide* exercise of the powers given by Parliament; and I should be very sorry to be supposed to entertain the notion that public bodies, under the general powers given by them by Act of Parliament, can do whatever they think right, but when this Court is called on to interfere, I take it to be the duty of the Court to consider the question, whether there is, or is not, a *bona fide* exercise of the powers conferred by the Legislature; and, on the evidence, I can see nothing which would, in any way, warrant the Court in imputing to the defendants that they are not exercising their powers *bona fide*. The question then resolves itself into the construction of the Act of Parliament. It is said that if the powers be as extensive as contended for on the part of the defendants, they might erect a urinal in front of any gentleman's house. The answer is that it would be impossible to hold that to be a *bona fide* exercise of the powers given by a statute."

(Note.—It is believed that some compromise was come to; neither the proposed erection nor the suit was proceeded with.)

In Mason v. Wallasey L. B., 1876, 58 J. P. 477, Jessel, M.R., held that the power was absolute if exercised *bona fide*.

In Vernon v. St. James', Westminster, 1880, 16 Ch. D. 449, 50 L. J. Ch. 81, C. A., the erection of a urinal under powers, conferred by s. 88, was restrained by injunction. Cotton, L.J., said in part:—

"If this were tried without any reference to parliamentary authority, could it be otherwise than a nuisance to erect a thing of this sort in this particular place, where young women going to the different shops of which we have heard are constantly passing at all hours of the day and all hours of the evening; and when this place is in the immediate proximity to the door of one large employer of labour, immediately at the entrance of a passage leading to two other doors, one going to the shop of the same employer of labour, and another going to another employer of labour, who has coming to his shop from 300 to 400 young women with work for the purposes of the shop. In my opinion to state that, is sufficient to shew that this erection is a nuisance placed in absolute proximity to those who are necessarily going for their daily work to these doors. Is it then authorized by this section of the Act of Parliament? . . . one must look to the whole of the section and see whether there is that in the section which will justify their erecting and maintaining a nuisance. It is impossible to say that a urinal or water-closet must necessarily be a nuisance. If it could be made out that such an erection, wherever made and however guarded, must of necessity be a nuisance, then indeed it would be true that the Act of Parliament has authorized a nuisance and the Court would not have interfered."

In Sellors v. Matlock Bath L. B., 1885, 14 Q. B. D. 928, the Board was restrained from continuing a urinal on the defendants' land, or so near thereto as to cause injury or annoyance.

Lifeboat Associations.

406.—(9) For granting aid to any organization owning, managing and working lifeboats or other apparatus

for life saving purposes. 3 Edw. VII. c. 19, s. 591, par. 11. 3 & 4 Geo. V. c. 43, s. 406 (9).

(9*a*) For licensing, regulating and governing massagists and for inspecting and regulating massage parlours, and such by-laws may provide for the enforcement thereof through the Medical Health Department or Police Department of the city or town. 6 Geo. V. c. 39, s. 7.

Residential Streets and Building Line.

(10) For declaring any highway or part of a highway to be a residential street, and for prescribing the distance from the line of the street in front of it at which no building on a residential street may be erected or placed.

(*a*) It shall not be necessary that the distance shall be the same on all parts of the same street.

(*b*) The by-law shall not be passed except by a vote of two-thirds of all the members of the council. 4 Edw. VII. c. 22, s. 19, *part amended;* 3 & 4 Geo. V. c. 43, s. 406 (10).

Steps and Other Projections.—The purpose of establishing a building line, is to preserve the width of the street and the general line of building frontage, in order to obtain architectural uniformity, and, upon that principle, the Electric Advertisement Sign was held as not constituting the projection from a building beyond the general line of buildings: Hull v. London C. C., 1901, 1 K. B. 580, 70 L. J. K. B. 364. This case was decided under s. 73 of the London Building Act, 1894, which provided that no projection from any building, except certain specified architectural decorations, should extend beyond the general line of buildings in any street. Correctness of the decision was subsequently doubted, but Lord Alverstone, C.J., pointed out in Pears v. London C. C., 1911, 105 L. T. R. 525, that it could only be altered by Act of Parliament.

In Manners v. Johnson, 1875, 1 Ch. D. 673, 45 L. J. Ch. 404, houses were set out in a regular plan, and each purchaser covenanted with the former owners of the whole, not to erect any building in advance of the general line of frontage. It was held that a bay window was a building contrary to the terms of the agreement, and a mandatory injunction was granted, to compel the defendant to pull it down. The last mentioned case was thought by Middleton, J., in Re Masonic Temple Co. and Toronto, 1915, 33 O. L. R. 497, to apply to any height superstructure for steps, but not to apply to steps which, at their highest point, were only four feet six inches above the ground level.

In Re Dinnick and McCallum, 1912, 26 O. L. R. 551 D. C., 28 O. L. R. 52 C. A., the facts are:—

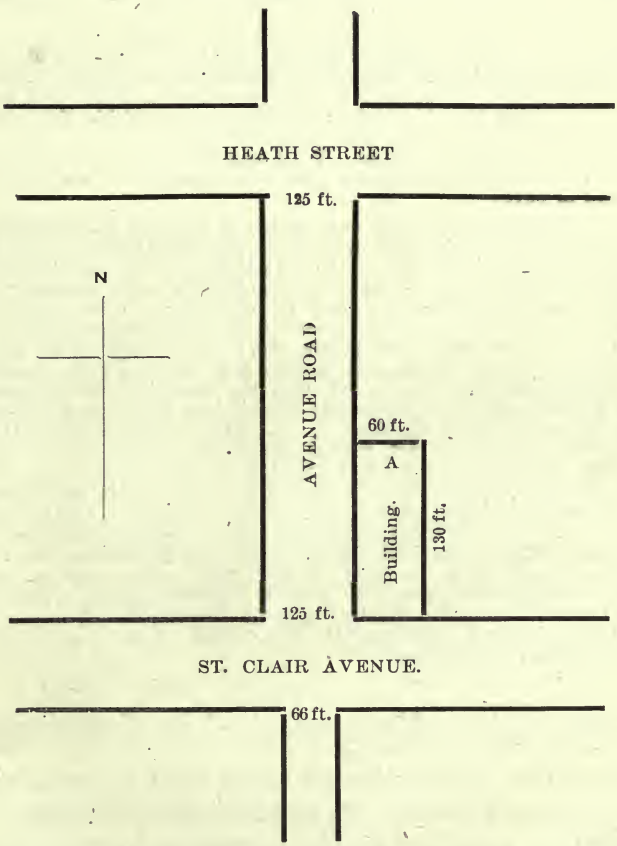
> "By the Act (1904) 4 Edw. VII., c. 22, s. 19 (adding s. 541a to the Consolidated Municipal Act, 1903), it was provided that "the councils of cities . . . are authorized . . . to pass and enforce . . . by-laws . . . to regulate and limit the distance from the

line of the street in front thereof at which buildings on residential streets may be built; such distance may be varied upon different streets, or on different parts of the same street.

"The Council of the City of Toronto, purporting to act under the powers given by this statute, in December, 1911, passed by-law No. 5891, containing the following provisions: 'No building shall hereafter be built or erected on the lots fronting or abutting on both sides of Avenue road from St. Clair avenue to Lonsdale road, within a distance of 40 feet from the east and west lines of the said road, and no person shall hereafter erect or build any such building in contravention of this by-law.'

"Avenue road is admittedly a 'residential street' within the meaning of the Act.

"Mr. Dinnick, being the owner of the block of land at the north-east corner of St. Clair avenue and Avenue road, desired to build an apartment house at the corner, 60 feet on St. Clair avenue and 130 feet on Avenue road (see rough plan).



"Drawing up all proper plans and specifications, he applied to the City Architect for a building permit, which was refused solely on the ground that the proposed building would be in violation of by-law 5891.

"Upon motion for a mandamus, the city corporation did not insist upon any technical objection, and the real matters to be decided are the validity of the by-law and its application to the present case.

"It is admitted that the building 'fronts' on St. Clair avenue."

Riddell, J., before whom the motion came, stated the view of the laws as follows:—

"We must look at the object of the legislation. It must be plain that the whole object was to enable the city to make residential streets more attractive, etc., by preventing building out to the street line—it would make a farce of the legislation if persons were to be allowed to build with the gable ends of their houses toward the street and up to the line of the street, claiming that they did not front on the street, and, therefore, the street was not 'in front thereof.' And it would be no less absurd to say that, if people could not build in that way in the middle of the block, they could at the corners. I am of the opinion that the power exists to prevent any buildings being placed within a distance (of course reasonable) of the line of a residential street."

The learned Judge thought himself bound by a contrary decision of Falconbridge, C.J.K.B., in Toronto v. Schultz, reported in 26 O. L. R. 554, and referred the case to the Divisional Court, which held that the building was within the object of the legislature, and within the restriction imposed by the by-law, and was not discriminatory, or so unreasonable that it should be declared invalid. The Court of Appeal, however, reversed the Divisional Court. Meredith, J.A., who gave the judgment of the Court, said in part:—

"The legislation deals only with the front of the house, the by-law in question deals, and deals only, with the land upon which it is built: 'No building shall . . . be built . . . on the lots fronting or abutting . . .' In the argument here it was assumed throughout on all sides that the land in question is a lot on St. Clair avenue, and not, except as to one of its side-lines, on Avenue road; and, if so, how can it be within the by-law except under the word 'abutting' which the legislation does not authorize? It would seem from the adding of that word, that the municipal council saw that the Act does not include such lots as that in question, and sought in by the by-law to extend its effect . . . My conclusion then is, that the proposed building is not within the by-law, which relates only to Avenue road, and so can affect only lots fronting upon it.

"If St. Clair avenue be a residential street, the by-law might have included it, but does not.

"Also that, if the by-law followed the statute, this case would not be within it, because the proposed building is not to front on Avenue road, but is to front on St. Clair avenue, and so could be affected only by a by-law respecting that highway; and, in my opinion, the street in front of a building is under this enactment, the one really in front of it, not another at the side, which no one would ever think of describing as in front of it."

Sewerage System—Management of by Commissioners.

406.—(11) Where the sewerage system includes the disposal or purification of sewage upon a sewage farm by filtration or other artificial means, for placing the management of it under a commission established under *The Public Utilities Act.*

(*a*) The By-law shall not be passed without the assent of the municipal electors. 3 Edw. VII. c. 19, s. 554, pars. 1*a*, 1*b*, *redrafted;* 3 & 4 Geo. V. c. 43, s. 406 (11).

Public Utilities Commission.—See the Public Utilities Act, R. S. O. 1914, c. 204, ss. 38 to 43.

Superannuation and Benefit Funds.

406.—(12) For granting aid for the establishment and maintenance of superannuation and benefit funds for the members of the police force and of the fire brigade, and of other officers and employees of the corporation, and of their wives and families. 3 Edw. VII. c. 19, s. 591, pars. 9, 10, *redrafted.*

Surveyors and Engineers.

(13) For appointing an Ontario land surveyor as surveyor for the corporation and for appointing one or more engineers. 3 Edw. VII. c. 19, s. 537, par. 5; 8 Edw. VII. c. 48, s. 25.

The Surveys Act, R. S. O. 1913, c. 166.—A municipal corporation will be restrained from passing a by-law to levy and from levying the cost of a survey under section 14 of the Surveys Act. In re Scott and Peterborough, 1867, 26 U. C. R. 36; Sutton v. Port Carling, 1902, 3 O. L. R. 445.

(*a*) An engineer so appointed and his assistants shall, in the performance of their duties, possess all the powers, rights and privileges which a surveyor possesses under the provisions of s. 6 of *The Surveys Act.* 2 Geo. V. c. 40, s. 8; 3 & 4 Geo. V. c. 43, s. 406 (12-13); *amended* 4 Geo. V. c. 33, s. 12.

406*a*.—(1) By-laws may be passed by the council of cities:—

(*a*) Requiring all residents in the municipality owning and using any wheeled vehicle to obtain a license therefor before using the same upon any highway of the city.

(*b*) Regulating the issuing of such licenses and the collection of fees therefor.

(*c*) Fixing an annual fee not exceeding $1.00 for such licenses, which shall be approved of by the Ontario Railway and Municipal Board.

(*d*) Fixing a scale of fees for different vehicles.

(*e*) Imposing penalties not exceeding $5.00, exclusive of costs upon all persons who contravene any such by-law.

(*f*) Providing that such penalties may be recoverable in the manner provided by this Act.

(2) For allowing any person owning or occupying any building or other erection which by inadvertence has been wholly or partially erected upon any highway to maintain and use such erection thereon and for fixing such annual fee or charge as the council may deem reasonable for such owner or occupant to pay for such privilege.

(*a*) such fee or charge shall form a charge upon the land used in connection therewith and shall be payable and payment of it may be enforced in like manner as taxes are payable and the payment of them may be enforced, but nothing herein contained shall affect or limit the liability of the municipality for all damages sustained by any person by reason of any such erection upon any highway.

(3) (*a*) For permitting the use of portion of any highway or boulevard by the owner or occupant of land adjoining such highway or boulevard during building operations upon such land for the storage of materials for such building or for the erection of hoardings.

(*b*) To fix a fee or charge for such use according to the area occupied and the length of time of such occupation and to collect the same.

(*c*) To regulate the placing of such materials or hoardings, the restoration of such highway or

boulevard to its original condition, the payment of such fee or charge, and the giving of permits for such privilege.

(4) For licensing and regulating the owners of public garages, and for fixing the fees of such licenses, and for imposing penalties for breach of such by-law and for the collection thereof.

(*a*) For the purpose of this paragraph a public garage shall include a building or place where motor cars are hired or kept or used for hire or where such cars or gasoline or oils are stored or kept for sale, and a building used as an automobile repair shop. 9 Geo. V. c. 46, s. 15.

(5) For licensing, regulating and governing bailiffs and for providing that each applicant for a license shall deposit with the issuer of licenses, with his application, such security or guarantee bond for such amount as may be required by the council of the municipality.

(*a*) For the purpose of this paragraph a bailiff shall mean "any person acting as agent for any other person under a warrant authorizing the seizure and sale of chattels, but shall not include a bailiff of any Division Court, nor any sheriff or his agent, nor any officer of any Court of Record." 4 Geo. V. c. 33, s. 13, *amended;* 7 Geo. V. c. 42, s. 16, *amended;* 8 Geo. V. c. 32, s. 9.

407. By-laws may be passed by the councils of towns and villages.

Fire Engines, etc.

(1) For purchasing fire engines *and for purchasing and installing* apparatus or appliances and appurtenances for fire protection at a cost not exceeding $5,000, and for the issue of debentures therefor, payable in equal annual instalments of principal and interest during a period not exceeding ten years.

(*a*) It shall not be necessary to obtain the assent of the electors to the by-law if it is passed by a two-thirds vote of all the members of the council. 6 Edw. VII. c. 34, s. 18, *part amended.*

The words in italics were added by 5 Geo. V., c. 34, s. 28.

28. Sub-section 1 of s. 407 of the Municipal Act is amended by inserting after the word "engines" in the first line thereof the words "and for purchasing and installing."

See ss. 398 (15) and 400 (14), without the power granted by the sub-clause, ss. 288 and 289 would apply.

Vehicles Used for Hire, etc.—Livery and Boarding Stables.

407.—(2) For licensing, regulating and governing teamsters, carters and dray men, drivers of cabs and other vehicles for hire, and regulating the charges for the conveyance of goods or for other services by them.

(3) For licensing, regulating and governing the keepers of livery stables, and of horses and cabs, carriages, omnibuses and other vehicles used or kept for hire; for regulating the fares to be charged for the conveyance of goods or passengers, and for enforcing payment thereof.

(4) For defining districts within which a livery or boarding stable shall not be established. 3 Edw. VII. c. 19, s. 583, pars. 37-38, *amended;* 3 & 4 Geo. V. c. 43, s. 407 (1-4).

Vehicles Kept for Hire.—Under the Town Police Clauses Act (Imp.), 1847, 10 & 11 Vict., c. 89, s. 37, police commissioners have power to license vehicles to ply for hire. See also Metropolitan Public Carriages' Act, 1869. There have been many decisions as to when a vehicle is plying for hire. See among others: Case v. Storey, 1868, L. R. Ex. 319, 38 L. T. M., C. 113 (cabs on railway grounds by arrangement), but *contra*, see Clark v. Stanford, 1871, L. R. 6 Q. B. 35-75, and 40 L. J. M. C. 151 (railway grounds); Allen v. Tunbridge, 1871, L. R. 6 C. P. 48, 40 L. J. M. C. 197 (railway grounds).

In R. v. Aitcheson, 1915, 9 O. W. N. 65, it was held that a new amended by-law could not be read as applying to licenses already issued under the old by-law.

Vehicles Kept for Hire.—See s. 400 (5).

Prohibited Areas.—The special power to prohibit does not cover private stables. Cities may deal with these under 409 (2), and Police Commissioners in cities under 422 (3, 4 and 5).

See s. 408 (6) for power of counties as to livery stables.

In R. v. Sparks, 1913, 23 W. L. R. 613, 3 W. W. R. 1126, 10 D. L. R. 616, a by-law delegating to the Chief of Police the discretion to prohibit any one whom he considered not to be of good moral character

from engaging in cab driving, was held *ultra vires*. The extent to which regulation may involve prohibiting, as it was held to do in Slattery v. Naylor, 1888, 13 App. C. as 446, 57 L. J. P. C. 73, was discussed.

In Re Kiely, 1887, the council of Toronto passed a by-law to regulate and license livery stables, although the power to do so conferred by the Act upon Police Commissioners. The by-law was held *ultra vires*, and even if not *ultra vires*, it would have been bad; because it required as a condition precedent to the granting of license that the applicant should procure the consent of the number of persons in the neighbourhood, thus divesting the commissioners of the power which they should personally exercise.

408. By-laws may be passed by the councils of counties.

Booms—Protection and Regulation of.

(1) For protecting and regulating booms on any stream or river for the safe keeping of timber, saw-logs and staves. 3 Edw. VII. c. 19, s. 547, par. 6; 3 & 4 Geo. V. c. 43, s. 408 (1).

Booms.—By the Rivers and Streams Act, R. S. O. 1914, c. 130, s. 3, all persons have the right subject to the provisions of the Act, during spring, summer and autumn freshets, to float timber down all rivers, and to construct "any . . . boom or other work therein or thereon," in order to facilitate the floating and transmitting of timber, doing no unnecessary damage to the river or its banks. Sub-section 1 enables county councils to make provisions by by-law to protect and regulate the booms so authorized.

As to rivers forming a boundary line between counties, see s. 456. There appears to be no jurisdiction under s.-s. (1) to pass by-laws dealing with booms on rivers forming such boundary lines. See s. 420 (6).

Fences.

408.—(2) For the exercise in respect of fences along highways under the jurisdiction of the council, of the powers conferred upon the councils of local municipalities by paragraph 29 of section 399 and by *The Snow Fences Act*. 3 Edw. VII. c. 19, s. 545, par. 8, first part. 3 & 4 Geo. V. c. 43, s. 408 (2).

In Hogg v. Brooke, 1904, 7 O. L. R. 273, C. A., the Court, Moss, C.J.O., referring to the powers conferred by this sub-section, said:—

"And it may fairly be presumed that it was supposed that in placing these powers in the hands of the municipalities, they would be brought into requisition when occasion required or circumstances demanded it. It cannot be that municipalities may totally neglect the measures they are thus entitled to take and ask to be excused from liability for damages sustained by reason of their default.

And Garrow, J.A., said:—

"Power in the case of public bodies has frequently been held to involve the duty of using it when necessary in the interest of the public: see Julius v. Bishop of Oxford (1880), 5 App. Cas. 214. And without determining that the defendants were legally bound to use these

powers or either of them, it is entirely proper to refer to them in considering whether, under all the circumstances of the case, the defendants have acted reasonably in their utter inaction in the premises under consideration.

Snow Fences. — The Snow Fences Act, R. S. O. 1914, c. 211, provides:—

2.—(1) The council of every township, city, town and village may pass by-laws requiring the owners or occupiers of land bordering upon a public highway to take down, alter or remove any fence which causes an accumulation of snow or drift so as to impede or obstruct travel.

(2) The council shall make such compensation to the owner or occupants for the taking down, alteration or removal of such fence and for the construction in lieu thereof of some other description of fence, approved of by the council, as may be mutually agreed upon; and in default of agreement the compensation shall be determined by arbitration, and three fence-viewers appointed by the council shall be the arbitrators. 2 Geo. V., c. 52, s. 2.

3.—(1) If the owner or occupant refuses or neglects to take down, alter or remove the fence as required by the council, the council, after the expiration of two months from the time the compensation has been agreed upon or determined by arbitration, may take down, alter or remove such fence, and may construct the fence which has been approved of by the council, and the amount of all costs and charges thereby incurred by the council, over and above the amount of compensation, may be recovered from such owner or occupant by action in any Division Court having jurisdiction in the locality, and the amount of the judgment, if not sooner paid, shall be placed by the clerk of the municipality upon the collector's roll against the land upon or along the boundaries of which the fence is situate, and shall be collected as other taxes.

(2) Where an occupant other than the owner is required to pay such sum, or any part thereof, he may deduct it, and any costs paid by him from the rent payable by him, or may otherwise recover the same unless he has agreed with the landlord to pay it.

(3) The arbitrators shall examine the premises and shall, if required, hear evidence.

(4) The arbitrators shall be entitled to $2 a day, which shall be paid by the corporation of the municipality if the amount of the award exceeds the amount offered by the corporation, otherwise by the owner or occupant.

(5) The award shall be filed in the office of the clerk of the municipality, and an appeal shall lie therefrom to the Judge of the County or District Court of the County or District.

(6) The provisions of the Line Fences Act shall *mutatis mutandis* apply to such appeal. 2 Geo. V., c. 52, s. 3.

4.—(1) Every such council may, on and after the 15th day of November in each year, enter into and upon the lands of His Majesty, or of any corporation or person situate within the municipality and lying along any public highway in or adjoining any such municipality, and may erect and maintain snow fences thereon, subject to the payment of such damages, if any, as may be suffered by the owner or occupant of the land so entered upon, the amount thereof to be ascertained, if not mutually agreed upon, by arbitration as provided in s. 2.

(2) The snow fences so erected shall be removed on or before the first day of April following. 2 Geo. V., c. 52, s. 4.

Brohm v. Somerville, 1906, 11 O. L. R. 588 D. C., was decided under s. 545, s.-s. 5 of the Consolidated Municipal Act, 1903, which provided as follows: By-laws may be passed—

5. For requiring the owners or occupiers of lands bordering upon any public highway, to take down, alter or remove any fence or fences, subject to the provisions of the Act Respecting Snow Fences. 55 Vict. c. 42, s. 489 (20).

Under this enactment the council passed a by-law which is as follows:—

"In places where the road is liable to be blocked with snow in winter and where in the opinion of the council such drifts would be prevented by the removal of any rail, board or other fence, the council may order the removal of such fence or fences as provided in the Act Respecting Snow Fences, R. S. O. 1897, c. 240, and on the removal of such fence or fences by the owners and the erection of such wire or other fences as the council shall direct, the parties erecting such wire or other fences shall be paid out of the general funds of the municipality a sum not exceeding 35 cents per rod of fence."

Anglin, J., thus stated the facts and law:—

"The plaintiff before erecting the fence in question submitted his contract for its construction to the council through the medium of a neighbour, Mr. Abernethy; that the opinion and order of the council that the plaintiff's existing fence should be removed, and its direction for or approval of the erection of the wire fence proposed by the plaintiff, were expressed to Abernethy by the reeve, Wilson, at a session of the council and in the presence of the township clerk and of several of the councillors; that such order and direction were by Abernethy communicated to the plaintiff; and that pursuant thereto and in reliance upon the by-law and the sanction of the council thus expressed and communicated, the plaintiff removed his existing fencing and had the wire fencing in question erected.

"Upon these facts the liability of the defendants to pay for the fencing, of which the erection was thus authorized is, we think, reasonably clear. The by-law is in itself a conditional undertaking by the defendants to pay, and the plaintiff has, by evidence accepted by the learned Judge, established the fulfilment of the prescribed conditions.

"The defendants further contend that the plaintiff's only remedy is that by arbitration under the Act Respecting Snow Fences, R. S. O. c. 240, s. 1, which provides as follows:—

"'And if the council and the owners or occupants cannot agree in respect to the compensation to be paid by the council, then the same shall be settled by arbitration in the manner provided by the Municipal Act, and the award so made shall be binding upon all parties.'

"The statutory provision does not, in my opinion, preclude the jurisdiction of the Court, where, as here, the parties are not merely unable to agree as to the amount of compensation, but the municipal corporation wholly repudiates liability. This defence is not upon the record, and an amendment to enable the defendants to defeat an apparently honest claim upon them should not at this stage be permitted. Moreover, they rejected the plaintiff's proposals for arbitration upon their solicitor's advice that to enter into such arbitration would involve an admission of the liability of the municipality."

Orders for Removal.—See ss. 500 and 501.

Guaranteeing Debentures.

408.—(3) For guaranteeing debentures of any local municipality in the county. 3 Edw. VII. c. 19, s. 539, par. 4. 3 & 4 Geo. V. c. 43, s. 408 (3).

Poles and Wires.

(4) Subject to *The Municipal Franchises Act* for permitting and regulating the erection and maintenance of electric light, power, telegraph and telephone poles,

towers and wires on, and the laying of pipes or conduits for the conveyance of water, gas or sewage under, the highways, under the jurisdiction of the council. 9 Edw. VII. c. 73, s. 21. 3 & 4 Geo. V. c. 408 (4).

Publicity Purposes.

(5) For expending for the purposes mentioned in section 428 and for diffusing information respecting the advantages of the county as an agricultural centre a sum not exceeding in any year $3,000. 2 Geo. V. c. 40, s. 18.

Traffic—Regulation of; Licensing Livery Stables, etc.

(6) If there are gravel or macadamized highways under the jurisdiction of the council, and under its immediate control, which are being kept up and repaired by municipal taxation, and upon which no toll is collected;

(*a*) For licensing, regulating and governing the keepers of livery stables, and of horses, cabs, carriages, omnibuses, and other vehicles used or kept for hire, and teamsters;

(*b*) For regulating the fares to be charged for the conveyance of goods or passengers;

(*c*) For regulating the traffic on such highways and the width of the tires on the wheels of vehicles used for the conveyance of articles of burden, goods, wares, or merchandise on such highways.

(*d*) For regulating the use of lock shoes on vehicles used on such highways. 8 Edw. VII. c. 19, s. 584. 3 & 4 Geo. V. c. 43, s. 408 (5-6).

Seeds—Refuse from Cleaning.

(7) For compelling the destruction or regulating the disposal of the refuse obtained in the process of cleaning grass or clover seed. 7 Geo. V. c. 42, s. 17.

This section was added to the Act by the Municipal Amendment Act, 1917, s. 17.

(8) For purchasing supplies of any or all kinds of vegetables, seeds and seed roots and tubers and donating them to residents of the county on such terms and conditions as may be fixed by the by-law for the purpose of promoting and aiding the production of crops.

(*a*) This paragraph shall be deemed to have been in force on, from and after the 12th day of April, 1917. 9 Geo. V., c. 46, s. 16.

409. By-laws may be passed by the councils of cities.

Commissioner of Industries.

(1) For the establishment and maintenance of a department of industries and for appointing a Commissioner of Industries to bring to the notice of manufacturers and others the advantages of the city as a location for industrial enterprises, summer resorts, residential, educational and other purposes. 10 Edw. VII. c. 85, s. 7. 3 & 4 Geo. V. c. 43, s. 409 (1).

Query.—Is the council limited to the amounts authorized under s. 428, and possibly under s. 427?

Location of Stables, etc.

409.—(2) For regulating and controlling the location, erection and use of buildings as livery, boarding or sales stables, and stables in which horses are kept for hire or kept for use with vehicles in conveying passengers, or for express purposes, and stables for horses for delivery purposes, laundries, butcher shops, stores, factories, blacksmith shops, forges, dog kennels, hospitals or infirmaries for horses, dogs, or other animals and for prohibiting the erection or use of buildings for all or any or either of such purposes within any defined area or areas or on land abutting on any defined highway or part of a highway;

(*a*) The by-law shall not be passed except by a vote of two-thirds of all the members of the council;

(*b*) This paragraph shall not apply to a building which was on the 26th day of April, 1904, erected or used for any of such purposes, so long as it is used as it was used on that day. 3 Edw. VII. c. 19, s. 484 (2); 4 Edw. VII. c. 22, s. 19, *part;* 5 Edw. VII. c. 22, s. 21; 7 Edw. VII. c. 40, s. 12; 8 Edw. VII. c. 48, s. 6; 3 & 4 Geo. V. c. 43, s. 409 (2).

409.—(2*a*) Paragraph 2 of this section shall also apply to plumber shops, machine shops, tinsmith shops, moving picture or other theatres and buildings used for the storage of builders' plant; but this paragraph shall not apply to a building which was on the 1st day of May, 1914, erected or used for any of such purposes so long as it is used as it was used on that day. 4 Geo. V. c. 33, s. 14.

409.—(2*b*) Paragraph 2 of this section shall also apply to private hospitals, public dance halls and undertakers' establishments, and for the purpose of this paragraph, any hall, room, or building in which dancing is carried on for which a fee is charged or to which any admission fee is demanded or paid, shall be deemed a public dance hall, but this paragraph shall not apply to a building which was on the 1st day of May, 1916, erected or used for any of such purposes nor to any building the plans for which have been approved of by the city architect prior to the 1st day of May, 1916. 6 Geo. V. c. 39, s. 8.

(2*c*) The passing of a by-law under this section shall not prevent the extension or enlargement of any building used for any of the purposes mentioned in this section at the time of the passing of the by-law.

(2*d*) For prohibiting the sale of goods, wares and merchandise on any private lands within any defined area or areas, or lands abutting on any defined highways or part of a highway, to which any by-law passed under

paragraphs (2), (2*a*), or (2*b*) of this section applies. 7 Geo. V. c. 42, s. 18.

(2*e*) Paragraph 2 of this section shall also apply to warehouses and gasoline and oil filling stations, but this paragraph shall not apply to a building or station which was on the 1st day of April, 1918, erected or used for any such purposes, so long as it is used as it was used on that day. 8 Geo. V. c. 32, s. 10.

(2*f*) Paragraph 2 of this section shall also apply to tents, awnings or other similar coverings for business purposes and buildings for the housing of motor trucks or apparatus used in any truck cartage business, but this paragraph shall not apply to any such tent, awning or building which was on the first day of May, 1919, erected or used for any such purpose so long as it is used as a building which was on the first day of April, 1919, erected or used for any such purpose so long as it is used as it was used on that day. 9 Geo. V. c. 46, s. 17.

Power to prohibit the carrying on of noxious industries is given by s. 415.

In Re Hobbs v. Toronto, 1912, 23 O. W. R. 8, 4 O. W. N. 31, it was held that a building, intended for storage, was not within the sub-section, and a mandamus was granted to compel the issue of a permit which had been refused. Boyd, C., considered that the broad meaning of shop as used in the sub-section, is a building used for the selling of wares at retail.

And (2), a building at which making or repairing of articles is carried on, or at which any industry is pursued.

For Preventing Erection, etc.—Where no express power was given to prevent a by-law which provided that no building should be used as a laundry in a specified district was held bad, though there was express power to define the limits within which laundries might be established and operated: Re Glover and Sam Kee, 1914, 20 B. C. R. 219, 27 W. L. R. 886.

In Beamish v. Glenn, 1916, 36 O. L. R. 10 App. Div., the plaintiff whose land adjoined a blacksmith shop, which had been established in a residential block, a permit having been obtained under a by-law, passed under s.-s. 2, secured an injunction, restraining the defendant from operating his shop "in the manner hitherto pursued by him, or in any other manner so as to cause a nuisance to the plaintiff by reason of offensive odours, smoke or noise." The defendant sought to justify himself by the permit. Meredith, C.J.C.P., said:—

> "The contention that because the shop is not upon a place forbidden by by-law of the municipality, the defendant cannot be enjoined from committing a nuisance as long as his business is carried on carefully, is quite without weight. The power of cities to regulate and control the location, erection and use of buildings such as

among many others, blacksmith shops and forges, is a restrictive power, not one under which the right can be given to any man to injure the property of another, or so to deprive another of any of his property or other rights."

Riddell, J., said:—

"Section 409 (2) seems to me to contemplate a decision by the council formulated in a by-law as to 'the location, erection and use of buildings . . . blacksmith shops . . .' and not a by-law requiring the obtaining of a permit for a particular spot, the right to the permit to be determined by the council without a by-law on application of any one desiring to start such an establishment. The council is to act and determine in a general way and by by-law not in a particular instance and by permit.

"The fact that the council directed a permit for this particular place is of no importance—except possibly as a shield against the city—and the defendant receives thereby no rights as against the plaintiff.

Side Lights on Vehicles.

409.—(3) For requiring all vehicles using the public streets after dusk and before dawn to carry lighted side lights plainly visible from in front of and behind such vehicles. 3 & 4 Geo. V. c. 43, s. 409 (3).

Lights on Vehicles.—Failure to comply with the provisions of the by-law is evidence of negligence. See s. 399 (61) and (62).

Under the Lights on Vehicles Act (Imp.), 1907, 7 Edw. VII., c. 45: Every person who permits any vehicle to be in any highway between one hour after sunset and one hour before sunrise, must provide the same with a lamp, or lamps in proper working order, capable of displaying to the front a white light for a reasonable distance. If only one lamp is provided, it must be placed on the right side, and if the lamps permit a light to be seen from the rear that light must be red. If any load projects more than six feet, a red light must be shown to the rear.

By-laws may prescribe lights in addition to those prescribed by the Motor Vehicles Act, R. S. O. 1914, c. 207, s. 6 (2), which requires every motor vehicle to carry in front a lighted lamp after dusk and before dawn.

Tussock Moths.

409.—(4) For requiring persons to destroy all tussock moths and the cocoons thereof on trees or elsewhere upon the premises owned or occupied by them. 6 Edw. VII. c. 34, s. 24, *first part amended*. 3 & 4 Geo. V. c. 43, s. 409 (4).

(Note.—Section 574a, last part, providing for officers of the municipality destroying the moths on failure of the owner or occupant to do so and charging him with the cost, etc., struck out as covered by general s. 500.)

410. By-laws may be passed by the councils of cities having a population of not less than 100,000.

Apartment Houses, Tenement Houses and Garages.

(1) For prohibiting, or for regulating and controlling the location or erection within any defined area or areas or on land abutting or defined highways or parts of highways of apartment or tenement houses and of garages to be used for hire or gain.

(*a*) For the purposes of this paragraph an apartment or tenement house shall mean a building proposed to be erected or altered for the purpose of providing three or more separate suites or sets of rooms for separate occupation by one or more persons. 2 Geo. V. c. 40, s. 10; 3 & 4 Geo. V. c. 43, s. 410 (1).

(*b*) To remove doubts it is declared that paragraph 1 applies to garages whether motor vehicles are kept therein for hire or gain or not, but does not apply to a garage where space for not more than two motor vehicles is rented or to a garage which is for the sole and exclusive use of the owner or occupant of the land. 8 Geo. V. c. 32, s. 11.

See 410 (*a*) *infra.*

In Toronto v. Delaplante, 1913, 25 O. W. R. 16, 5 O. W. N. 69, Middleton, J., held that the garage to be used by the attendants of an apartment house was not a garage to be used for hire or gain. The subsection has aimed at a livery where an automobile ought to be kept by any transient or traveller. The renting of a carriage is not prohibited.

In Toronto v. Williams, 1912, 27 O. L. R. 186 D. C., the facts were that this lot was purchased by the defendant in May. A permit was obtained for building on it, and for the purpose of that project, a cellar was dug.

A permit was obtained to erect an apartment house on the same lot (which would supersede the other permit); but no work was done in pursuance of this scheme till the 18th July, 1912, and a new excavation was begun on the north side of the lot, and more or less work done.

Before this last work on the lot, the defendant knew of a by-law being passed by the city, forbidding the erection of apartment houses on residential streets, which included this locality, and that former permits would cease and become invalid; and there was a letter received by him from the City Architect notifying him that the permit was withdrawn. Prior to this, the only work done on the place was referable to the abandoned bungalow scheme.

This by-law was pursuant to the powers given to cities by the statute 2 Geo. V., c. 40, s. 10 (assented to 16th April); and it follows the words of the Act. The prohibition is against "the location" on the street named of apartment houses.

Boyd, C., thus dealt with the facts in the D. C. "The argument before us was, that the location of this apartment house (coupled with the defendant's intention to build thereon), had attached or had been completed

when the permit was obtained, and that all the prior and subsequent work done on the lot was referable thereto, and, having been so acted upon, it was inequitable and incompetent for the city to recede or to revoke the location."

But it is to strain the meaning of the word "location" to give it this scope. No doubt, the word is used with a technical or conventional import when used in connection with lines of railway and other undertakings, as pointed out by Strong, C.J., in the Queen v. Farwell (1887), 14 S. C. R. 392, 426. But there is nothing in the statute to interfere with its etymological and ordinary meaning: City of Toronto v. Ontario and Quebec R. W. Co. (1892), 22 O. R. 344.

The word "location" is used in the statute in its primary and proper import, as given in Latham's Johnson's Dictionary (sub voce) namely: "Situation with respect to place, act of placing, state of being placed." Read the clause with this substitution of words: "Prohibit the situation with respect to place of an apartment house on the street." "Prohibit the act of placing a house on the street." "Prohibit the site of house being placed on the street." Any of these substitutes brings out the meaning, which is forbidding the locus being used for the purpose of putting an apartment house thereon.

The context and intent of the statute and by-law is to forbid the placing of an apartment house on that site. The preparation of the plans and specifications was no more than a preliminary to the application for a permit; and the permit, when granted, was merely to erect the proposed building, *i.e.*, to locate it on the site. No outlay has been incurred since the granting of this permit up to the date of its revocation, and case of estoppel can be made out. The permit to build may be regarded as a license to build; but that the owner might withdraw from; as also the city, in case the situation was not changed, in pursuance of the license. No such change is proved here; the only change appears to be a steady increase in the value of the land.

We cannot mistake the policy of the legislature; the plaintiffs, as a public body, are called on to enforce it in proper residential neighbourhoods. While it may bear hardly on the individual owner, who is hampered in the free enjoyment of his property, still it is one of the effects of advancing civic life and amenity that, for the sake of preponderating advantages to the whole locality, one proprietor may have to suffer deprivation.

In Toronto v. Garfunkel, 1912, 22 O. W. R. 374, the defendant obtained a permit for the erection of an apartment house, and entered into contracts. He had done no actual work. Then a by-law was passed prohibiting apartments within the area, and the City Architect wrote withdrawing the permit, and subsequently after the decision in Toronto v. Wheeler, he wrote withdrawing his withdrawal.

The city then brought an action to restrain erection, and the defendants relied on the letter.

Boyd, C., in granting an injunction gave no costs and made it conditional on the city paying defendant's loss from breach of the contracts into which he had entered.

In Toronto v. Wheeler, 1912, 3 O. W. N. 1424, 22 O. W. R. 326, Middleton, J., pointed out that the, then, section prohibited location only, and that location must be distinguished from erection and use, as the excavation was well under way. It was held to be a location, and an action to restrain based on the by-law, passed subsequent to such location, was dismissed.

In Toronto v. Ford, 1913, 4 O. W. N. 1386, 24 O. W. R. 717, the Appellant Division refused to overrule Toronto v. Williams.

In Toronto v. Stewart, 1913, 4 O. W. N. 1027, 24 O. W. R. 323, the staking out of the building was held to amount to location, and as it was done prior to the passing of the by-law, an action to restrain was dismissed.

Building Restrictions—Deviation from.

410.—(2) For authorizing the city architect, or other officer appointed for that purpose, to permit in special cases, which in his judgment warrant it, such deviation from the by-laws regulating the erection of buildings as he may deem proper. 5 Edw. VII. c. 22, s. 22; 3 & 4 Geo. V. c. 43, s. 410 (2).

The absence of a dispensing power is discussed, *ante*. See s. 400 (4) and 16 to 19.

A by-law passed by the City of Toronto, under the foregoing power, contained the following clause:—

> "The said inspector, who is hereby appointed for this purpose, may permit such deviation from the by-laws regulating the erection of buildings in special cases as in his opinion will afford proper and safe construction under the circumstances."

In Toronto v. Rogers, 1914, 31 O. L. R. 167, App. Div., the effect of this clause was discussed by Sutherland, J., as follows:—

> "The defendant company had cleared the ground of trees, excavated for the foundations, and built a couple of small buildings to store their appliances and materials in, when the plaintiff corporation assumed to revoke the permit, and thereafter applied for and obtained an interim injunction. They ask that it should be made permanent.
>
> "The defendant company contend, in the first place, that the permit once given could not be recalled, except for the reasons set forth in s. 2, s.-s. 10, of the by-law, which says that 'every permit shall be subject to revocation, should the inspector of buildings, or any of his inspectors, ascertain that the work carried on under such permit is being done in a manner that does not reasonably comply in every respect with the plans and specifications submitted for approval when such permit was granted, or, in the opinion of the said inspector of buildings, satisfactory progress is not being made to complete the said work.'
>
> "It was admitted on the appeal by counsel for the plaintiff corporation that this is so, and that they cannot justify the cancellation of the permit in the manner attempted. They say, however, that it was not competent for the inspector to give any permit wider than the authority conferred on him, under s.-s. 6 of s. 2. That sub-section only permits him to authorize in special cases such deviation from the by-laws 'regulating the erection of buildings' as, in his opinion, might be warranted in the circumstances. It is an authority to deal with and deviate from a stipulated mode of erection of buildings, not to substitute a different kind of material from one required.
>
> "I agree with this view, and am of opinion that s.-s. 6 must be construed as an authority to permit a deviation only in so far as anything is enacted in the by-law pursuant to the power granted under s. 542 of the Act, s.-s. 1 (a) (now 410 (2)), 'for regulating the erection of buildings,' is concerned and no further.
>
> "In this view, it becomes unnecessary to deal with the question whether the defendants' proposed building is a wooden building, within the meaning of the statute, or within the meaning of the by-law itself, which allows buildings of the same character in this and other fire limits. So, also, with the questions as to the right to require a permit, or the terms of the permit granted, or the effect of granting it when expenditure is made on the faith of it, and also as to the right of the city inspector to allow a deviation from the requirements of this section of the by-law, or to revoke his permit except for the two reasons mentioned in the section giving him power of revocation,

and whether in fact there was a revocation by him or only by the Board of Control. I may point out, however, that s.-s. 6 of s. 2 of the by-law, which authorizes the inspector to allow deviation, follows the wording (and under the Interpretation Act, 1907, 7 Edw. VII., c. 2, s. 7 (44), the meaning), of the statute 5 Edw. VII., c. 22, s. 22, which authorizes deviation from the by-laws 'regulating the erection of buildings,' which are the words used in clause (a).

Speedways.

410.—(3) For setting apart one or more highways on which horses may be ridden or driven more rapidly than is permitted upon other highways, and for regulating the use for such purpose of any such highway.

(*a*) If a majority of the property owners on any such street petition against such by-law, it shall be repealed. 3 Edw. VII. c. 19, s. 559, par. 8, *last part.* 3 & 4 Geo. V. c. 43, s. 410 (3).

As to petitions, see *ante*, p. 365.

University of Toronto.

410.—(4) For granting aid to the University of Toronto. 3 Edw. VII. c. 19, s. 587, par. 9, *part;* 3 & 4 Geo. V. c. 43, s. 410 (4).

Unslaughtered Cattle.

(5) For authorizing the seizing, in order to prevent their use as food, of unslaughtered cattle, sheep, calves and hogs which have died within the municipality, and for disposing of the carcasses so as not to endanger the public health, and so as to secure to the owner such value as remains over and above the expenses incurred in disposing of them. 3 Edw. VII. c. 19, s. 550, par. 3; 3 & 4 Geo. V. c. 43, s. 410 (5).

Carcasses exposed for sale, or deposited for the purpose of sale, etc., if unfit for food, may be seized under the provisions of the Public Health Act, R. S. O. 1914, c. 218, s. 100. See Firth v. McPhail, 1905, 2 K. B. 300, 74 L. J. K. B. 458. If there is no exposure for sale, there is no authority to seize, unless for the purpose of abating a nuisance. This sub-section gives the necessary powers to authorize seizure by way of prevention.

See the Animal Contagious Diseases Act, P. S. C.

410*a*. By-laws may be passed by the councils of cities and towns having a population of not less than 5,000 for the purposes set out in paragraph 1 of section 410, as amended by section 11 of *The Municipal Amendment Act,* 1918. 9 Geo. V., c. 46, s. 18.

411. By-laws may be passed by the councils of townships.

Fires—Prevention of.

(1) Within defined areas, where the number of the inhabitants or the proximity of buildings in any part of the township renders it expedient to do so, for exercising the powers conferred on the councils of urban municipalities by paragraphs 16 to 35 of section 400. 3 Edw. VII. c. 19, s. 542*a*; 3 & 4 Geo. V. c. 43, s. 411 (1).

(1*a*) For exercising the powers conferred on cities and towns by paragraph 6 of s. 406, with reference to the collection, removal and disposal by the corporation of ashes, garbage and other refuse. 7 Geo. V. c. 42, s. 19.

Portable Steam Engines.

411.—(2) For prescribing the distance from a highway within which unenclosed portable steam engines may not be used for running a sawmill or a shingle mill. 3 Edw. VII. c. 19, s. 542, par. 18, *part;* 3 & 4 Geo. V. c. 43, s. 411 (2).

See notes to s. 460, *infra.*

As to the liability of those who commit a nuisance to a highway on property adjoining the highway. The principle to be applied is illustrated by Beamish v. Glenn, 1916, 36 O. L. R. 10, discussed under s. 409 (2).

Sleighing—Keeping Open Highways During Season of.

411.—(3) For providing for keeping open the highways during the season of sleighing in each year; and for the application of so much of the commutation of the

Statute Labour Fund, as may be necessary for that purpose. 3 Edw. VII. c. 19, s. 561, pars. 8, 9.

(4) For requiring the overseers of highways or the pathmasters to make and keep open the highways during the season of sleighing.

(*a*) Such overseers and pathmasters may require the persons liable to perform statute labour to assist in keeping open such highways, and shall give to any person so employed a certificate of his having performed statute labour and of the number of days' work done, for which he shall be allowed on his next season's statute labour. 3 Edw. VII. c. 19, s. 537, par. 3, *redrafted;* 3 & 4 Geo. V. c. 43, s. 411 (3-4).

See ss. 408 (2) and 399 (29), and see 460. The duty to keep highways in repair, imposed by s. 460, involves the duty of dealing with conditions resulting from the falling and drifting of snow. No by-law is necessary where an imperative statutory duty exists.

The powers conferred by s.-s. (3) and (4) enable special means to be adopted; if not exercised, the fact determining will be an element, to be considered in the liability of the municipality for damages sustained in case of default.

Note opinions expressed in the Court of Appeal in Hogg v. Brooke, 1904, 7 O. L. R. 273, given under s. 408 (2).

Streams, Creeks and Water-courses — Prohibiting Obstruction of.

411.—(5) For prohibiting the obstruction of streams, creeks and water-courses, by trees, brushwood, timber or other materials, and for requiring the clearing away and removing of the obstructions by the person causing the same. 3 Edw. VII. c. 19, s. 562, par. 12; 3 & 4 Geo. V. c. 43, s. 411 (5).

Weighing Machines.

(6) For erecting and maintaining weighing machines within the municipality or within an adjacent village, and charging fees for the use thereof, not being contrary to the limitations prescribed by subsection 8 of section 402. 3 Edw. VII. c. 19, s. 582, *redrafted;* 3 & 4 Geo. V. c. 43, s. 411 (6).

Townships have no power to regulate the weighing of articles, similar to those conferred on urban municipalities by s. 401 (3) and (6), as limited by s. 402 (5) and (8).

N.B.—Martin v. Middlesex, 1913, 4 O. W. N. 682, 1540.

Wet Lands.

411.—(7) For purchasing any wet land in the township, the price of which, in case of Crown lands, shall be fixed by the Lieutenant-Governor in Council, and for draining such land. 3 Edw. VII. c. 19, s. 556, par. 1, *part.* 3 & 4 Geo. V. c. 43, s. 411 (7).

By s. 6 where power to acquire land is conferred, it includes the power to expropriate, unless otherwise expressly provided. The use of the word "purchasing" in this sub-section limits townships to that mode of acquisition when exercising powers under the sub-section. The corporation as the owner of lands may sell or leave the same, or use them for any of the purposes for which the corporation is created.

Naming Streets and Numbering Houses.

411.—(8) In the case of townships bordering on cities having a population of not less than 50,000, for naming [and changing the names of] and surveying streets and for numbering houses and lots under and in conformity with paragraphs 38 and 39 of section 400. *New.* 3 & 4 Geo. V. c. 43, s. 411 (8); 4 Geo. V. c. 33, s. 15.

This section was new in 1913, 3-4 Geo. V., c. 43, s. 411 (8). The words in brackets were added in 1914 by 4 Geo. V., c. 33, s. 15.

411*a*. By-laws may be passed by the councils of villages,

(1) For exercising the powers conferred on cities and towns by paragraph 10 of section 406 with reference to residential streets and building line. 5 Geo. V. c. 43, s. 29.

This section was added by 5 Geo. V., c. 34, s. 29.

(2) For exercising the powers conferred on cities and towns by paragraphs 5 and 6 of s. 406. 6 Geo. V. c. 39, s. 9.

412. By-laws may be passed by the councils of counties, separated towns and towns in unorganized territory

and of cities having a population of less than 100,000 and by the Board of Commissioners of Police of cities having a population of not less than 100,000.

Auctioneers.

(1) For licensing, regulating and governing auctioneers and other persons selling or putting up for sale goods, wares, merchandise or effects by public auction, and for prohibiting the granting of a license to an applicant who is not of good character, or whose premises are not suitable for the business of auctioneer or are upon a residential or other highway in which it is deemed not desirable that the business should be carried on; for ascertaining by such means as the by-law may provide whether an applicant is not of good character or his premises are not suitable for the business; for determining the time the license shall be in force;

(*a*) No such by-law shall apply to a sheriff or bailiff offering for sale goods or chattels seized under an execution or distrained for rent. 3 Edw. VII. c. 19, s. 593, par. 2; 3 & 4 Geo. V. c. 43, s. 412.

Prohibiting the Granting of Licenses to a Person not of Good Moral Character.—This power cannot be implied from a general power to regulate and license: Merritt v. Toronto, 1895, 22 A. R. 205.

Where Osler, J., said as follows:—

"Any one who is willing to pay this fee is entitled to the license, and when licensed must submit, if the legislative power has been further delegated, as it is by the section in question, to such reasonable provisions and restrictions for regulating and governing him in exercising his right as the council see fit to impose. The fallacy of the argument for the appellants as to the construction of the section is that in assuming the exercise of the trade or calling of an auctioneer to be a mere privilege grantable in the discretion of the council (in which case they might perhaps attach such conditions as they pleased to the acquirement of it), instead of a common law right, the exercise of which they may attach by the authority of the legislature the condition of taking out a license, and may regulate and govern the holder of such license."

And MacLennan, J.A., at p. 213, says:—

"The words 'govern and regulate' are no doubt very large words, but in themselves they cannot, as it seems to me, when applied to a class of persons, extend to giving power to exclude from the class to be regulated and governed. What the municipality is authorized to do is to regulate and govern a certain class of persons. To exclude a person from that class is one thing, to regulate and govern is another, and different thing."

The principle of Merritt v. Toronto was applied by the Full Court of Alberta in R. v. Pope, 1906, 4 W. L. R. 278, in quashing a by-law which discriminated between resident and non-resident auctioneers.

An auctioneer cannot be prevented from selling by auction in a public market, anything which can properly be sold there: Bollander v. Ottawa, 1900, 27 A. R. 335. Osler, J.A., referring to old 580, s.-s. 6, now s. 401, s.-s. 5, said:—

> "Sub-section 6 permits the council to pass by-laws for preventing criers and vendors of small wares from practising their calling in the market place and public streets and vacant lots adjacent thereto, *i.e.*, adjacent to the market: Toronto v. Virgo (1896), A. C. 88, at p. 92. I agree with the Court below that the express power thus conferred upon the council to prohibit this class of persons from practising their calling in the market excludes the inference of any implied power to prevent other persons from doing so. Mr. McCarthy urged very strongly that the by-law might be supported under s.-s. 5, which enables the corporation to pass by-laws for regulating the place and manner of selling grain and other articles exposed for sale, and this, he contended, conferred the power of preventing one mode or manner of selling, and so, of selling by auction."

Delegation of Power.—The granting or refusal of a license is a judicial act, which the council cannot delegate without express authority. But appointing a committee of council to investigate and make a report as a basis for such action is not delegation: Osgood v. Nelson, 1872, L. R. 5 Q. B. 636, 41 L. J. Q. B. 329. But referring the matter to the Chief of Police or other officer, would be a delegation such as is now authorized by the section.

In Elves v. McCallum, 1916, 34 W. L. R. 669, the Full Court of Alberta refused a mandamus to compel the license inspector to issue a license. Stuart, J., giving the judgment of the Court, said in part:—

> "Section 221 of the Edmonton charter enacts that the council may make by-laws and regulations 'for the peace, order and good government of the city, and for the issue of licenses and payment of license fees in respect of any business.'
>
> "Section 233 enacts that 'the power to license shall include power to fix the fees to be paid and to specify the qualifications of the persons to whom, and the condition upon which, such licenses shall be granted.'
>
> "By-law No. 253, s. 8, provides that 'all applications for licenses . . . shall be referred to the Chief of Police, who shall ascertain if the applicant is of good character, or not, and report to the inspector of licenses, who, if the report is favourable and upon the other conditions of this by-law being complied with, shall issue the license; but if he ascertains that the applicant is not of good character the license shall not be issued. Provided, however, that if the applicant be dissatisfied with the action of the inspector, he may apply to the said commissioners, who after hearing the applicant and the inspector and such evidence as they may adduce, may confirm, or may reverse the decision of the inspector and order the license to issue.
>
> . . .
>
> "The real grounds of the appeal are that there was no power in the council to impose the condition of good character, and that, even if there was, there was no power to delegate the decision on that point to the Chief of Police.
>
> As to the matter of delegation, it seems to me to be clear that there was no real delegation in any case. What s. 8 of the by-law provided was merely a means of obtaining evidence in the first place, and as a matter of routine. It would be absurd to require either the council or the commissioners as a Board to conduct an investigation in every case in the first instance into the character of an applicant. Therefore a procedure was provided which would suffice for ordinary cases, and for the usual routine of business. But the proviso to s. 8 clearly retains the right of ultimate decision in

the commissioners by permitting the applicant to take his case before them if he has been refused in the usual routine of the business of the license officer.

"It is true that the proviso may not be very happily worded because while by the foregoing provisions the inspector is given no discretion whatever, but must give the license if the report as to character is favourable (other conditions being complied with), and must refuse it if the report is unfavourable, yet it is against the decision of the inspector that the appeal is given. But taking the whole of the section and proviso together, particularly the words about adducing evidence, it is apparent that the real appeal is intended to be against the report of the Chief of Police. This was the way in which the commissioners evidently dealt with the matter.

"In Rex v. Sparks, 1913, 23 W. L. R. 613, the Chief of Police had been given absolute discretion to refuse the license, and there was no right of reviewing his decision.

"In the next place, neither in Rex v. Sparks, nor in Hall v. City of Moose Jaw, 3 Sask. L. R. 22, did the statute empower the council to 'specify the qualifications of persons to whom licenses shall be granted' as is done by s. 233 of the Edmonton Charter.

"In my opinion, the words of s. 233 are clearly wide enough to authorize the requirement of good character as a condition precedent to the issue of a license. And it is to be observed that all the occupations specified in s. 8 of the by-law are of such a kind that the good character of the persons licensed to engage in them is of special importance to the peace, order and good government of the city, because they are all occupations which furnish unusual opportunities for the assistance and protection of vice and crime.

"There are many recent cases to which I need not refer which shew that the licensing power granted to representative bodies governing cities and towns should not be narrowly scrutinized by the Courts, but that very wide scope should be allowed to them in their endeavours to provide for the peace and welfare of the community . . .

"The result is that the matter stands in the same position as if the Legislature had spoken of 'good character' directly, as was done by the Ontario Legislature."

Bill Posters.

412.—(2) *Repealed.* 5 Geo. V. c. 34, s. 30.

412*a*. By-laws may be passed by the councils of counties and towns, and of cities having a population of less than 100,000 and by Boards of Commissioners of Police of cities having a population of not less than 100,000.

For licensing, regulating and governing bill posters, advertising sign painters, bulletin board painters, sign posters and bill distributors, and for prohibiting the posting up or distributing of posters, pictures or hand bills which are indecent or tend to corrupt morals.

(*a*) A by-law of a county passed under this paragraph shall not have force in a town which has passed a by-law for a similar purpose. 5 Geo. V. c. 34, s. 31.

413. By-laws may be passed by the councils of counties, towns and by Boards of Police Commissioners of cities. *Amended,* 9 Geo. V. c. 46. s. 19.

Junk and Second-hand Shops, etc.

(1) For licensing, regulating and governing junk shops, junk yards, and second-hand shops and dealers in second-hand goods, and for revoking and cancelling the license of any person convicted of a second offence against the by-law or of an offence against sections 399 to 401 of *The Criminal Code. Amended,* 9 Geo. V. c. 46, s. 19 (2).

(*a*) "Dealers in second-hand goods" shall include persons who go from house to house or along highways for the purpose of collecting, purchasing or obtaining second-hand goods.

(*a*1) The by-law may apply to and require every person using a vehicle for any of the purposes mentioned in paragraph 1, either on his account or as the agent or servant of another person, to take out a license;

(*a*2) The power of licensing shall not apply to persons engaged in any of the objects mentioned in paragraph 1 for patriotic or charitable purposes. 9 Geo. V. c. 46, s. 19 (3).

(*b*) "Second-hand goods" shall include bottles, bicycles, waste paper, rags, bones, old iron or other scrap or junk. 3 Edw. VII. c. 19, s. 583, par. 22; 8 Edw. VII. c. 48, s. 16.

(*c*) The fee to be paid for the license shall not exceed $20 for one year. 3 Edw. VII. c. 19, s. 583, par. 22*a;* 3 & 4 Geo. V. c. 43, s. 413 (1).

(*d*) A by-law of a county passed under this paragraph shall not have force in a town after the council of the town has passed a by-law for a similar purpose. 9 Geo. V. c. 46, s. 19.

The Public Health Acts Amendments Act, 1907, provides:—

86.—(1) Every person who shall carry on business as a dealer in old metal or as a marine store dealer shall register his name and

place of abode and every place of business, warehouse, store and place of deposit occupied or used by him for the purpose of such business, in a book to be kept for the purpose at the offices of the local authority.

(2) Every person carrying on business as aforesaid shall correctly enter in a book to be kept by him for that purpose the description and price of all articles purchased or otherwise acquired by him, and the name, address and occupation of the person from whom the same were purchased or otherwise acquired.

(3) Every person who shall carry on such business without having so registered or without keeping such book and making such entries as required by this section shall be liable to a penalty not exceeding five pounds and to a daily penalty not exceeding forty shillings.

(4) Any officer of the local authority or other person duly authorized in writing in that behalf by the local authority, and if so required, exhibiting his authority, shall have free access at all reasonable times to every such place of business, warehouse, store and place of deposit, to inspect the same and the books by this section required to be kept, and every person who shall prevent, hinder, or obstruct any officer or person so authorized in the execution of his duty under this sub-section shall be liable to a penalty not exceeding five pounds.

(5) The local authority shall give public notice of the provisions of this section, by advertisement in two newspapers circulating in the district, and by handbills and otherwise in such manner as they think sufficient.

Power to prohibit the carrying on of noxious industries is given by s. 415.

See Public Health Act, R. S. O. 1914, c. 218, ss. 84 and 85, given under s. 415, *infra*.

Receiving Stolen Property.—Sections 399 to 401 of the Criminal Code are as follows:—

"399. Every one is guilty of an indictable offence, and liable to fourteen years' imprisonment, who receives or retains in his possession anything obtained by any offence punishable on indictment, or by any acts wheresoever committed, which if committed in Canada would have constituted an offence punishable upon indictment, knowing such thing to have been so obtained. 55-56 Vict., c. 29, s. 314.

"400. Every one is guilty of an indictable offence and liable to five years' imprisonment who receives or retains in his possession, any post letter or post letter bag, or any chattel, money or valuable security, parcel or other thing, the stealing whereof is hereby declared to be an indictable offence, knowing the same to have been stolen. 55-56 Vict., c. 29, s. 315.

"401. Every one who receives or retains in his possession anything, knowing the same to have been unlawfully obtained, the stealing of which is punishable on summary conviction, either for every offence, or for the first and second offence only, is guilty of an offence and liable on summary conviction, for every first, second, or subsequent offence of receiving, to the same punishment as if he were guilty of a first, second, or subsequent offence of stealing the same. 55-56 Vict., c. 29, s. 316."

Revoking and Cancelling.—Under the general provisions of s. 253 (4), where power to revoke a license is conferred, the revoking is in the discretion of the council, and is not subject to review. The power to revoke must be specially given, or it does not exist.

Under this sub-section, the power given can only be exercised by a by-law which, if passed—as to which there is, of course, full discretion—must provide that the license shall be revoked and cancelled on the happening of the events mentioned. The revoking will be a merely ministerial act, once the by-law is passed, which can be delegated to an officer.

Shops and Dealers.—Both can be dealt with by by-law. See s. 422 (5).

The Location of Junk Shops may be dealt with by by-law under s. 409 (2).

In R. v. Levy, 1899, 30 O. R. 403, a by-law provided that no keeper of a second-hand store and junk store should trade with any person who appeared to be under the age of eighteen years. Boyd, C., quashed a conviction on the ground that this provision was unauthorized, saying:—

> "The power given by the Municipal Act is to regulate the junk shop, not to prescribe the class of people who shall deal thereat: see In re Barclay and the Municipality of Darlington (1854), 12 U. C. R., at pp. 95-97; Macdonald v. Lochrane (1887), 3 Times L. R. 464. The assumption is that infants under eighteen are predisposed to dishonesty, and that their natural tendency shall be checked by forbidding junk shop men to bargain with them . . . the by-law is open to the objections pointed out by Lord Russell in Kruse v. Johnson; Krun v. Tolman (1898), 2 Q. B., at p. 99, as being partial and unequal in operation as between different classes, and inviting oppressive or gratuitous interference with the rights of those subject to the by-law without reasonable justification."

The by-law in this case provided that dealers should not purchase any goods between 7 p.m. and 7 a.m., but the by-law was not attacked on this ground. See Re Campbell and Stratford, 1907, 14 O. L. R. 184, where a by-law requiring eating-houses to be closed at certain hours, was held valid.

Dealing With Minors may now be prohibited in certain cases, by by-laws passed by council of towns and villages and Police Commissioners in cities, under s. 421 (2).

414. By-laws may be passed by the councils of counties, separated towns and towns in unorganized territory.

Public Fairs.

(1) For authorizing, on petition of at least fifty electors, the holding at one or more of the most public and convenient places in the municipality public fairs restricted to the sale, barter and exchange of cattle, horses, sheep, pigs and articles of agricultural production or requirement.

(*a*) The by-law shall prescribe rules and regulations for the government of the fairs, and appoint a person to see that they are carried out, and shall also fix the fees to be paid to him by persons attending the fair, and public notice of the passing of the by-law shall be forthwith given by the council. 3 Edw. VII. c. 19, s. 578, *redrafted;* 3 & 4 Geo. V. c. 43, s. 414 (1).

See **Title Markets,** *supra.*

A Market is a Gathering of Buyers and Sellers.—The term is also applied to the place where the gathering is held. The legal right to hold such a gathering is also termed a market. Fair involves the same meanings, with this difference, that the term is employed for a gathering, or right to hold such, which takes place or exists once, or several times annually; a market is generally a daily or weekly assembly. A true market or fair at law can only exist where the right to hold it arises by grant from the Crown by prescription, or by legislative authority.

As to what is a fair, see Collins v. Cooper, 1893, 9 T. L. R. 250, 68 L. T. 450.

For Authorizing the Holding of Public Fairs.—The power conferred by the foregoing words is in contrast with the words of s. 401 (1), which provides: establishing, maintaining and regulating markets. Local authorities in England to establish markets with the consent of the owners and ratepayers of the district under the Public Health Act, 1875, s. 166, but no power is given to establish a fair.

Query.—Can the by-law establish annual fairs, or only particular fairs mentioned in the by-law, as to the holding of which notice must be given forthwith?

Under the Public Health Act, 1875, s. 166, urban authorities excepting town councils, have the power with the consent of owners and ratepayers expressed by resolution and Schedule III of the Act provides machinery for the holding of the necessary meeting, providing that it can only be held on the requisition of any twenty ratepayers or owners. Under s. 401, councils can originate action as to markets, but under s. 414, petition is presented to the right to authorize the holding of fairs.

If the council attempted to proceed without a proper petition, it could be restrained by injunction on such an application; it would be the duty of the court to determine for itself whether or not a petition sufficiently signed has, in fact, been presented, whatever view the council may have taken of it.

Re Williams v. Brampton, 1908, 17 O. L. R. 398, at 407, and R. ex rel. Sovereen v. Edwards, 1912, 22 M. R. 790, where the validity of a petition was considered at length.

Surgeons.

414.—(2) For appointing one or more surgeons of the gaol and other institutions under the control of the corporation. 3 Edw. VII. c. 19, s. 537, par. 7, *part amended;* 3 & 4 Geo. V. c. 43, s. 414 (2).

415. By-laws may be passed by the councils of counties, cities, separated towns and towns in unorganized territory.

Tanneries.

(1) For defining areas within which tanneries, rag, bone, or junk shops, or industries of a noxious or unhealthy character, may not be carried on. 3 Edw. VII. c. 19, s. 586, par. 5.

(*a*) This paragraph shall not apply to a tannery erected before the 7th day of April, 1890. *New.* 3 & 4 Geo. V. c. 43, s. 415 (1).

See ss. 400 (18) and 409 (2), the Public Health Act, R. S. O. 1914, c. 218, provides:—

Offensive Trades.

"84.—(1) Any person who without the consent of the local board or of the municipal council establishes any of the following trades or businesses or manufactures—

"Blood boiling, bone boiling, refining coal oil, extracting oil from fish, storing hides, soap boiling, tallow melting, tripe boiling, slaughtering animals, tanning hides or skins, manufacturing gas, manufacturing glue, fertilizers from dead animals, from human or animal waste, or any other trade, business or manufacture which is or may become offensive, or which is by the regulations declared to be a noxious or offensive trade, business or manufacture; shall incur a penalty of not less than $100 nor more than $250, in respect of the establishment thereof, and a penalty of not less than $20 for every day on which after notice in writing by the local board, or an officer thereof, to desist, such business, trade or manufacture is carried on, whether there has or has not been any conviction in respect of the establishment thereof." 2 Geo. V., c. 58, s. 84.

"85. Any person who keeps or stores any rags, bones, junk, bottles, scrap-iron or other metals, or other refuse within any municipality, except on premises approved of by the Medical Officer of Health, shall incur a penalty of not less than $10 nor more than $50, and the continuance of the offence for each week after conviction shall be considered a separate offence." 2 Geo. V., c. 58, s. 85.

416. By-laws may be passed by the councils of counties and towns, and of cities having a population of less than 100,000, and by the Board of Commissioners of Police of cities having a population of not less than 100,000.

Hawkers and Pedlars.

(1) For licensing, regulating and governing hawkers, pedlars and petty chapmen, and other persons carrying on petty trades, or who go from place to place or to other men's houses on foot, or with any animal, vehicle, boat, vessel, or other craft, bearing or drawing goods, wares, or merchandise for sale, or otherwise carrying goods, wares or merchandise for sale [or who go from place to place or to other men's houses to take orders for coal oil or other oil which is to be delivered afterwards from a tank car moved on a railway line or who go from place to place or to a particular place to make sales or

deliveries of coal oil or other oil from such tank car.] 3 & 4 Geo. V. c. 43, s. 416 (1), *amended;* 5 Geo. V. c. 34, s. 32.

(*a*) No such license shall be required for hawking, peddling or selling goods, wares or merchandise to a retail dealer, or for hawking, peddling or selling goods, wares or merchandise, the growth, produce or manufacture of Ontario, not being liquors within the meaning of *The Liquor License Act,* if the same are hawked or peddled by the manufacturer or producer of them, or by his *bona fide* servants or employees having written authority to do so;

(*b*) Such servant or employee shall exhibit his authority when required so to do by any municipal or peace officer;

(*c*) In a prosecution for a breach of the by-law the onus of proving that he does not for either of the reasons mentioned in clause (*a*) require to be licensed shall be upon the person charged.

(*d*) Nothing in this paragraph shall affect the powers to pass by-laws, under sections 401 and 402, paragraph 1 of section 419, and paragraphs 6 and 7 of section 420.

(*e*) "Hawkers" in this paragraph shall include agents for persons not resident within the county, who sell or offer for sale tea, coffee, spices, baking power, dry goods, watches, plated ware, silverware, furniture, carpets, upholstery, millinery [coal oil, tinware, carpet sweepers and electrical appliances], or jewellery, spectacles or eyeglasses, or who carry and expose samples or patterns of any such article, which is to be afterwards delivered within the county to a person not being a wholesale or retail dealer in such article. *Amended,* 5 Geo. V. c. 34, s. 33.

(*f*) Where the council of a town not separated from a county has passed a by-law under this para-

graph a by-law of the county shall not be in force in the town while the by-law of the town remains in force. 3 Edw. VII. c. 19, s. 583, par. 14; 6 Edw. VII. c. 34, s. 26, *redrafted.*

(*g*) The fee to be paid for the license under by-laws passed under this paragraph may be lower in the case of persons who have resided continuously within the municipality for which the license is sought for at least one year prior to the application therefor than in the case of persons who have not so continuously resided, but in cities having a population of not less than 100,000, the fee shall not be more than $50 for a motor vehicle or a two-horse waggon, $30 for a one-horse waggon, $15 for a push-cart, $10 for one carrying a pack, and $1 for one carrying a basket.

(*h*) The licensee shall at all times whilst carrying on his business have his license with him and shall upon demand exhibit it to any municipal or peace officer, and if he fails to do so shall, unless the same is accounted for satisfactorily, incur a penalty of not less than $1 or more than $5.

(*i*) If a peace officer demands the production of a license by any person to whom the by-law applies and the demand is not complied with, it shall be the duty of the peace officer, and he shall have power to arrest such person without a warrant and to take him before the nearest Justice of the Peace, there to be dealt with according to law. 3 Edw. VII. c. 19, s. 583, par. 16; 4 Edw. VII. c. 22, s. 24; 6 Edw. VII. c. 34, s. 28, *redrafted.*

(2) For providing the treasurer or clerk of the county, or the clerk of any municipality within the county with

licenses under by-laws passed under paragraph 1 of section 412 and paragraph 1 of this section, to be issued under such regulations as may be prescribed to persons applying for them. 3 Edw. VII. c. 19, s. 583, par. 15.

3. For prohibiting the sale of fruit, candy, peanuts, ice cream or ice cream cones from a basket, or a waggon, cart or other vehicle upon any highway or part of it, or in any public park or other public place.

(*a*) The by-law shall not apply to a farmer, market gardener or other person selling or delivering goods at any place of business or residence upon such highway or part thereof. 6 Edw. VII. c. 34, s. 27.

In R. v. Hamilton, 1913, 5 O. W. N. 58, 265; 25 O. W. R. 33, the defendant was fined for peddling on the boundary line between two counties, under a by-law passed by one of the counties. The conviction was quashed on the ground that the by-law was not applicable to the road, and s. 433 did not help the county. Neither did s. 436 (3), as no by-law had been passed under that sub-section. Further, if s. 439 conferred jurisdiction, then joint action was necessary which had not been taken.

History of the Legislation.—See R. v. Geddes, 1915, 35 O. L. R. 177.

Prohibiting.—The power to prohibit is contained in Sales on Highways, or in public places.

Farmers and Market Gardeners.—See s. 420 (6).

Goods, Wares and Merchandise.—In R. v. Prosterman, 1909, 11 W. L. R. 141, Trant, P.M., held that the expression "goods, wares and merchandise" does not include fish bought from fisherman and peddled by the purchaser, and in R. v. Geddes, 1915, 35 O. L. R. 177, Boyd C., dealing with a conviction under a by-law passed under s. 420 (6), where the same expression is used, said:—

> "The allocation of the words 'goods, wares and merchandise' point to relations of trade and commerce, and are not suggestive of agricultural pursuits and farm products.
>
> "It is contended that the defendant made only one sale, and therefore, he is not within the purview of the by-law. But it is admitted that he went from place to place with horses and conveyances drawing certain ranges for sale; and though the admission as to sale and exhibiting is said to cover 'just one range on one occasion only,' I do not find any such limitation as to going from place to place. And that is what the statute and by-law cover: Regina v. Rawson (1892), 22 O. R. 467."

A county by-law under the section does not apply to boundary roads between counties, and see 433, *infra*, does not keep: R. v. Hamilton, 1913, 25 O. W. R. 33, 945; 5 O. W. N. 58, 261, App. Div.

Clause (i) does not authorize a magistrate to issue a warrant, without information previously laid: McCatherin v. Janmer, 1912, 41 N. B. R. 367.

In re Garnham's conviction, 1915, 34 O. L. R. 545, 35 O. L. R. 54, App. Div., a conviction was quashed, Riddell, J., saying:—

"The *modus operandi* was to obtain from the purchaser an order on the Columbus Oil Company, of Columbus, Ohio, to ship to the purchaser a named quantity of oil, to be delivered at a place named in the order, cash on delivery. There is no evidence of sale beyond this, and nothing to indicate sale by sample meaning or delivery from a tank car. This is not a 'sale' within the meaning of the Act, and consequently not an offence: Rex v. St. Pierre, 1902, 4 O. L. R. 76, decides. A Divisional Court of the High Court approved and followed this decision in Rex v. Pember, 1912, 3 O. W. N. 1216. The carrying of samples is not proved or suggested, and the amendment of 1915 does not apply."

Farmers and Fruit-growers. — Farming and fruit-growing are businesses, but they cannot properly be called trades, since the latter involves buying and selling: Harris v. Amery, 1865, 35 L. J. C. P. 89.

Other Persons.—This means other trading persons. Boyd, C., in R. v. Geddes, 1915, 35 O. L. R. 177, at 185.

For history of the legislation: see R. v. Geddes, *supra*.

416.—(4) For licensing, regulating and governing the business of dry cleaners, pressers and persons engaged in those and similar businesses in which gasoline or benzine is used. 4 Geo. V. c. 33, s. 16.

416*a*. A by-law passed by the council of a county under the provisions of s. 416 shall, whether the same is mentioned or not, cover and include the boundary line or highway between such county and an adjoining county, and a sale made on said boundary line or highway to a resident of a county in which such by-law is in force shall be and constitute a breach of such by-law in the same manner and with like consequences and effect as if made wholly within the said county. 4 Geo. V. c. 33, s. 17.

This section was added by 4 Geo. V., c. 33, s. 17.

417. By-laws may be passed by the councils of counties, towns, villages and townships and of cities having a population of less than 100,000, and by the Boards of Commissioners of Police of cities having a population of not less than 100,000.

Intelligence Offices.

(1) For licensing and governing suitable persons to keep intelligence offices; for registering the names and residences of servants, workmen, clerks and other per-

sons seeking employment; for procuring employment for them and giving information to them and to persons in want of them, and for fixing the fees to be charged by the keepers of such offices, and the duration of the license.

(2) For regulating such intelligence offices;

(3) For revoking any such license.

(*a*) The license fee shall not exceed $10 for one year. 3 Edw. VII. c. 19, s. 583, pars. 17-19, 20, *amended;* 3 & 4 Geo. V. c. 43, s. 417 (1-3).

The section authorizes: (1) The licensing and governing of the keepers of private intelligence offices, and the regulating of their offices, and (2) the establishment of municipal offices for regulating workmen, etc., and procuring them employment, etc.

The Labour Bureau London Act, 1902, 2 Edw. VII., c. 13, confers power on metropolitan borough councils to establish and maintain "labour bureaus" or "labour exchanges."

The Labour Exchanges' Act, 1909, 7 Edw. VII., c. 7, provides that the Board of Trade may establish and maintain labour exchanges and may make regulations which must be laid before Parliament. Regulations were made providing for registrations by post, periods during which registration is good without renewal, establishment of advisory trade committee, consisting of equal representatives of employers and workmen and a chairman, filing of statements as to the existence of strikes and lockouts, and the giving of notice thereof to persons interested.

A similar power, though confined to servants, is found in the Public Health Acts Amendment Act, 1907 (Imp.). Part VII., s. 85, is as follows:—

"85.—(1) Every person who shall carry on, for the purpose of private gain, the trade or business of keeper of a female domestic servants' registry shall register his name and place of abode, and also the premises in which such trade or business is carried on, in a book to be kept at the offices of the local authority for the purpose.

"(2) The local authority may make by-laws, prescribing the books to be kept and the entries to be made therein, and any other matter which the local authority may deem necessary for the prevention of fraud or immorality in the conduct of such trade or business, and for regulating any premises used for the purposes of or in connection with such trade or business.

"(3) The person registered shall keep a copy of the by-laws made by the local authority under this section hung up in a conspicuous place in the registered premises.

"(4) Any officer of the local authority or other person duly authorized in writing in that behalf by the local authority, and if so required exhibiting his authority, shall at all reasonable times be afforded by the person registered full and free power of entry into the registered premises and the books required to be kept by such person.

"(5) Any person carrying on such trade or business as aforesaid whose name, place of abode, and premises in which such trade or business is carried on have not been registered in accordance with subsection 1 of this section, or whose registration has been cancelled or suspended as hereinafter provided, or acting in contravention of any of the provisions of this section or of any by-law made thereunder, shall be liable to a penalty not exceeding five pounds and to a daily penalty not exceeding forty shillings, and the Court may (in lieu of or in addition to imposing a penalty) order the suspension or cancellation of the registration.

"(6) The local authority shall give public notice of the provisions of this section by advertisement in two newspapers circulating in the district, and by handbills and otherwise in such manner as they think sufficient."

The London County Council (General Powers) Act, 1910, 10 Edw. VII. and 1 Geo. V. c. 129, provides for licensing suitable persons to carry on agencies, connected with the employment of persons in any capacity, even lecturers: Lecture League v. London, 108 L. T. 55.

Powers of entry and inspection must be specially given.

(Note.—Section 583, par. 20, gives power to prohibit the keeping of any intelligence office without a license struck out as unnecessary.)

Victualling Houses, etc.

(4) For limiting the number of and licensing and regulating victualling houses, ordinaries, and houses where fruit, fish, oysters, clams or victuals are sold to be eaten therein, and places not being a tavern or shop licensed under *The Liquor License Act* for the lodging, reception, refreshment or entertainment of the public.

(5) For revoking the license.

(*a*) The sum to be paid for the license shall not exceed $20. 3 Edw. VII. c. 19, s. 583, pars. 34-36, *redrafted;* 3 & 4 Geo. V. c. 43, s. 417 (4-5).

(Note.—Last part of old par. 35 as to revoking without giving a reason and as to refund of part of license fee struck out as covered by new section 253.)

(6) For licensing, regulating and controlling all places where cakes, pastry and candies are made for sale or sold.

(*a*) The license fee shall not exceed the sum of $1 for one year. 8 Geo. V. c. 32, s. 12.

The power to limit the number must be expressly given, and is not to be implied from a power to license or regulate.

Regulation of Victualling Houses.—Magistrates who were empowered to grant licenses for the sale of ice cream in specified premises held to be acting *ultra vires* in imposing a condition that the licensee should not keep his premises open on Sunday, or on any other day set apart for public worship by lawful authority: Rossi v. Edinburgh, 1905, A. C. 21, 91 L. T. 668, H. L. (Sc.). Under a power to make by-laws in regard to the opening and closing of ice cream shops "the hours of business not being more restricted than fifteen hours daily," a by-law making it illegal to open such shops except from 7 a.m. to 10 p.m. was held not *ultra vires* or unreasonable: De Prato v. Partick, 1907, A. C. 153, 96 L. T. 398 H. L. (Sc.).

"In Baker v. Municipal Council of Paris, 10 U. C. R. 621, under a statute authorizing councils to regulate inns and houses of public enter-

tainment, a rule in a by-law that bar-rooms should be kept closed from 11 p.m. to 4 a.m. and all day Sunday, was upheld.

"In re Greystock and Municipality of Otonabee, 12 U. C. R. 458, a by-law, under the same statute, requiring all bar-rooms to be closed at 10 p.m., and kept closed all day Sunday, was held to be reasonable, and a good enactment.

In Re Campbell and City of Stratford, 1917, 14 O. L. R. 184, a by-law under the same section as the present, 583 (34), was upheld by Mabee, J., whose decision was affirmed by a Divisional Court. It enacted that no licensed eating house in Stratford should be open between 1 a.m. and 6 a.m. nor on Sunday after 7 p.m.

"This case being precisely in point, reference may be had to the reasoning and to the authorities. . . .

"See also the reasoning of Dubuc, C.J., in Re Fisher and Village of Carman (1905), 16 Man. L. R. 560, at p. 562, in dismissing an application to quash a by-law closing pool and billiard rooms from 10 to 6 during the week and all day Sunday, passed under the section of the Municipal Act as to regulating and governing such rooms, a decision which was affirmed on appeal."

In re Karry and Chatham, 1910, 20 O. L. R. 178, C.A., a by-law providing that all eating houses should be closed on Sunday between 2 p.m. and 5 p.m. and 7.30 p.m. on Sunday to 5 a.m. Monday, was upheld, although attacked as: (1) Unreasonable, (2) oppressive, (3) passed with the improper motive of aiding in the enforcement of Sunday legislation. On the question of unreasonableness, Maclaren, J., said:—

"Under this head we were urged to set aside the by-law on the ground that, among the motives influencing those who promoted the by-law, was that of aiding in the enforcement of Sunday legislation. In reality it is a question of power rather than of motive. The later authorities shew that the Courts should be slow in setting aside the by-laws of public representative bodies, clothed with ample authority, on the ground of supposed unreasonableness. As said by Lord Russell, C.J., in Kruse v. Johnson (1898), 2 K. B. 91, at p. 99, such by-laws 'ought to be supported if possible. They ought to be, as has been said, 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. And again, on p. 100: 'A by-law is not unreasonable merely because particular Judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some Judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than Judges.' See to the same effect: Kelly v. City of Winnipeg (1898), 12 Man. L. R. 87; Re Fisher and Village of Carman, *supra;* Waldon v. Town of Westmount (1895), Q. R. 8 S. C. 324; Corporation of Ste. Louise v. Chouinard (1896), Q. R. 5 Q. B. 362; Haggerty v. City of Victoria (1895), 4 B. C. R. 163.'"

In re Campbell v. Stratford, 1907, 14 O. L. R. 184, D. C., a by-law provided that no eating house should be open between 1 a.m. and 6 a.m. and on Sunday after 7 p.m. This was upheld by the D. C., Mabee, J., said:—

"I think it is clear that the directions to close at stated hours are regulations and fall within the foregoing provisions of the statute.

"It was contended that the case was covered by Regina v. Levy (1899), 30 O. R. 403, but I think that case is clearly distinguishable. The by-law there dealt with the class of persons who should be permitted to deal at second-hand shops, and the Court said that was not regulating junk shops, but fell within Kruse v. Johnson (1898), 2 Q. B. 91, as being partial and unequal in operation as between different classes of persons.

"If the by-law now attacked provided that certain classes of persons should not be provided with refreshment at eating houses, it might then fall within the Levy case. It may also be noticed that the by-law quashed in Regina v. Levy provided that second-hand dealers should not purchase any goods between 7 p.m. and 7 a.m., but the by-law was not attacked upon that ground, and it seems to have been taken for granted that such a provision was within the authority of the council.

"In Regina v. Martin (1894), 21 A. R. 145, a regulation by license commissioners that the lower half of bar-room windows should be left uncovered during prohibited hours was held valid and reasonable.

"Merritt v. City of Toronto (1895), 22 A. R. 205, does not assist the applicant, as there the defendants were said to be in the wrong, because they had refused a license unless the police reported favourably upon the character of the applicant, and the Court said this delegation by the council was improper.

"In Barbier v. Connolly (1885), 113 U. S. R. 27, the Supreme Court of the United States held that an ordinance prohibiting washing and ironing in public laundries within defined territorial limits from ten o'clock at night to six in the morning was within the competency of a municipality possessed of the ordinary powers, and this decision was followed by the same Court in Soon Hing v. Crowley (1885), *ibid*, p. 703, in the same volume.

"I do not think the special Act in question in the Calder and Hebble Navigation Company v. Pilling (1845), 14 M. & W. 76, conferred as wide powers upon the company as the Municipal Act confers upon municipal councils.

"In Scott v. Pilliner (1904), 2 K. B. 855, the Court came to the conclusion that the by-law was unreasonable, and quashed it upon that ground alone.

"The rule is that where power is given to license and regulate, proper provision may be made as to the mode of carrying on the particular business, and if the Court interfered in the present case it would bring under review almost every act of municipal councils where attempts were made to regulate the many matters over which they are invested with supervisory power by the statute."

"The general power to regulate, while it enables rules to be made for the maintenance of order and the like, does not give power to rule out, to annul or extinguish the subject of municipal provision. That is well settled by many decisions: Re Smith and the City of Toronto, 10 C. P. 225; In re Bright and the City of Toronto, 12 C. P. 433; Ward v. Folkstone Waterworks Co., 24 Q. B. D. 334, and Sharp v. Wakefield (1891) A. C. 182, per Lord Bramwell."

Bannan v. Toronto, 1892, 22 O. R. 274, was an action for a declaration that a by-law was illegal. The, then, section gave power to determine the time during which licenses should be in force, and the corporation passed a by-law providing that upon conviction of a licensee of a victualling house, under the Liquor License Act, the licensee should in addition to the penalty forfeit his license. Boyd, C., said:—

"In the Municipal Act in the case of intelligence offices provision is made for the passing of by-laws for limiting the duration of or revoking any license to such offices: s. 504, s.-s. 3. But no such power appears to be explicitly conferred in the case of victualling licenses, *i.e.*, the right to forfeit the license unless it can be inferred from the general words in s. 285, as to determining the time during which the license shall be in force. But that does not to me appear to be the obvious and ordinary meaning of these words; it is rather an expression of that inherent power which the corporation had to fix, the duration of the license in point of time upon its being granted or issued. If there is unconditional power to grant a license there is power to limit it for any period which may be thought proper. The language of the statute refers rather to the term of the license fixed at

its inception than to a provision for forfeiture during its currency: Hoffman v. Bond, 32 L. T. 775; Kirk v. Nowill, 1 T. R., at p. 124. This last case, which has been universally followed, decides that the power to create a forfeiture of property is one which must be expressly given to a corporation by Parliament, and that such an extraordinary power is at least of all to be inferred when Parliament has provided other means of enforcing by-laws by means of fine and amerciament. . . .

418. By-laws may be passed by the councils of towns and cities having a population of less than 100,000, and by Boards of Police Commissioners of cities having a population of not less than 100,000.

Electrical Workers.

(1) For examining, licensing and regulating electrical workers. 3 Edw. VII. c. 19, s. 583, par. 26*a*. 3 & 4 Geo. V. c. 43, s. 418.

419. By-laws may be passed by the councils of towns and villages and of cities having a population of less than 100,000 and by the Board of Commissioners of Police of cities having a population of not less than 100,000.

Sale of Meat.

(1) For regulating the storage, handling and sale of fresh meats and prescribing the equipment and appliances necessary to conduct such business under sanitary conditions, and for granting annually or oftener licenses for the sale of fresh meat in quantities less than by the quarter carcass, and fixing and regulating the places where such sale shall be allowed, and for prohibiting the sale of fresh meat in less quantities than the quarter carcass unless by a licensed person and in a place authorized by the council.

(*a*) The power conferred by paragraph 1 shall not be affected or restricted by anything in s. 402.

(*b*) Nothing in paragraph 1 shall affect the powers conferred by paragraphs 3 and 4 of s. 402.

(c) The fee to be paid for the license shall not exceed $50 in a city and $25 in a town or village. 8 Geo. V. c. 32, s. 13.

Tobacconists.

419.—(2) For licensing, regulating and governing keepers of stores and shops other than taverns and shops licensed under *The Liquor License Act* where tobacco, cigars or cigarettes are sold by retail, and for revoking any license granted. 3 Edw. VII. c. 19, s. 583, par. 28. 3 & 4 Geo. V. c. 43, s. 419 (2).

420. By-laws may be passed by the councils of towns, townships, villages and cities having a population of less than 100,000 and by Boards of Commissioners of Police in cities having a population of not less than 100,000.

Bagatelle and Billiard Tables.

(1) For licensing, regulating and governing persons who for hire or gain, and proprietary clubs which directly or indirectly keep, or have in their possession, or on their premises any billiard, pool or bagatelle table, or keep or have any such table, whether used or not, in a house or place of public entertainment or resort; for limiting the number of licenses to be granted and the number of such tables which shall be licensed and for revoking any license granted. 3 & 4 Geo. V. c. 43, s. 420.

420.—(*a*) "Proprietary club" shall mean and include all clubs other than those in which the use of any such table is only incidental to the main objects of the club.

(*b*) The License Commissioners having jurisdiction in the license district may, when authorized by order of the Lieutenant-Governor in Council, determine whether any club in such district is within the provisions of clause (a), and any certificate given by the Commissioners in

respect thereto shall be final and conclusive. 5 Geo. V. c. 34, s. 35.

28.—(a) of the Ontario Companies Act as added by 5 Geo. V., c. 20, s. 18 (3) provides that—

"Where a municipal corporation has passed or may hereafter pass a by-law to license, regulate and govern persons or proprietary clubs as provided by paragraph 1 of s. 420 of the Municipal Act, no charter heretofore or hereafter granted whether by special Act or letters patent or otherwise for any of the purposes mentioned in that paragraph shall be construed as exempting the holders thereof from compliance with the provisions of such by-law or as affecting the discretionary power to refuse or grant a license conferred by s.-s. 4 of s. 253 of the Municipal Act."

Dogs.

420.—(2) For prohibiting or regulating the running at large of dogs; for seizing and impounding and for killing, whether before or after impounding, dogs, running at large contrary to the by-law; and for selling dogs so impounded at such time and in such manner as may be provided by the by-law.

(*a*) For the purposes of this paragraph, a dog shall be deemed to be running at large when found in a highway or other public place, and not under the control of any person. 3 Edw. VII. c. 19, s. 540, pars. 1-2; 1 Geo. V. c. 57, s. 8 (2). *amended.*

420.—(3) For regulating and licensing [subject to the provisions of the *Theatres and Cinematograph Act*] exhibitions held for hire or gain, theatres, music halls, bowling alleys, moving picture shows, and other places of amusement, and for prohibiting the location of them, or a particular class of them, on land abutting on any highway or part of a highway to be named in the by-law and for revoking any license granted. 3 Edw. VII. c. 19, s. 583, par. 10; 8 Edw. VII. c. 48, s. 15; 1 Geo. V. c. 57, s. 12.

The words in brackets were added in 1916 by 6 Geo. V., c. 24, s. 27 (2).

Plumbers.

(4) For licensing, regulating and governing plumbers, master plumbers and journeymen plumbers:—

(*a*) For the purposes of this paragraph "master plumber" shall mean a person who is skilled in the planning, superintending and installation of plumbing, is familiar with the laws, rules and regulations governing the same, has a regular place of business in the municipality, and who himself or by journeymen plumbers in his employ performs plumbing work.

(*b*) A "journeyman plumber" shall mean a person other than a master plumber, who has been in the employ of a master plumber for not less than one year, and desires to follow plumbing as his calling. 7 Geo. V. c. 42, s. 20.

Shows.

420.—(5) For prohibiting or regulating and licensing exhibitions of wax work, menageries, circus-riding and other like shows usually exhibited by showmen, and for regulating and licensing roller skating rinks and other places of like amusement, and merry-go-rounds, switchback railways, carousals, and other like contrivances; and for imposing penalties not exceeding the amount of the license fee on offenders against the by-law; and for levying the same by distress and sale of the goods and chattels of the showman or proprietor, or belonging to or used in such exhibition or show whether owned or not owned by such showman or proprietor.

(*a*) A license shall not be granted for any such exhibition or show to be held on the days of the exhibition of any district or township agricultural society, within 300 yards from the grounds of the society, or for any such exhibition or

show in or in connection with which gambling is carried on or goods, wares or merchandise are sold or trafficked in. 3 Edw. VII. c. 19, s. 583, par. 8; 6 Edw. VII. c. 34, s. 25.

(*b*) The fee to be paid for the license shall not exceed $500. 3 Edw. VII. c. 19, s. 583, par. 9.

Transient Traders.

(6) For licensing, regulating and governing transient traders and other persons whose names have not been entered on the assessment roll in respect of income or business assessment for the then current year; and who offer goods, wares or merchandise for sale by auction, conducted by themselves or by a licensed auctioneer or otherwise, or in any other manner.

(7) For requiring transient traders and other persons whose names are not entered on the assessment roll or are entered on it for the first time, in respect of income or business assessment, and who so offer goods, wares or merchandise for sale, to pay a license fee before commencing to trade.

(*a*) A by-law passed under paragraphs 6 or 7 shall not apply to the sale of the stock of an insolvent which is being sold or disposed of within the county or district in which he carried on business therewith at the time of the issue of an attachment or of the execution of an assignment. 3 Edw. VII. c. 19, s. 583, pars. 30 and 31, *part;* 6 Edw. VII. c. 34, s. 29.

(*b*) "Transient traders" shall include any person commencing business who has not resided continuously in the municipality for at least three months next preceding the time of his commencing such business there. 3 Edw. VII. c. 19, s. 583, part 31, *part;* 6 Edw. VII. c. 34, s. 30.

(*c*) The fee to be paid for a license under paragraph 7 shall not exceed in a city or town $250, in a village in unorganized territory $200, and in other local municipalities $100.

(*d*) The sum paid for a license shall be credited to the person paying it, on account of taxes thereafter payable by him. 3 Edw. VII. c. 19, s. 583, par. 33, *redrafted;* 3 & 4 Geo. V. c. 43, s. 420 (5-7).

Transient Traders.—R. v. Myers, 23 C. L. T. 286; R. v. Murray, 24 C. L. T. 183; R. v. Pember, 1912, 2 D. L. R. 542, 3 D. L. R. 347; R. v. St. Pierre, 1902, 4 O. L. R. 76; R. v. Wilson, 20 C. L. T. 144; R. v. Ogle, 1910, 15 W. L. R. 325.

In R. v. Pember, 1912, 3 O. W. N. 957, 1216, but exhibiting of samples at a hotel, and the taking of orders was held not to be within a transient traders' by-law.

Transient Trader or Pedlar.—In R. v. Scales, 1917, 41 O. L. R. 229, Masten, J., quashed a conviction which had been made under a by-law passed under section 420, sub-sections 6 and 7. The accused was held to be a pedlar and, therefore, not liable to conviction as a transient trader on the ground that, "the provision of paragraph 1, clause (d), of section 416 of the Municipal Act comes into play only when a pedlar becomes a transient trader. If he localizes his operations or otherwise comports himself and carries on his trade in such a way that he becomes a transient trader, then the fact that he has previously taken out a license under section 416 as a pedlar does not interfere with the right of the municipality to pass a by-law under section 420 and to require him to take out a license in his new capacity as a transient trader. But it is a question of fact in each individual instance whether a man is or is not a transient trader. If he is not a transient trader, the by-law relating to transient traders cannot be applied to him."

Delegation of Licensing Power.—Re Foster and Hamilton, 1899, 31 O. R. 292.

Power of Legislature to Confer Power to Make By-laws.—Hodge v. Queen, 1883, 9 App. Cas. 117; The Queen v. Burah, 1878, 3 App. Cas. 889.

In R. v. Langley, 1899, 31 O. R. 295, the defendants were convicted under a by-law for licensing transient traders. The conviction was quashed by Rose, J., who thus discussed the facts:—

> "The various steps in the dealing are as follows: There is the transfer of the stamps as a voucher to the merchant who has no property in them, but has only to hand them as gifts to the purchaser from him. When the merchant pays fifty cents per hundred, that is only used as the measure by which he pays for the advertising done and trouble taken by Langley in his behalf. The stamp is the customer's evidence of having dealt on a cash basis with the advertised merchants, and he is at length able to get an article which costs him nothing by turning over a book full of stamps which is of no value to the defendant . . .
>
> "The essence of the defendant's system appears to be an advertising device by which local business is promoted and a cash trade stimulated. There is no competition between the defendant and the permanent traders of the locality, who pay taxes and bear municipal burdens.

His presence and activity is not in violation of the policy of the Act which is aimed at the migratory dealer in rival wares and so-called bankrupt stocks, the man who undersells the legitimate merchant, and while injuring the ordinary channels of trade contributes nothing to the municipal treasury.

"Neither in law nor in reason has there been a violation of the statute and by-law as to transient traders."

421. By-laws may be passed by the councils of towns and villages and Boards of Commissioners of Police of cities.

Bands and Musical Instruments.

(1) For regulating or prohibiting the playing of bands and of musical instruments in any highway, park, or public place except by a military band attached to any regular corps of the Militia of Canada when on duty, under the command of its regular officer. 3 Edw. VII. c. 19, s. 484 (5).

Junk Stores—Purchasing or Receiving Pledges from Minors.

(2) For prohibiting keepers of second-hand shops or junk stores or shops, directly or indirectly purchasing from, exchanging with, or receiving in pledge from any minor appearing to be under the age of 18 years, without written authority from a parent or guardian of such minor, any metals, goods, or articles. 3 Edw. VII. c. 19, s. 484 (4*a*), *amended;* 3 & 4 Geo. V. c. 43, s. 421 (1-2).

The power conferred by this sub-section, and the reason for the exception is apparent from the remarks of Boyd, C., in R. v. Levy, 1899, 30 O. R. 403. "The infant might be the messenger of a sick parent to dispose of something to procure food or medicine." See s. 413.

422. By-laws may be passed by Boards of Commissioners of Police of cities.

Cab Drivers—Licensing of.

(1) For licensing drivers of cabs. 3 Edw. VII. c. 19, s. 484 (3), *part.*

Children in Certain Occupations.

(2) For regulating and controlling children engaged as express or despatch messengers, vendors of newspapers and small wares and bootblacks. 3 Edw. VII. c. 19, s. 484 (4).

Fares for Conveyance of Goods and Passengers.

(3) For establishing the rates of fare to be taken by the owners or drivers of vehicles for the conveyance of goods or passengers, either wholly within the city, or from any point within the city to any other point not more than three miles beyond its limits, and providing for enforcing payment of such fares. 3 Edw. VII. c. 19, s. 484 (1), *part amended.*

Livery Stables, etc.—Hours of Labour.

(4) For regulating the hours of labour of persons employed in livery or boarding stables as drivers of motor vehicles, cabs, carriages, or sleighs kept for hire, or by the owners of horses, carts, trucks, omnibuses, and other vehicles kept for hire. 3 Edw. VII. c. 19, s. 484 (3), *part amended.*

Livery Stables, etc.—Licensing of.

(5) For licensing and regulating the owners of livery stables and of horses, cabs, carriages, carts, trucks, sleighs, omnibuses, and other vehicles regularly used for hire within the city, whether such owners reside within or without the city. 3 Edw. VII. c. 19, s. 484 (1), *part.* 3 & 4 Geo. V. c. 43, s. 422 (1-5).

The power to quash by-laws is statutory, and as no power has been given to quash by-laws of Commissioners of Police: Re Major Hill Taxicab Co. and Ottawa, 1915, 33 O. L. R. 243, which settles the doubt expressed in McGill v. License Commissioners of Brantford, 1892, 21 O. R. 665.

Whether drivers of motor cars, used as cabs, can be required to take out licenses is an open question. See Re Major Hill Taxicab Co. v. Ottawa, 1915, 123 O. L. R. 243, at 246. Note s. 4 of the Motor Vehicle Act, R. S. O. 1914, c. 207.

A company with a Dominion charter, having a license from the Government of Ontario, can be compelled to take out an additional license under a by-law passed under this sub-section, *ibid.*

As to licensing, see s. 253, under which: (1) Power to license includes power to prohibit acting without a license, and (2) there is a discretion which cannot be reviewed in any Court to grant, refuse or revoke any license.

In R. v. Latham, 1894, 24 O. R. 616, a by-law was held bad which included a tariff of rates and then provided that no higher or other rate should unless by agreement be paid to or equitable by any person licensed.

In Re v. Butler, 1892, 22 O. R. 462, a by-law passed under the authority of s.-s. 5, provided that no person should drive any of the vehicles mentioned without being licensed. It was held *ultra vires*, as a sub-section refers only to onus.

In R. v. Gurr, 1891, 21 O. R. 499, defendant was a licensed livery driver under a by-law relating to livery stables, but was not a licensed cab-driver. The question was whether he was entitled to stand with his carriages for hire on his own property in place in the street, other than where his stable was. It was held that if he wished to use his vehicles as cabs, both he and his driver must obtain a license.

In R. v. Boyd, 1889, 18 O. R. 485, the defendant contended that he did not come within the portion of a by-law, on the ground that he merely used his horses and waggons to carry coal and pipe for the gas company, for which he was paid. If he had hired the horses from owners who paid the license, he would not be liable, but if not from a licensed person, he would be liable.

Jurisdiction to Quash By-laws.—Apart from statute there is no jurisdiction to quash a municipal by-law, and therefore, as no power to quash by-laws of Boards of Commissioners of Police has been conferred by the Municipal Act, the Courts will not assume jurisdiction to quash such by-laws: Re Major Hill and Ottawa, 1915, 33 O. L. R. 243, App. Div., thus resolving the doubt expressed by Rose, J., in McGill v. The License Commissioners of Brantford, 1892, 21 O. R. 665. Note also Daniels v. Burford, 1852, 10 U. C. R. 478, where Robinson, C.J., doubted the power to quash a resolution of council under the then statute: Cæsar v. Cartwright, 1854, 12 U. C. R. 341, is a decision of the same Judge to the same effect.

Parades and Traffic on Highways.

422.—(6) For regulating parades or processions on highways, and from time to time, and as occasion may require, prescribing the routes of travel to be observed by all vehicles, horses and persons upon the highways, and preventing the obstruction of the highways during public processions or public demonstrations, and for giving directions to the Police Constables for keeping order, and preventing any collision or obstruction of traffic at the intersections or other frequented portions of the highways, on all occasions when the highways are thronged, or liable to obstructions.

(*a*) This paragraph shall not affect the right, if any, of a street railway company to regulate the routes of its cars and no regulation or direction

which may affect a street railway company shall be made or given until the company has been afforded an opportunity of being heard. 9 Edw. VII. c. 73, s. 14; 3 & 4 Geo. V. c. 43, s. 422 (6).

Destitute Insane Persons—Support of.

423. The council of every county shall make provision for the whole or partial support within the county of such insane destitute persons as cannot be admitted to a Provincial Asylum, and shall determine the sums to be paid for such support, and the persons to whom the same shall be paid. 3 Edw. VII. c. 19, s. 589, *amended;* 3 & 4 Geo. V. c. 43, s. 423.

Members of the Council—Payment of.

424. By-laws may be passed by the councils of counties and townships for paying the members of the council for their attendance at meetings of the council or of its committees, at a rate not exceeding $5 a day, and five cents for each mile necessarily travelled in going to and from such meetings. 3 Edw. VII. c. 19, s. 538, par. 1; 10 Edw. VII. c. 85, s. 8; 3 & 4 Geo. V. c. 43, s. 424.

425. By-laws may be passed by the councils of cities having a population of not less than 100,000, for paying an annual allowance, not exceeding $300 to aldermen, and an additional allowance not exceeding $100 to each chairman of a standing committee and to the chairman of the Court of Revision and the Local Board of Health.

(*a*) The by-law shall provide for the deduction from such allowance of a reasonable sum to be fixed by the council for each day's absence from meetings. 3 Edw. VII. c. 19, s. 538, par. 2; 3 & 4 Geo. V. c. 43, s. 425.

425 (*a*) By-laws may be passed by the councils of cities having a population of not less than 200,000 with

the assent of the municipal electors for paying an annual allowance not exceeding $1,200 to aldermen and an additional allowance not exceeding $100 to each chairman of a standing committee and to the chairman of the Court of Revision and the Local Board of Health. 4 Geo. V. c. 33, s. 18.

Payment of remuneration to members of councils where not specially authorized has repeatedly been held illegal: Re McLean and Cornwall, 1871, 31 U. C. R. 314 (grant of $1,600 to retiring mayor as "small token of appreciation"); Blaikie v. Staples, and E. Nissouri v. Horseman, 1857, 16 U. C. R. 576, 13 G. R. 67 (councillors ordered to repay sums received); Amherst v. Read, 23 L. T. 139, 40 N. S. R. 154. In Heffernan v. Walkerton, 1903, 6 O. L. R. 79, D. C., an injunction was granted to restrain a payment to a mayor because of contravention of procedure by-law in the passing of the by-law to authorize the payment, see *supra*, p. 298.

See s. 216 as to remuneration to heads of councils, and 209, 210 for salaries of members of Boards of Control.

Members of Certain Councils may be Appointed Commissioners.

426. A member of the council of a county, village or township may be appointed commissioner, superintendent or overseer of any highway or of any work undertaken wholly or in part at the expense of the corporation and may be paid the like remuneration for his services as if he were not a member of the council. 3 Edw. VII. c. 19, s. 537, par. 1, cl. (*a*) *amended*. 3 & 4 Geo. V. c. 43, s. 426.

See s. 52, s.-s. 2 (e), supra.—The general rule is, that an officer, employee, or servant of the corporation shall not be eligible to be elected a member of a council or be entitled to sit or vote therein.

The effect of s. 426 is to prevent the appointment of members of councils of cities and towns to the positions mentioned, on the principle *expressio unius est exclusio alterius*, see the terms of old s. 537 1 (a); s. 53 is by itself wide enough to prevent such appointment from operating as a disqualification.

Expenses of Reception of Distinguished Guests and Travelling Expenses.

427.—(1) The council of a city, town, village, county or township may pay for or towards the reception or

entertainment of persons of distinction or the celebration of events or matters of national interest or importance, or for or towards travelling or other expenses incurred in respect to matters pertaining to or affecting the interests of the corporation, a sum not exceeding in any year in the case of

(*a*) A city having a population of not less than 100,000	$20,000
(*b*) A city or town having a population of not less than 20,000	2,500
(*c*) A city or town having a population of not less than 10,000	1,000
(*d*) A county	1,500
(*e*) Other municipalities	500

4 Geo. V. c. 33, s. 19.

Such payments have repeatedly been held *ultra vires* unless specially authorised.

The Attorney-General is not a necessary party because the ratepayers suffer damage peculiar to themselves, because of the increased rates they will have to pay, and a ratepayer can bring an action on behalf of all ratepayers. It matters not whether the damage be great or small unless the whole transaction is so trivial that the Court would refuse to interfere. The inhabitants who are not ratepayers, who also have an important interest as corporators, are represented by the corporation, and therefore sufficiently before the Court.

For full discussion, see MacIlreith v. Hart, 1907, 39 S. C. R. 657, 41 N. S. R. 351, where moneys paid to a mayor for travelling expenses were recovered back. Idington, J., said:—

> "I see no possible legal defence in the way of justification for the appellant, and the argument in his favour, derived from the alleged rule that moneys paid *ultra vires* cannot be recovered, is not applicable to one standing, as he did, in relation to the depleted fund."

Councillors who authorize illegal payments will be ordered to refund the moneys and cannot justify by the excuse they have acted honestly and reasonably.

To pay moneys of the corporation to persons having no legal claim, or for purposes not authorized, is to commit a breach of trust, rendering them responsible to the *cestuis que trust*; the ratepayers' advice of counsel will not avail to protect the transaction: Patchell v. Raikes, 1904, 7 O. L. R. 470, C. A.

In addition to the money cases referred to, in the judgments in the two last mentioned cases: see Davis v. Winnipeg, 1914, 24 M. R. 478, 28 W. L. R. 93, where an injunction was granted to restrain a proposed illegal payment.

Publicity Purposes.

428. The council of every city and of every town having a population of not less than 5,000 may expend a sum not exceeding in any year $500, in diffusing information respecting the advantages of the municipality as a manufacturing, business, educational or residential centre, or as a desirable place in which to spend the summer months, and the councils of other municipalities except counties may expend for the like purpose a sum not exceeding in any year $100. 3 Edw. VII. c. 19, s. 597; 3 & 4 Geo. V. c. 43, s. 428.

Publicity Purposes.—Would such expenditure be *ultra vires* without this section?

> "Apart from some provision in a local Act, the council of an English or Welsh borough could not, at any rate if there is no surplus, pay out of the borough fund the cost of advertising the attractions of the borough. A bill to give them powers in this direction is at present (1910) before Parliament. As to Ireland, see the recent Health Resorts and Watering Places (Ireland), Act 1909 (9 Edw. VII., c. 32."

As to power of counties: see s. 408 (5).

Delegation—Note.—A council must consider the granting of a license itself. It cannot delegate this judicial function to an officer. But if a right of appeal to the council is provided, the power may be exercised by a designated officer. Where the granting of a license is a merely ministerial matter, the power to grant can be delegated.

In Re v. Webster, 1888, 16 O. R. 187, a by-law making it unlawful to erect a steam engine within the corporation limits, without the leave of the council, was held bad, because it applied to all cases where there was a danger in causing or promoting fire or not.

By-laws—Miscellaneous Notes—Repeal of By-law.—Repeal of repealing by-laws may revive original by-law. The Interpretation, R. S. O. 1914, c. 1, s. 8, s.-s. 46, does not apply to by-laws: R. v. Laforge, 1906, 12 O. L. R. 308, Maxwell, lv. Ed. 122.

We must not be understood to accede to the conviction that it is open to a defendant on a trial before a magistrate or upon motion to quash a conviction to attack the validity of the by-law under which he is prosecuted on grounds not apparent on the face of the by-law, and to be re-enacted if at all by extraneous evidence: R. v. LaForge, 1906. 12 O. L. R. 308.

Part of a by-law may be invalid without affecting the rest: In re Fennell and Guelph, 1865, 24 U. C. R. 238; R. v. Van Norman, 1909, 19 O. L. R. 447.

Internal Procedure.—Section 50 of the procedure by-law of the City of London reads as follows:—

> "Every bill shall be introduced on motion for the first reading thereof, and shall receive three several readings, each on different days previous to its being passed, except on urgent and extraordinary occasions, when it may be read twice or thrice in one day."

At a special meeting the by-law under an emergency clause of the city by-law was read the first, second and third times and carried by a majority of one. Subsequently an alderman resigned, and the by-law not having been signed by the mayor a motion for the second reading of the by-law was defeated. The council was held competent to reverse the prior vote because the by-law was inoperative until signed by the mayor: London Street R. W. Co. v. London, 1903, 9 O. L. R. 439, C. A.

Consent to Resignation.—The passing of a resolution referring to an alderman as having resigned and thanking him for his services is ample consent by the council to the resignation: London Street R. W. Company v. London, 1903, 9 O. L. R. 439, C. A.

In London Street R. W. Co. v. London, 1903, 9 O. L. R. 439, C. A., an action to compel the mayor to sign a by-law failed, the by-law not having been duly passed. See also Galt By-law, 1908, 17 O. L. R. 270.

Injury Resulting from Faulty Construction of Municipal Buildings.—Where a municipal corporation employs an architect and engineer believed to be competent and lets the work to independent contractors, they will not be liable in case any person was injured by reason of defects in the construction of the building: Hill v. Taylor and Ottawa, 1904, 9 O. L. R. 643, C. A., applying Hall v. Lees, 1904, 2 K. B. 602, 73 L. J. K. B. 819, but note that the corporation will be liable if it has been guilty of negligence: McCann v. Toronto, 1897, 28 O. R. 650.

PART XXI.

HIGHWAYS AND BRIDGES.

429.—(1) In this Part

(*a*) "County bridge" shall mean a bridge under the exclusive jurisdiction of the council of a county. *New.*

(2) Except as provided by section 445 this Part shall not apply to a Provincial road or bridge under the control of the Crown. *New.* 3 & 4 Geo. V. c. 43, s. 429.

County Bridge.—Bridges erected under s. 452 would not be county bridges, but may be assumed as county bridges under s. 446, or made county bridges under s. 449.

County bridges may cease to be such under the provisions of s. 436 (2).

The provisions of ss. 432, 433 and 460 are wide enough to include all roads and bridges in a municipality, so that the provisions of s. 429 (2) are necessary.

430. Where by this Part power is conferred upon a council to pass by-laws for acquiring or for assuming a highway it shall include the power to pass by-laws for acquiring or for assuming part of a highway. *New.* 3 & 4 Geo. V. c. 43, s. 430.

This section simpy embodies the rule of interpretation adopted by the courts: In re Falle v. Tilsonburg, 1873, 23 C. P. 167; Taylor v. Belle River, 1909, 18 O. L. R. 330.

431. Where power to pass by-laws in respect of a highway or bridge is by this Act conferred on a council, unless otherwise expressly provided, it shall be exercisable only by the council having jurisdiction over the highway or bridge, or if the highway or bridge is under the joint jurisdiction of two or more councils only by the joint action of such councils, and a by-law by all of them shall be necessary for the exercise of such powers. *New.* 3 & 4 Geo. V. c. 43, s. 431.

Shall be Exercisable only by the Council Having Jurisdiction.—The township of Barton passed a by-law authorizing the adjoining town-

ship of Ancaster to take possession of and keep in repair a certain macadamized road within Barton and over which Barton had jurisdiction, and thereupon the township of Ancaster by by-law assumed the road in question, and established a toll gate on it. The right to take tolls was called in question in the suit: Smith v. Ancaster, 1896, 27 O. R. 276 D. C.: Both by-laws were held invalid.

Only by Joint Action.—Where the municipalities having jurisdiction are unable to agree, the matter in dispute can be determined under ss. 465-469 inclusive.

432. Except in so far as they have been stopped up according to law all allowances for roads made by the Crown surveyors, all highways laid out or established under the authority of any statute, all roads on which public money has been expended for opening them, or on which statute labour has been usually performed, all roads passing through Indian lands, all roads dedicated by the owner of the land to public use, and all alterations and deviations of and all bridges over any such allowance for road, highway or road, shall be common and public highways. 3 Edw. VII. c. 19, s. 598, *re-drafted.* 3 & 4 Geo. V. c. 43, s. 432.

Allowances for Roads Made by Crown Surveyors.—The allowance for a road made by a Crown surveyor, is a highway within the meaning of s. 432 of the Municipal Act, and although not an open public road used and travelled on by the public, it is a highway within the meaning of the Railway Act of Canada (51 Vic. c. 29, s. 2). Although the road allowance has not been cleared, and opened up for public travel, and not been used for a public road, it is not necessary for the municipality to pass a by-law opening it, before having jurisdiction over it. The council may direct it to be opened, and such direction will be sufficient. The right of a railway company under s. 90 (g) of the Railway Act to construct their tracks and build fences across the highway, is subject to s. 183, which provides against any obstruction to the highway, and s. 194, which provides for fences being erected, and therefore defendants had no right to maintain fences which obstructed the highway or interfered with the public user, or with the municipal control over it. The Railway Committee of the Privy Council have no jurisdiction to determine this question, s. 11 (h) and (g) of the Railway Act, not applying. That the Court had jurisdiction to give the relief sought: Fenelon Falls v. Victoria Ry. Co., 29 Gr. 4 and City of Toronto v. Lorsch, 24 O. R. 227, followed.

The highway being vested in the township corporation, who wished to make it fit for travel, plaintiffs were entitled to enjoin defendants for obstructing it, and fences ordered removed: Gloucester v. Canada Atl. Ry. Co., 22 C. L. T. 63.

The public roads allowed by the Crown in the original organization of the several townships of Ontario are instances of dedication by the Crown: Badgely v. Bender, 3 O. S. 221. If the patent does not mark out the course of such allowance, and it is necessary to resort to extrinsic evidence, the best proof is the allowance on the ground, and if that cannot be established the public records may be looked at: ibid. See also Kenny v. Caldwell, 1894, 21 A. R. 110; 24 S. C. R. 699.

Highways Established under the Authority of any Statute.—This will include a road established under the authority of the Municipal Act: Palmatier v. McKibbon, 1892, 21 A. R. 441, was an attempt by the

owner of lands to stop the use of a road established or presumably established under the authority of 50 Geo. III. c. 1, and used for 60 years, on which statute labour had been performed for many years. Hagarty, C.J.O., held that latitude must be allowed in the mode of proof owing to the difficulty of shewing that the proceedings to open it had been completed. The maxim *omnia praesumuntur rite esse acta* was applied.

Laid out or established does not involve actual construction: Palmatier v. McKibbon, *supra;* see also Winslow v. Dalling, 1 N. B. Eq. 615.

Public Money or Statute Labour.—See St. Vincent v. Greenfield, 1886, 12 O. R. 297; 15 A. R. 567, and Hubert v. Yarmouth, 1889, 18 O. R. 458. The performance by statute labour on a private road will not make it a highway: ibid.

"Roads Passing Through Indian Lands."—A dictum by Cameron, C.J., in Township of St. Vincent v. Greenfield, 12 O. R. 297, is as follows: "Road means 'an open way or public passage,' and it would seem the Legislature must have had such a definition in view when making use of the expression 'roads through Indian lands,' which generally speaking, had no defined boundaries other than those indicated by the worn ways. It could hardly be contended that under such language it would be competent for the public to claim the right, after sale of any Indian lands over which such a road might pass, to travel wheresoever they would over 33 feet on each side of the centre line of such worn way.

"The meaning of the clause is, I think, that roads which under the provisions of the Act were to acquire the character of legal highways, should have that same legal character, when they passed through Indian lands, as in other parts of their course, although they might not (as to such portions of them) be public allowances made in any original survey, nor had any public money expended or statute labour performed on them"; Byrnes v. Bowen, 8 U. C. R. 181.

Dedicated by the Owner.—At common law a highway may be created by dedication by the owner of the land, but such dedication must be accepted by the public. "There must be both dedication and acceptance in order to make a highway by dedication," per Brett, J., in Cubitt v. Maxse, 1873, L. R. 8 C. P. 704; 42 L. J. C. P. 278, following the notes to Dovaston v. Payne, or Smith's L. C., 6th ed., p. 140, and Fisher v. Prowse, 31 L. J. Q. B. 212.

User is evidence both of dedication and of acceptance.

Dedication of Highway Subject to Easement of Cattle-pass thereunder.—M. granted to a township corporation land for a highway, reserving the right to a cattle-pass under the highway, which was to be made, maintained and repaired by the corporation, subsequently the lands on the north of the highway became vested in a different owner from the lands to the south, and the corporation claimed that it was under no obligation to maintain the pass. In an action for a declaration of the plaintiff's right to the pass, and to have it kept in repair, Masten, J., held that the duty to maintain was an obligation as part and parcel of the easement as originally created, and did not rest upon any covenant, and that an integral part of the easement passed to the owner for the time being of each of the portions lying on either side of the highway, distinguishing Austerberry v. Oldham, 1885, 28 Ch. D. 750, where a covenant to maintain a highway which did not run with the land was held not to be binding on the assigns of the original covenantor.

User as Evidence of Dedication.—Where the land of a private owner is used as a highway the presumption of dedication arises subject to rebuttal by contrary evidence: Poole v. Huskinson, 11 M. & W. 827. It is not material where the user has been for a great number of years, to enquire who the owner was or whether he intended to dedicate the highway: R. v. East Mark Tyching, 11 Q. B. 877; 17 L. J. Q. B. 117; R. v. Petrie, 4 El. & Bl. 737; 24 L. J. Q. B. 167.

Evidence of user must be of user by the public as such, not by persons who may have a right of way or a license for special purposes: Vine v. Wenham, 1915, 84 L. J. Ch. 913.

Traversing land which is open and laid out for building, and making tracks in every direction, is no evidence of dedication to the public: Kirty v. Paignton U. Council, 1913, 1 Ch. 337; 82 L. J. Ch. 198, Neville, J.

Dedication will be presumed from user against the Crown in the same manner as it may be where the land belongs to a private person, unless there is some statutory restriction or limitation on the powers of the Crown so to dedicate: Turner v. Walsh, 1881, 50 L. J. P. C. 55 (New South Wales). The plaintiff obtained a grant of lands over which for forty years there had been a road used by the public with carriages, horses and cattle, and on foot; dedication by the Crown was presumed and the plaintiff's action for trespass against the defendant who had pulled down fences, was dismissed: R. v. East Mark, 11 Q. B. 877; 17 L. J. Q. B. 117, and R. v. Petrie, 4 E. & B. 737; 24 L J. Q. B. 167, followed. In the latter case after seven years' user without interruption, the court held that dedication might be presumed, although it was not proved that during that time there was anyone who was absolute owner of the fee, but it being possible that such an owner then existed.

In case of trespass for breaking and entering a close, defence that there was a highway. Lord Denman, C.J.: "A dedication must be made with intention to dedicate; the mere acting so as to lead persons into the supposition that the way is dedicated does not amount to a dedication if there be an agreement which explains the transaction," and the user was referred to a license to use: Barraclough v. Johnson, 1838, 8 A. & E. 99.

In Wood v. Veal, 5 B. & Ald. 454, the land had been under a ninety-nine years' lease during the whole term, and Abbott, C.J., left it as a question for the jury whether there had been dedication to the public before the term commenced, saying that if not, there could be no dedication except by the owner of the fee, and the lease explained the user as not being referable to a dedication by him. Yet there was strong evidence to shew that the landlord could not have been ignorant of the user.

Dedication by a lessee will not bind a landlord without evidence of his knowledge: Rugby Charity v. Merryweather, 11 East. 376, and Winterbottom v. Derby, 36 L. J. Ex. 194.

Lands acquired under statutory powers may be dedicated by the company as a highway if such dedication is not incompatible with the use of such lands for the purposes for which acquired: R. v. Leake, 5 B. & Ad. 469; Grand Junction Canal Co. v. Petty, 21 Q. B. D. 273; 57 L. J. Q. B. 572.

Dedication may be for a limited purpose, as for example, for a pool-way: Poole v. Huskinson, supra. There cannot be dedication to a particular class or part of the public, ibid.; or for a limited time, for a highway if dedicated at all, must be dedicated in perpetuity: Dawes v. Hawkins, 8 C. B. (N. S.) 848; any such limitation as to a class or for a limited time or subject to a right to take tolls is simply void: Austerberry v. Oldham Corporation, 29 Ch. D. 750; 55 L. J. Ch. 633.

Acts of user may be referable to and evidence of a mere license: Barraclough v. Johnson, 1838, 8 A. & E. 99.

The provisions of Municipal Acts, so far as they apply to highways, are subordinate to the paramount rights of the owner of the soil and the freehold, reserved at the time of dedication, subject of course to the right of public passage: St. Mary Newington Vestry v. Jacobs, L. R. 7 Q. B. 47; 41 L. J. M. C. 72; thus the owner may have the right to plow up a path: Mercer v. Woodgate, L. R. 5 Q. B. 26; 39 L. J. M. C. 21; Arnold v. Blaker, L. R. 6 Q. B. 433; 40 L. J. Q. B. 185.

Dedication Subject to Obstruction.—The English cases decide that dedication must be accepted by the public subject to existing dangerous obstructions or openings, as a flight of steps, a projecting flap: Robbins v. Jones, 15 C. B. (N. S.) 221; 33 L. J. C. P. 1; or a trapdoor: Fisher v. Prowse, 2 B. & S. 770; 31 L. J. Q. B. 212; or an overhead bridge: Warner v. Wandsworth B. of Works, 53 J. P. 471. But see Brown v. Edmonton, supra.

A canal company was held incapable of dedicating a right of way over the embankment of reservoirs, where the user would result in the destruction of the embankment: G. W. Ry. v. Solihall Rural Council, 86

L. T. 852; 66 J. P. 722 C. A.; Lancashire & Y. Ry. v. Davenport, 4 L. G. R. 425; 70 J. P. 129 C. A.

A railway company can dedicate a footway, in the nature of a level crossing, so long as the user thereof is not inconsistent with the objects of company. The company was restrained from closing such footway: Atty.-Gen. v. London & S. W. Ry., 69 J. P. 110; 3 L. G. R. 1327; 21 T. L. R. 220.

No Dedication to Part of the Public.—In Poole v. Huskinson, 1842, 11 M. & W. 827, the plaintiff brought an action for trespass for breaking gates, and proved that the user of the road had taken place without the knowledge of the parties interested in retaining the road as a private carriage road, and more recently under protest, and that many persons had been turned back who attempted to use the road, and that at various times notice boards had been set up cautioning persons against using the road as a public carriage road. The learned Judge stated to the jury that a dedication to a limited part of the public was invalid, but would nevertheless operate as a dedication of the soil in favour of the whole public. Parke, B., said:—

"There may be a dedication to the public for a limited purpose as for a footway, horse-way or drift-way; but there cannot be a dedication to a limited part of the public. In that respect the direction of the learned judge was quite correct, not so the alternative that as such partial dedication was invalid in law, it would nevertheless operate against the intention of the owner of the soil in favour of the whole public. . . . Such a partial dedication would be merely void. In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled, there must be an intention to dedicate—there must be an *animus dedicandi* of which the user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment."

Dedication Subject to Toll Gate.—A road apparently cannot be dedicated subject to the right to erect a toll gate: Austerberry v. Oldham Corporation, 1885, 28 Ch. D. 750; 55 L. J. Ch. 633 (App.), at 638. It is not a highway if any one has the right to stop the King's subjects and demand a toll.

Acts to Prevent Dedication.—If a person does not mean to dedicate, but only to give a license, he should do some act to shew that he gives a license only, as for example, closing the way once a year: British Museum Trustees v. Finnis, 5 Car. & P. 460.

A single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment. User by the public of land belonging to a non-resident owner is less cogent evidence of dedication than where user is necessarily brought to his personal notice, and the weight to be attached to user depends somewhat upon the nature of the land itself—*e.g.*, whether it is cultivated or is rough and uncultivated: Chinnock v. Hartley Whitney R. C., 63 J. P. 327.

Cul de Sac.—*Cul de sac* can be dedicated as a highway. If it were otherwise it would be a trap to make people trespassers: per Lord Kenyon: Rugby v. Merryweather, 11 East. 376n.

A bar set across a street, which is shut at pleasure, shews a limited right to the public: ibid.

Cul de sac held not to be dedicated as a highway: Hull Corporation v. N.-E. Ry., 1915, 84 L. J. Ch. 905; Vine v. Wenham, 1915, 84 L. J. Ch. 913.

Contra: Rugby Charity Trustees v. Merryweather, 1790, 11 East. 375, and see also Atty.-Gen. v. Chandos, 74 J. P. 401.

Acts Amounting to Dedication.—Continued user by the public of a way raises a presumption that that way belongs to the public, and that it has been dedicated by the owner to the public use for which it has been used, and it is not incumbent on the public to shew by what particular owner the road has been dedicated. If dedication is possible it will be assumed, but it is open to the owner of the soil to establish that

owing to the condition of the title dedication was not possible, and if he shews that, then the presumption which results from continued user is rebutted: Farquhar v. Newbury R. Council, 1909, 1 Ch. 12; 78 L. J. Ch. 170

Once a Highway Always a Highway.—The public right over a highway cannot be released nor lost by mere closure, and no length of time will preclude the public from resuming the exercise of the right where once enjoyed: Atty.-Gen. v. Richmond Corporation, 29 L. T. 700; 20 T. L. R. 131; Harvey v. Truro R. Council, 1903, 2 Ch. 638; 72 L. J. Ch. 705; Belmore v. Kent C. Council, 1901, 1 Ch. 873; 70 L. J. Ch. 501.

It is an established maxim—once a highway always a highway, for the public cannot release their rights and there is no extinctive presumption or prescription. The only methods of legally stopping a highway are, either by the old writ of *ad quod damnum*, or by proceedings before magistrates under the statute: Per Byles, J., Dawes v. Hawkins, 1860, 8 C. B. (N. S.) 848.

Public user may be referred to the right to dedicate when the way is foundrous, and may not be evidence of an intention by the owner to dedicate the portion as used. Ibid.

Acts to Prevent Dedication.—"When one finds an owner alive to the necessity for evidencing his continued possession by periodical perambulations, active to prevent any encroachment or interference with his soil, and warning off trespassing wayfarers from part of his land, and at the same time permitting without protest or interference of any kind the unrestricted passage of the public over the surface of the very soil by which he is asserting his ownership, and over parts of his lands which differ only from the parts where passing is prohibited by their being adjacent to the high road. I think there are cogent reasons for assigning to the public use an origin which as against the owner of the soil has established public rights." Eve, J., Coats v. Herefordshire County Council, 78 L. J. Ch. at 576, and on appeal 781.

Acts referable to the ownership of the soil must be distinguished from those which shew an intention to exclude the passage of the public. The assertion of ownership may emphasize acquiescence in user by the public: Coats v. Herefordshire C. Council, [1909] 2 Ch. 579; 78 L. J. Ch. 568, 781.

Dedication of Lands Vested for Statutory Purpose.—A railway company cannot dedicate generally: Beauchamp v. G. W. Ry., L. R. 3 Ch. 745; 38 L. J. Ch. 833.

They can dedicate for their own purposes not *ultra vires*: Taff Vale Ry. v. Pontypridd U. C., 1905, 93 L. T. 126; G. W. Ry. v. Solihull R. C., 1902, 86 L. T. 852.

There is nothing to prevent a railway company from dedicating its land to the public, so long as the public use is not inconsistent with its undertaking: R. v. Leake, 1833, 5 B. & Ad. 469; Grand Junction Canal v. Pedy, 1888, 21 Q. B. D. 273; 57 L. J. Q. B. 572; Atty-Gen. v. London S. W. Ry., 1905; 21 T. L. R. 220.

See also Arnit v. Whitby U. Council (No. 2). 101 L. T. 14; Rowley v. Tottenham U. Council, [1914], A. C. 95; 83 L. J. Ch. 411; Folkstone Corpn. v. Brockman, [1914] A. C. 338; 83 L. J. K. B. 745.

General Notes.—There cannot be a dedication unless there is an intention to dedicate: Offen v. Rochford R. C., 1906, 1 Ch. 342; 75 L. J. Ch. 348.

A single act of interruption by the owner is of more consequence than many acts of enjoyment or acquiescence: Poole v. Huskinson, 1843, 11 M. & W. 827.

If dedication is possible, dedication will be presumed: Farquhar v. Newbury R. Council, 1909, 1 Ch. 12; 78 L. J. Ch. 170; Belmore v. Kent County Council, 1901, 1 Ch. 873; 70 L. J. Ch. 501.

Owner absent, rule must be applied with great caution: Chinnock v. Hartley-Whitney R. C., 1899, 63 J. P. 327.

No necessity for plaintiff to prove that there was during the period of user, a person capable of dedicating, it is for the defendants to prove there

is no such person: Atty.-Gen. v. Walford R. Council, 1912, 1 Ch. 417; 81 L. J. Ch. 281.

Cul de sac remaining a highway: Josselsohn v. Weiler, 9 L. G. R. 1132; 75 J. P. 513.

A strip of land between houses and a highway, with no physical demarcation between it and the highway, was paved by the local authority at the request of a sub-lessee (80-year term), shortly after the term commenced. Held no dedication: Corsellis v. London C. Council, [1908] 1 Ch. 13; 77 L. J. Ch. 120, C. A.

It is open to the owner to shew that owing to the condition of the title dedication was impossible: Farquhar v. Newbury R. Council, [1908] 2 Ch. 586.

Until the public has acquired a right by clear acceptance of a proffered dedication, it can be withdrawn.

The inexpediency of having highways for whose repair no one can be held responsible, should in this country prevent any further recognition of the creation of highways by dedication than can be avoided where the municipal councils have not recognized them: Augell on Highways.

Dedication may be subject to gates to keep cattle from straying: Atty.-Gen. v. Meyrick, 19 J. P. 515.

Acts constituting an offer of dedication: Strang v. Arran, 1913, 28 O. L. R. at 111.

Attempt to retract dedication: Pedlow v. Renfrew, 1900, 27 O. R. 611.

Turner v. Walsh as to dedication by the Crown followed: Fraser v. Diamond, 1905, 10 O. L. R. at 93, and R. v. Moss, 1896, 26 S. C. R. at 332, distinguishing Harper v. Charlesworth, 4 B. & C. 574, supposed to have established a contrary doctrine.

As against a grantee from the Crown, public user for 30 years without objection or interference is conclusive evidence of dedication: Mytton v. Duck, 1866, 26 U. C. R. 61.

In a new part of the country or over a low area of land, where persons would naturally look for high places over which to travel user of a road is not to be too readily accepted as evidence of an intention to dedicate: Dunlop v. York, 1869, 16 Gr. 216.

The whole user should be referred to a lawful origin rather than to a series of trespasses: Turner v. Walsh, 1881, 6 App. Cases 642.

Review of authorities: O'Neil v. Harper, 1913, 28 O. L. R. 635.

Query—When does dedication become irrevocable?

Dedication by Plan.—The Surveys Act, R. S. O. 1913, c. 166, s. 44 (1) is as follows:—

44.—(1) Subject to the provisions of The Registry Act, as to the amendment or alteration of plans, all allowances for roads, streets or commons surveyed in a city, town, village or township, or any part thereof, which have been or may be surveyed and laid out by companies or individuals and laid down on the plans thereof, and upon which lots fronting on or adjoining such allowances for roads, streets or commons have been or may be hereafter sold to purchasers, shall be public highways, streets and commons.

Such streets become vested in the municipality, though there may be no liability to repair: Roche v. Ryan, 1891, 22 O. R. 107.

Section 44 is retroactive and applies to re-subdivisions: Gooderham v. Toronto, 19 A. R. 641. On the latter point note the dissenting judgment of Burton, J.A., for a history of this section.

The section formerly did not apply to townships: McGregor v. Watford, 1906, 13 O. L. R. 10; Sklitzsky v. Cranston, 1892, 22 O. R. 590, was a case of a plan of subdivision of a township lot. A person who purchased a lot on such a plan was held to have a private right to use all the streets on the plan, subject to the right of the public to make them highways, in which case his private right would be extinguished, so far as the dedication was accepted by the public, and remain as to the streets which did not become highways. This case would appear to apply to sales by an unregistered plan. See also Espley v. Wilkes, L. R. 7 Ex. 298; 41 L. J. Ex. 241; Clifford v. Hoare, L. R. 9 C. P. 362; 43 L. J. C. P. 225.

The making of a plan and selling lots according to it does not amount to dedication of the streets shewn on the plan, but is apparently an offer to dedicate, which may be accepted by user.

As to leases of parcels shewn on a registered plan, no sale having been made, see Ihde v. Starr, 1910, 21 O. L. R. 407 C. A. See also Mykel v. Doyle, 1880, 45 U. C. R. 65.

Plans—Approval by Authority.—The refusal of a town council to approve of a plan for the subdivision of land does not preclude its approval by a Judge of the County Court, under the jurisdiction conferred by s. 80 of the Registry Act, R. S. O. 1914, c. 124, which provides that plans shall be registered when approved by a municipal council or a Judge of a County or District Court. On an appeal by certain owners from an Order in Chambers made on the application of the corporation prohibiting the District Judge from issuing an order approving of appellants' plan for subdivision of their lands, Riddell, J., said that the decision must depend upon the meaning of s. 80. "The registrar shall not register any plan upon which any street, road or lane is laid out unless there is registered therewith the approval of the proper municipal council or the order of the Judge approving of such plan." It is not contended by the town that the word "or" has not its ordinary meaning. The argument is that there are two courses prescribed by the Statute, either of which may be adopted by the owner, but the cases cited do not support this consideration.

The council, no doubt, is considered to represent the municipality. When an owner of land desires to register a plan the council should see that the roads agree with their policy. If so, of course, the council would approve; but the council does this, not as a Court determining the rights of two contesting parties, but as representing one of the parties, namely the public. The other party interested, that is the owner, must look out for himself. If the council refuses, this refusal is not a judicial determination of the rights of the parties, but an assertion of what the one party desires or claims. It was to enable the owner to have a judicial decision that the Legislature, by 8 Edw. VII., c. 33, s. 37, by limiting the rights of an owner to register a plan enabled him to go to the County Court. If the other party interested consents the plan can be registered. If not, an order must be made by the Court. That may follow a refusal by the council, or be without an application to the council at all, but the order will not be made without notice to the council. This is not opposed in Re Stinson and College, etc., Ont., 1912, 10 D. L. R. 699; Re Birely and Toronto H. & B. Ry. Co., 25 A. R. 88, and Aurora v. Markham, 1902, 32 Can. S. C. R. 457, distinguished: Re Royston Park and Steelton, 1913, 13 D. L. R. 454.

See notes to s. 479, supra, for restrictions on the power of an owner to dedicate a highway by plan or otherwise.

Altering dedication made by plan: Re City of Toronto Plan M. 188, 1913, 28 O. L. R. 41; Wandsworth v. Golds, [1911] 1 K. B. 60; 80 L. J. K. B. 126.

Other Cases Re Dedication by Plan.—Gooderham v. Toronto, 1895, 25 S. C. R. 246; G. T. R. v. Toronto; Hay v. Bisonnette, 1910, 14 O. W. R. 279, 123; 17 O. W. R. 321; Carey v. Toronto, 1885, 14 S. C. R. 172; 11 A. R. 416.

Deviations and Alterations.—For discussion see infra, p. 938.

Common and Public Highways.—The common law definition of highway must be read into this section. A highway at common law is "a passage which all the King's subjects have a right to use," see Shirley's Leading Cases, 8th ed., p. 627, or "a passage which is open to all the King's subjects," see 2 Smith's L. C., 11 ed., 164. Heath, J., in Dovaston v. Payne, 2 H. Bl. 527; 3 R. R. 497, said: "The property is in the owner of the soil, subject to an easement for the benefit of the public." But the right of the public is not, correctly speaking, an easement. There is no

such thing known to the common law as an easement in gross. "A highway is not an easement; it is a dedication to the public of the surface of the land for the purpose of passing and repassing": per Lord Cairns in Langeley v. Midland Ry., 37 L. J. Ch. at 316.

Where the soil and the freehold of a highway is vested in an abutting owner, as well as in cases where the soil and the freehold of the highway is vested in the Crown or a local authority, the right of the public is confined to passing and repassing, with the right to stop for reasonable purposes in connection with the passing and repassing, but not for purposes extraneous to the use of the highway as a highway. This is illustrated by Harrison v. Duke of Rutland, [1893] 1 Q. B. 142; 62 L. J. Q. B. 117, where according to Lord Esher, M.R., "the plaintiff from some perverted notion, went out upon a highway which crossed the moors, knowing the Duke and his friends would be exercising the undoubted right of shooting . . . not for the purpose of using the highway as a highway, but for the sole purpose of incommoding and disturbing the Duke and his friends . . . He went there for the purpose of interfering with, and did in fact interfere, with the rights of the Duke; but when he was asked to desist from waving his pocket handkerchief and opened umbrella, he refused to do so. The Duke's servants, the keepers, then took hold of him and held him down on the ground until the drive was over, for the sole purpose of preventing him interfering with it, and they only held him down as long as was necessary to prevent him so interfering," (p. 118). The plaintiff brought an action to recover damages for an assault, and Lord Coleridge, C.J., directed the jury, as a matter of law, that the plaintiff was not trespassing on the land of the Duke, who owned the freehold of the highway. On appeal, the Court of Appeal held, following R. v. Pratt, 4 E. & B. 860, that the plaintiff was a trespasser. Harrison v. Duke of Rutland was followed in Hickman v. Maisey, 1900, 1 Q. B. 752; 69 L. J. Q. B. 511 C. A., where the plaintiff owned a newspaper in which he published the doings of race horses. He made a practice of walking up and down a highway within a short space, with field glasses and note book, observing and noting the doings of race horses. The soil of the highway belonged to the owner of the land used for exercising and training the horses. The owner brought an action for trespass and for an injunction. Day, J., found for the plaintiff, and granted an injunction, and the Court of Appeal upheld the judgment. Collins, L.J., said: "It is not easy to define exactly where the line is to be drawn between user of a highway, as a highway, and user beyond the rights conferred by dedication . . . Primarily a highway is dedicated for the purpose of passing and repassing, but in modern times a legitimate extension has been allowed, for as time goes on and districts become crowded, ideas as to what is reasonable undergo modification, and the user of highways becomes enlarged. Yet not so as to conflict with the paramount object of passing and repassing, for it must always be kept in view, that anything substantially beyond user for that purpose is a trespass. . . . In the case before us, the act of the defendant in remaining longer on the highway than reasonably incident to the purpose of passage, constitutes an illegitimate user of the highway for purposes disconnected with the right of passing and repassing." Power, L.J., said in part: "If the defendant had done the acts complained of upon land not vested in the plaintiff, the latter would have had no legal right to complain."

The vesting of the soil and freehold of highways in municipalities does not in any way increase or lessen the rights of the public in respect of the highway. These rights can only be restricted or enlarged by the legislature, or by municipal corporations in so far as the legislature has delegated to them power so to do.

In Hadley v. Righton, [1907] 2 K. B. 345; 76 L. J. K. B. 891, Phillimore, J., doubted whether the view that a highway was to be used simply for passing, repassing and delaying for a short time, exhausts the uses to which a highway may be put by a member of the public.

Duty on a User of the Highway as Such—A person who allows cattle or any other farm animal to stray on a highway is under no liability for an accident occasioned thereby to a person using the highway: Cox v. Burbidge, 32 L. J. C. P. 89; (horse kicking a child) Hadwell v. Righton, [1907] 2 K. B. 345; 76 L. J. K. B. 891; (fowl upsetting cyclist)

Higgins v. Searle, 1909, 100 L. T. 280 C. A.: (cattle) Hadwell v. Righton contains a discussion, many cases illustrative of the very considerable difficulty in the way of drawing the line at the precise point where a duty lies on the person using the highway.

433. Unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this Act. 3 Edw. VII. c. 19, s. 599, *redrafted.* 3 & 4 Geo. V. c. 43, s. 433.

(2) In the case of a dedicated highway, such vesting shall be subject to any rights in the soil reserved by the person who laid out or dedicated the highway. *Amended* 9 Geo. V. c. 46, s. 20.

Minerals Upon or Under Roads.—Section 195 of The Mining Act of Ontario, R. S. O. 1914, c. 32, is as follows:—

195.—(1) The corporation of any county or township in that part of Ontario lying south of the French River, Lake Nipissing and the River Mattawan wherever minerals are found, may sell or lease, by public auction or otherwise, the right to take minerals found upon or under any roads over which the township or county has jurisdiction, if considered expedient so to do.

(2) No such sale or lease shall take place until after due notice of the intended by-law has been posted up in six of the most public places in the immediate neighbourhood of such road, for at least one month previous to the time fixed for considering the by-law.

(3) The deed of conveyance, or lease to the purchaser or lessee under the by-law, shall contain a proviso protecting the road for public travel, and preventing any user of the granted rights which would interfere with public travel.

(4) In the remaining portions of Ontario the mines, minerals and mining rights in, on or under all common and public highways and road allowances shall be and are hereby vested in his Majesty, and may be sold, leased or otherwise disposed of under this Act. Where any mining location or mining lands adjoin a common and public highway or road allowance, and the mineral vein or deposit thereon extends into or under such highway or road allowance, the owner or owners thereof shall have the right to purchase or lease the mines, minerals and mining rights in, on or under the same, subject to the provisions of this Act, or where there are mining locations or mining lands on both sides of such highway or road allowance the said rights shall accrue to the owner or owners on both sides thereof as respects the half of such highway or road allowance adjoining his or their lands. This sub-section shall not apply to highways on lands heretofore granted by the Crown under this Act, or in the grant whereof the mines and minerals were not reserved to the Crown.

(5) The patent or lease of such mines, minerals and mining rights shall contain a proviso protecting the road for public travel and preventing any user of the granted rights which would interfere with public travel unless and until a road in lieu thereof has been provided and accepted by the municipal corporation having control of the road.

(6) Sub-sections 4 and 5 shall not affect any rights acquired from or any agreement made or entered into with any municipal corporation under this section prior to the first day of May, 1904. 2 Geo. V. c. 8, s. 30.

The Soil and the Freehold Shall be Vested in the Corporation. —The Public Health Act, 1875, 38 & 39 Vict, c. 55, s. 149 (1) provides as follows in part:—

> All streets . . . within any urban district and the pavement, stones and other materials thereof . . . shall vest in and be under the control of the urban authority.

The effect of the above provision was discussed by Collins, M.R., as follows: "It has been decided in a long series of cases that the word vest means that the local authority do actually become owners of the street to this extent, that they become the owners of all the air above and the stratum below which is necessary for the ordinary use of the street as a street, and they are not entitled to anything beyond that—for instance, they do not take that part of the subsoil which has to be used for the purpose of laying sewers. That point was clearly decided in the case of Tunbridge Wells Corporation v. Baird, [1896] A. C. 434; 65 L. J. Q. B. 451, where the question was whether the local authority, by virtue of the vesting of the street were entitled to make underground lavatories and conveniences of that kind. They asserted that that was a sort of use that a public authority might be taken to have the right to make of a street; but it was held by the House of Lords that that was going beyond the ordinary use of a street *qua* street; that the use of a street *qua* street did not involve the right to make excavations for the purpose of making lavatories and conveniences": Finchley El. Light Co. v. Finchley Urban Council, [1903] 1 Ch. 437; 72 L. J. Ch. 297, C. A. Where the plaintiffs, an electric light company, without any statutory powers, put their wires over a street at a point admitted to be outside the area of user of the street, it was held that the right to interfere with them must be justified by ownership in fee which was not vested in the corporation under s. 149, except as to the area of user. The air *usque ad cœlum* and the soil *usque ad inferos* was not vested in the local authority, but elsewhere; see also Wandsworth B. of W. v. United Telephone Co., 1884, 13 Q. B. D. 904; 53 L. J. Q. B. 449 (C. A.).

The principle to be followed in construing an Act of Parliament which confers a right upon a public authority for which they do not pay is laid down in a line of cases beginning with Coverdale v. Charlton, 1878, 4 Q. B. D. 104; 47 L. J. Q. B. 446, and is according to Collins, M.R., in Finchley v. Finchley, supra, that the best effect is given to the intention of the legislature by limiting the right to the area which is necessary to enable them to perform the duties imposed upon them in respect of the street as a street.

In Wandsworth v. United Telephone Co., supra, the local authority brought an action to restrain the telephone company from placing or retaining any wire or wires across certain streets vested in the local authority, alleging that they were dangerous to persons using the streets. The C. A. held, applying the principle of Coverdale v. Charlton, that the plaintiffs were not entitled to an injunction as they had only such limited statutory property in the street as was necessary for their control of and for the safe and convenient user of the street, and that as the wires caused neither nuisance nor appreciable danger, there had been no infringement of their right.

In Coverdale v. Charlton, supra, Bramwell, L.J., said . . . "street comprehends what we may call the surface—that is to say, not a surface—but of no reasonable thickness, but a surface of such a thickness as the local board may require for the purpose of doing to the street that which is necessary for it as a street, and also of doing those things which commonly are done on a street; and to that extent they had a property in it."

This area or zone of user, according to Brett, M.R., in Wandsworth v. United Telephone Co., supra, does not include such a depth as would carry

with it the right to mines; neither would "street" include any buildings which happen to be built over the land.

While a conveyance of land carries with it everything down to the centre of the earth and everything *usque ad cœlum* by the common law of England, when the word land is used it does not follow that when a street is vested in some person or body the same consequences follow, even though there is a grant or conveyance.

Where there is no grant or conveyance, but there is a statute, then the object of that statute, and the subject matter dealt with by it, must be considered. Brett, M.R., *ibid.*, and Bowen, L.J., said: "Now the word 'vest' may apply to any kind of property transferred to or made to reside in some person, and the section which we are considering might be considered as giving the local authority something analogous to a common law freehold interest in the soil, or it might be considered as giving them such a special statutory interest in the soil as would enable them to carry out the purposes of the statute." And he cited with approval the remarks of Thesiger, L.J., in Rolls v. St. George's Southwark, 14 Ch. D. 785; 49 L. J. Ch. 691: "that section . . . has given to these bodies, over and above the mere easement of passage which the public possess and over and above the right and control of management of roads which the old surveyors of highways possessed, some possessory right, which would enable the . . . boards to maintain actions in respect of that property or possessory right."

Bearing in mind L.J. Bowen's remarks it would appear that the words of s. 433 that "the soil and the freehold of every highway shall be vested in the corporation," seems aptly designed to vest the land of the highway *usque ad cœlum* and *usque ad inferos* in the corporation.

This view is borne out by reference to s. 492, where the abutting owner has the right to purchase the soil and the freehold of the original road allowance, and where the word "site" is used of the land taken for a highway. The corporation according to s. 492 pays compensation for a site of a highway, i.e., for land of which it acquires the fee or "the soil and the freehold"; see also ss. 493 and 494, where "the soil and the freehold" of the original allowance is vested by statute in private persons.

In this connection it should be noted that under s. 599 of R. S. O. 1897, c. 223, "the soil and the freehold of every highway" was vested in the Crown, while by s. 601 of the same Act, every public road in a city, etc., was vested in the municipality. This gave rise to much discussion as to the nature of the property of a municipality in a highway and in the land so occupied by such highway.

The language of the Act now seems consistently to express the idea that a municipality has the fee of the land occupied by highways.

The vesting mentioned in s. 601, supra, was subject to any rights in the soil reserved by the person who laid out the highway. This exception gave rise to much difficulty and conflicting views as to the effect of the vesting, see Biggar, p. 818.

The presence of the exception at the end of s. 601, supra, was held to restrict 601 to roads acquired from or dedicated by private owners, and a municipality was held to have no property in other highways, see Biggar, p. 818. The words "unless otherwise expressly provided," coming at the beginning of the vesting section, do not operate as the exception in s. 601 was held to do. Express provision otherwise might be made in the conveyance of a highway or in the by-law assuming it or on a plan by express endorsement or in the case of the sale of lots on a proposed plan by express stipulation in the agreements for sale and express reservations in the conveyances, and where not otherwise expressly provided the corporation has the fee of the land or site occupied by the highway, and the fee of the highway only (meaning the area of user), when the owner has reserved rights in the soil as to conflicts resulting from 599 and 601 of the Act of 1897; see Re Knight v. Medora and Wood, 1887, 14 A. R. 112; Sarnia v. Great Western, 21 U. C. R. 59; Mutton v. Duck, 1866, 26 U. C. R. 61; Roche v. Ryan, 22 O. R. 107.

Soil and Freehold of Toll Roads.—A toll road may be constructed along a highway, in which case the road company or other owner have a statutory easement or right over a road which still remains a public highway, the soil and the freehold of which by virtue of s. 433, will be vested

in the municipality which has jurisdiction: R. v. Davis, 1875, 24 C. P. 575; Montreal v. Ottawa, 1902, 4 O. L. R. at 67. If a toll road is constructed over land not a highway the soil and the freehold will be vested in the owners. In the former case when the rights of the road company are extinguished the road continues simply a highway, and does not become land belonging to the municipality as a park does: Montreal v. Ottawa, supra. A municipality not entitled to compensation from a railway company for the privilege of crossing a highway. Such a right to cross is not "land" within the meaning of the expropriation sections of the Railway Act: Montreal v. Ottawa, supra.

Authorizing the Use of Highway.—By reason of the vesting of the soil and freehold of the highway in the corporation it can grant licenses to graze cattle on highways: Ross v. E. Nissouri, 1901, 1 O. L. R. 353 D. C. See also Coverdale v. Charlton, 1878, 4 Q. B. D. 104 at 121-3. and Haigh v. West, 1893, 2 Q. B. 19; 62 L. J. Q. B. 532. But as to trees on highways, see notes to s. 487, infra.

Sale of Gravel or Minerals from Highway.—A by-law is necessary to authorize any such sale, see notes to s. 472, infra.

JURISDICTION OVER HIGHWAYS AND BRIDGES.

434. Except where jurisdiction over them is expressly conferred upon another council, the council of every municipality shall have jurisdiction over all highways and bridges within the municipality. 3 Edw. VII. c. 19, s. 600, *redrafted*. 3 & 4 Geo. V. c. 43, s. 454.

Note.—Last part of old section 600, added by 5 Edw. VII. c. 22, s. 30, giving Lieutenant-Governor in Council power to stop up, lease, sell, etc., original allowances for roads in unorganized territory struck out as unnecessary.

Exceptions.—(1) Roads or bridges owned by companies or individuals, s. 435; (2) county roads and bridges, s. 436; (3) highway or bridge belonging to another municipality, s. 440; (4) approaches to bridges under jurisdiction of another council, s. 442.

Under the Municipality.—This excludes boundary lines, as to which see s. 439 and s. 444. This section refers to counties, cities, separated towns and local municipalities.

435. The next preceding two sections shall not apply to roads or bridges owned by companies or individuals. *New*. 3 & 4 Geo. V. c. 43, s. 435.

As to these see The Toll Roads Act, R. S. O. 1914, c. 210.

436.—(1) The council of a county shall have jurisdiction over every

(*a*) Highway, bridge and boundary line assumed by the council;

(*b*) Bridge crossing a river, stream, pond or lake forming or crossing a boundary line between local municipalities other than a city or separated town in the county; and

(*c*) Bridge crossing a river or stream over 100 feet in width within the limits of a village in the county where the bridge forms part of a main highway leading through the county. 3 Edw. VII. c. 19, s. 613, *redrafted.*

(2) The council may provide that the jurisdiction conferred upon it by clause (*b*) of sub-section 1 shall not extend to bridges over rivers, streams, ponds or lakes, less than 80 feet in width, or of such width less than 80 feet, as may be specified in the by-law. 3 Edw. VII. c. 19, s. 617 (3); 4 Edw. VII. c. 22, s. 27 (1), *redrafted.* 3 & 4 Geo. V. c. 43, s. 436.

Assumed by the Council.—This may be done by by-law under the powers given by s. 446, which see for discussion; as to bridges crossing rivers, etc., forming or crossing a boundary line between a county and a city or separated town, see 438, and between a county and a county, see 437.

As to bridges crossing such rivers under 80 feet wide.

When excepted, see s. 439.

As to duty to erect bridges mentioned in (b) and (c), see s. 451, and as to duty with respect to assumed highways and bridges, see s. 450.

Within the Limits of a Village.—See s. 441.

100 Feet in Width.—The question was raised in Hamburg v. Waterloo, 1893, 22 O. R. 193; 20 A. R. 1; 22 S. C. R. 296, as to whether or not the River Nith was a river or stream over 100 feet in width. Ferguson, J.'s, holding was reversed by the D.C. The C. A. sustained the judgment of the D.C., being equally divided. The Supreme Court of Canada unanimously restored the original judgment. Gwynne, J., gave the judgment of the court, which held that it is not the length of the bridge, but the width of the river, which is to be considered and added: "After heavy rain and during freshets, which are ordinary occurrences in this country, the waters of the streams and rivers are accustomed to be much swollen and raised to a great height, and a bridge, therefore, which is designed to be the means of connecting the parts of a main highway leading through a county which are separated by a river, must necessarily be so constructed as to be above the waters of the rivers in such periods and the width of the rivers at such periods, must therefore . . . be taken into consideration in every case." The river in this case had too well defined banks, one lower than the other. The measurement approved by the S.C. was from a point a mile below the brow of the lower bank, in a straight line, to the bank opposite.

"**Less than Eighty Feet in Width.**"—See Re Newburgh, 1907, 10 O. W. R. 541; Re Caledonian, 1912, 22 O. W. R. 961; Pow v. W. Oxford, 1908, 13 O. W. R. 162.

437. The councils of the corporations whose duty it is to erect and maintain bridges over rivers, streams, ponds or lakes forming or crossing a boundary line between counties shall have joint jurisdiction over such bridges. *New.* 3 & 4 Geo. V. c. 43, s. 437.

438. The councils of the corporations whose duty it is to erect and maintain bridges over rivers, streams, ponds or lakes forming or crossing a boundary line between a county and a city or separated town shall have joint jurisdiction over such bridges. *New.* 3 & 4 Geo. V. c. 43, s. 438.

The duty to erect such bridges is imposed by s. 452.

Joint Jurisdiction.—For other instances of this in the Act, see ss. 439 and 443, and for an elaborate code for dealing with disputes in cases of joint jurisdiction, see ss. 467, 468 and 469.

439. The councils of the local municipalities between which they run shall have joint jurisdiction over all boundary lines, whether or not they form also county boundary lines, which have not been assumed by the council of the county, and over the bridges on them except such bridges crossing rivers, streams, ponds or lakes forming or crossing such boundary lines as by the provisions of this Act are under the jurisdiction of another council or other councils. *New.* 3 & 4 Geo. V. c. 43, s. 439.

Assumed by the County.—See s. 446.

Under Jurisdiction of Another Council.—See ss. 436 (1b), 437, 438 and 452.

440. Where a boulevard, drive or highway or a public avenue or walk is owned or has been opened and laid out or is under the authority of this Act, assumed, or a bridge is owned or has been constructed or is under the authority of this Act assumed by the corporation of a municipality other than that in which it is situate the council of that corporation shall have jurisdiction over it. *New.* 3 & 4 Geo. V. c. 43, s. 440.

Assuming Highway in Adjacent Municipality.—This may be done under the powers given by s. 447.

441.—(1) The council of a village may pass by-laws for the assumption by the corporation of the village with the consent of, and on such terms and conditions as may be agreed on with, the council of the county, of any bridge within the limits of the village and under the jurisdiction of the council of the county.

(2) When the by-law takes effect the bridge shall cease to be under the jurisdiction of the council of the county and shall come and thereafter remain under the jurisdiction of the council of the village, and shall be and remain toll free. 3 Edw. VII. c. 19, s. 604, *redrafted.* 3 & 4 Geo. V. c. 43, s. 441 (1-7).

Under the jurisdiction of the council of the county, by virtue of s. 436 (1c), when the bridge forms part of a main highway leading through the county.

442. The council having jurisdiction over a bridge shall have jurisdiction over the approaches to it for 100 feet next adjoining each end of the bridge. 3 Edw. VII. c. 19, s. 605, *redrafted.* 3 & 4 Geo. V. c. 43, s. 442.

This section applies only where two municipalities are concerned, one of which is bound to keep the bridge in repair, per Osler, J.A., in Johnston v. Nelson, 1890, 17 A. R. at 19.

The word approaches means artificial structures reasonably necessary and convenient for the purpose of enabling the public to pass from the road to the bridge and from the bridge to the road.

There is no jurisdiction conferred beyond such artificial structures. The words "the remaining portion or portions of such approaches shall be kept up and maintained by the local municipalities in which they are situate," formerly followed at the end of this section.

In Traversy v. Gloucester, supra, it is stated that the roads upon which the approaches are to be made are not vested nor are the approaches vested in the bridge-owners, nor are they given jurisdiction over the roads or over the approaches, but the road and approaches still remain vested in and under the jurisdiction of the local municipality.

This requires examination in view of the changes in the Act. See under bridges.

A bridge includes the roadway which the bridge carries, and may include the approaches: Burg v. Lancaster, 1888, 14 App. Cases, 417; 57 L. J. Q. B. 280.

For example see notes to s. 449, infra: Re Cummings and Carleton, 1894, 26 O. R. 1.

443. Where land annexed to a city or town under this Act abuts on a highway the highway shall be under the joint jurisdiction of the councils of the city or town and the adjacent municipality or municipalities. 10 Edw. VII. c. 85, s. 12, *amended.* 3 & 4 Geo. V. c. 43, s. 443.

For procedure and power to annex see s. 21.

Such a highway might be within a local municipality within the meaning of s. 434, and not be a boundary line within the meaning of s. 439. This section covers such a case.

444.—(1) The corporations of adjoining municipalities may enter into an agreement for the maintenance and repair of any highway forming the boundary between such municipalities, including the bridges thereon which it is their duty to maintain and repair, whereby each of them may undertake, for a term of years not to exceed ten years, to maintain and keep in repair any portion of such highway for its whole width, and to indemnify and save harmless the other from any loss or damage arising from the want of repair of such portion.

(2) When the agreement is confirmed by by-law of the council of each of the municipalities, the by-law shall be registered in the registry office of the registry division in which the highway is situate.

(3) After the registration of the by-law, each corporation shall have jurisdiction over that portion of the road which it has undertaken to maintain and keep in repair, and shall be liable for the damages incurred by reason of neglect to maintain and keep the same in repair; and the other corporation shall be relieved from all liability in respect of its maintenance and repair. 3 Edw. VII. c. 19, s. 625 (1-3); 10 Edw. VII. c. 85, s. 15. 3 & 4 Geo. V. c. 43, s. 444 (1-3).

Partition of Joint Jurisdiction.—The corporations of adjoining local municipalities in the same county might arrange to maintain and repair jointly under s. 486.

This enables a joint jurisdiction to be put to an end, and in lieu thereof enables each municipality involved to obtain a sole jurisdiction over a part only, but not exemption from liability for want of repair.

If the corporations are unable to agree, see ss. 465-469.

Registration of By-law.—The partition of jurisdiction only becomes effective from the time of registration.

To Indemnify from Loss from Want of Repair.—This evidently refers to the liability for non-feasance, see s. 460, infra.

445. Where the Lieutenant-Governor in Council by proclamation declares, which it shall be lawful for him to do, that any public road or bridge under the control

of the Minister of Public Works shall not be under his control after a day named in the proclamation, such road or bridge shall after that day cease to be under the control of the Minister and no tolls shall be collected thereon and the road or bridge shall be under the jurisdiction of the council of the local municipality in which it is situate, or if it is partly situate in two or more municipalities shall be under the jurisdiction of the councils of such municipalities, each having jurisdiction over the part which lies within its municipality, or if it lies between two or more municipalities shall be under the joint jurisdiction of their councils. 3 Edw. VII. c. 19, s. 627, *part redrafted.* 3 & 4 Geo. V. c. 43, s. 445.

Shall be Lawful.—This section confers power which is in addition to powers given elsewhere.

The soil and the freehold of the road or bridge will be vested under s. 433. See title Jurisdiction.

A presumption that a proclamation has been made will arise from the making of repairs by a municipality: Irwin v. Bradford, 1872, 22 C. P. 18, 421. But note that the county council had assumed the road by by-law which had been repealed, and that the village repaired for 12 years after such repeal.

For instances of roads coming under municipal jurisdiction by proclamation, see In re Knight v. Medora, 1886, 11 O. R. 138; 14 A. R. 112; Bennett v. York, 43 U. C. R. 542; Port Whitby v. Whitby, 18 U. C. R. 40, and Smith v. Ancaster, 1896, 27 O. R. 276. Where by proclamation a public road came under the jurisdiction of the township of Barton, and that township authorized the township of Ancaster to assume the road and to collect tolls, and Ancaster by by-law assumed the road and exacted tolls, both by-laws were held invalid. But now as to assuming of a road in an adjoining township, see s. 440.

446.—(1) The council of a county may by by-law assume as a county road any highway, or as a county bridge any bridge, within a town, not being a separated town, village or township.

(2) The by-law shall not take effect until assented to by the council of the town, village or township. 3 Edw. VII. c. 19, s. 613, par. 1, *part amended.*

(3) The council of a county may also by by-law assume as a county road any county or township boundary line. 3 Edw. VII. c. 19, s. 614, *part.*

(4) The council of a county may also by by-law assume as a county road any highway in a town, not being a separated town, or in a village or township which connects with a county road. 3 Edw. VII. c. 19, s. 615, *part*.

Where a council does not desire to assume a highway under s. 446 (4) with the results that it acquires jurisdiction over the assumed road by s. 436 (1), with the consequent duty to repair under s. 460 (1), it may grant aid under s. 482 (5), see Merritton v. Lincoln, 1917, 41 O. L. R. 6, App. Div.

(5) Where a highway is assumed under this section the bridges thereon shall also be assumed as county bridges. *New*.

(6) A by-law passed under the authority of this section may be at any time repealed by the council of the county. 3 Edw. VII. c. 19, s. 613, par. 1, *part amended*.

(7) After the repeal of the by-law such highway or bridge shall cease to be under the jurisdiction of the council of the county and shall fall and be under the jurisdiction of the council or councils which had jurisdiction over it at the time of the passing of the by-law for assuming it. *New*. 3 & 4 Geo. V. c. 43, s. 446 (1-7).

May by By-law Assume.—Where corporation officers have been making repairs to and managing a highway or bridge and the municipality has been apparently exercising authority in that respect, any tribunal would be guilty of a very gross omission to do its duty if it did not assume from that condition of things that all these things were legally done and the burden of proof is on those persons who seek to shew that the acts were illegal. Victoria v. Patterson, 1899, A. C. 615; 68 L. J. P. C. 128.

Assent Necessary to Assumption.—Assent, under s.-s. 2, need not be by by-law. Acquiescence may amount to assent, Balzer v. Gosfield, 1889, 17 O. R. 700, but note that this was a case where a county tried to escape from liability for want of repair of a road it had assumed by law on the ground that the township did not assent.

Effect of Assumption.—The effect of assumption is to give jurisdiction to the county and to deprive the local municipalities of jurisdiction, s. 436.

The effect of jurisdiction is to vest the soil and the freehold in the county, s. 433, and to impose the duty of maintaining, which may be enforced by mandamus or by indictment, s. 450. It confers the power to pass by-laws respecting the assumed highway or bridge, s. 431, and carries with it a liability for damages resulting from want of repair, s. 460 (1), and generally, see here Jurisdiction, supra.

Formerly roads were vested in the local municipalities, the soil and freehold was vested in the Crown, and exclusive jurisdiction was given to counties in respect of assumed roads. See R. S. O. 1897, ss. 599, 601, 613. For discussion of "exclusive jurisdiction" under former conditions: see Wellington v. Wilson, 1865, 14 U. C. C. P. 300; 16 U. C. C. P. 124.

Under similar provisions to those contained in s. 446, it was held that a county had no power to assume roads and then compel local municipalities to maintain the assumed road at their own expense: In re Rose and Stormont, 1862, 22 U. C. Q. B. 531.

Successive Highway Authorities. Liability for Acts of Former Authority.—In England the Court of Appeal has held that a local authority is responsible for damages resulting from the misfeasance of its predecessors in the office of highway authority, but this decision was based on special statutory provisions. See Nash v. Rochford R. D. C. 1916, 1 K. B. 284, C. A. The principle of this case would seem to apply in Ontario, where a county has assumed a road in which there is a condition due to the misfeasance of the local municipality which had jurisdiction over the road before the assumption by the county, there being no misfeasance on the part of the county.

May be Repealed.—For discussion of cases where by-laws cannot be repealed, see supra, p. 341. A by-law assuming a highway or bridge with the consent of another council would be in the nature of a contract. Consent, however, is not necessary before assuming under ss. 3 and 4. That is where the road is a county or township boundary line or connects with a county road; s.-s. 1 refers to roads within a local municipality which do not connect with county roads, i.e., which do not directly run into county roads; "run into" was formerly the expression used, see s. 615, R. S. O. 1897, c. 223. Biggar, p. 848. The difficulties arising from s. 615 have been eliminated.

The power to repeal given by this sub-section would appear to be subject to the restrictions set out in s. 448.

447.—(1) The council of a city or town may pass by-laws for assuming for the purpose of a public avenue or walk any highway in an adjacent local municipality and for acquiring so much land on either side of such highway as may be required to increase its width to not more than 100 feet.

(2) The by-law shall not take effect unless or until it is assented to by by-law of the council of the adjacent municipality. 3 Edw. VII. c. 19, s. 603, *amended*. 3 & 4 Geo. V. c. 43, s. 447 (1-2).

Assumption for Avenue or Walk.—This section formerly read "for acquiring and assuming possession and control," s. 603, R. S. O. 1897, c. 223.

Assuming would apparently involve the acquisition of jurisdiction with all its consequences, coupled with the loss of jurisdiction by the adjacent local municipality.

The Act is not clear. Contrast the provisions of ss. 446 and 436 with s. 447.

Assented to by By-law.—Contrast with s. 446 (2).

Although under s. 447 and s. 446 (1) assumption is to be by by-law, yet if a municipal corporation without passing a by-law spends money or labour on a highway not under its jurisdiction such acts are illegal acts. The members of the council of the municipal corporation and the officers are responsible within the limits discussed in the leading case of Mill v. Hawker, 1874, 43 L. J. Ex. 129; 44 L. J. Ex. 49.

448.—(1) The council of a county may by by-law abandon the whole or any part of a toll road owned by the corporation of the county or of any other road

owned by it, whether the road is situate wholly within the county or partly within it and partly within an adjoining county.

(2) Forthwith after the passing of the by-law the clerk shall transmit by registered post to the clerk of every local municipality through or along or on the border of which the road runs a copy of the by-law certified under his hand and the seal of the corporation to be a true copy.

(3) The by-law shall not take effect unless or until it is approved by the Municipal Board, nor shall it take effect as to the part of the road lying within or along or on the border of a local municipality whose council does not by by-law assent to the by-law. 3 Edw. VII. c. 19, s. 658, par. 9, *amended.*

(4) From and after the taking effect of the by-law the council of a municipality within which any part of the road so abandoned lies shall have jurisdiction over that part of it which lies within the municipality, and where any part of a road so abandoned lies between or on the border of two or more local municipalities the councils of such municipalities shall have joint jurisdiction over that part of it. *New.*

(5) Nothing in this section shall extend or apply to a bridge which under the provisions of this Act is to be maintained wholly or partly by the corporation of the county. *New.* 3 & 4 Geo. V. c. 43, s. 448 (1-5).

Sub-section 5 applies to bridges mentioned in s. 436 (b) and (c).

Every Local Municipality.—This includes those in another county.

Approved by the Municipal Board.—There is apparently no express jurisdiction conferred on the Municipal Board by The Ont. Ry. & Mun. Bd. Act, R. S. O. 1914, c. 186, to approve of or disallow by-laws passed under this section. The nature of the jurisdiction must, therefore, be determined on general principles. As to withholding consent unless terms or conditions are complied with see G. T. P. and Fort William, 43 S. C. R. 412, where terms were imposed by the Railway Board on use of a highway by a railway company. See general discussion under title "Municipal Board," supra.

County Acquiring Toll Roads.—A county may acquire a toll road under the provisions of The Toll Roads Act, R. S. O. 1914, c. 210, ss. 19 to 26.

When the toll road is constructed on land not a highway the soil and the freehold as well as the zone or area of user are vested in the owner of the toll road. Where the toll road is constructed on a public highway all that is vested in the owner is the zone of user. See Montreal v. Ottawa, supra. See notes to s. 435.

The county may also own a road opened by it under s. 472, and it owns roads and bridges assumed by by-law under s. 446.

Partly Within an Adjoining County.—In the case of a toll road, a county would require power by special Act to open or acquire or assume highways in another county.

Query: Under what authority, if any?

May by By-law Abandon.—Such a by-law is within the meaning of s. 436 (6). This section would appear to render s. 446 (6) and (7) unnecessary.

449.—(1) A bridge of a greater length than 300 feet in a town having an equalized assessment of less than $1,000,000 or in a township may, on the application of the council of such town or township, be declared to be a county bridge where

Of Greater Length than 300 Feet.—Embankments are to be counted as part of the bridge: In re Mud Lake Bridge, 1906, 12 O. L. R. 159, but only when within the limits of the lake or river and properly a part of the bridge: Re Williamsburg and Stormont, 1908, 15 O. L. R 586.

In the Mud Lake case a bridge had extended across the lake. Subsequently embankments were raised for 140 feet at one side and 260 at the other, upon the timbers of the old bridge, which were sank to the bottom of the lake. The central portion of the wooden structure remained. The waters of the lake came up on each side of the embankments, and the wooden section would have been useless without the embankments, and they were held to be a part of the bridge. In Re Williamsburg and Stormont, the bridge crossed a creek at a point where the creek ran almost parallel with and close to the north shore of the St. Lawrence River. The embankment was not built within the limits of either the creek or the river at high or at low water mark. It was situated on a boggy or swampy place, but that condition did not arise from the overflowing of the water which was only occasional, and there was nothing to shew that the situation alone would have prevented the road from being a serviceable one had the embankment not been built. The embankment was in the nature of rough crib work, and was more for the purpose of keeping back the waters of the St. Lawrence, and having the travelled road above the reach of them, than for the purpose of bridging over the waters of the creek when they overflowed the land on which the embankment was built. The embankment was held not to be a part of the bridge.

449.—(1) (*a*) It is used by the inhabitants of other municipalities;

Other Municipalities.—Means at least two municipalities either within or outside of the county: McNab v. Renfrew, 1905, 11 O. L. R. 180. The wear and tear is just the same whatever the local residence of the travellers may be, and the general character of the travel removes the local character of the bridge so as to make it legislatively unjust to saddle all the expense on the township: per Boyd, C., McNab v. Renfrew, supra.

449.—(1) (*b*) It is situate on an important highway affording means of communication to several municipalities; and

(*c*) On account of its length, and for the reasons mentioned in clauses (*a*) and (*b*), it is unjust that the burden of maintaining and repairing it should rest upon the corporation of the town or township.

Highway Affording Means of Communication to Several Municipalities.—The highway may be entirely within the township or may extend into one municipality only, but if it is so connected with other local roads as to afford a ready means of communication for several (at least three) municipalities, the terms of the statute are satisfied. The test of this requirement points to some general convenience of access available for the benefit of several municipalities as distinguished from local use serving merely or entirely the township of the site.

The section does not say direct communication or access.

"In one sense every highway affords a means of communication to not only several municipalities, but to all the world, and to the lands which abut on such, and upon no other highway, the only means; but the legislation cannot be given that very narrow meaning, for it would render the words superfluous . . . I am led to the conclusion that it is enough to satisfy the requirements . . . if it indirectly affords a much used way of passage into more than two municipalities": per Meredith, in McNab v. Renfrew, 11 O. L. R. 180.

On Account of its Length and for the Reasons Mentioned in (a) and (b).—All three reasons must be present. S. 617a of Cons. Mun. Act, 1903, enabled a judge to make an order when the allegations were partly proved. This was held in McNab and Renfrew, supra, to justify the making of an order if some one of the conditions in a, b or c was entirely absent. It is now clear that all three conditions must be present before an order can be made. Boyd, C., speaking of (a) and (b), said: "Both point to something being established which shews that the bridge is not merely of local importance, but serves a large municipal area outside of the particular township of the site: "(a) points to steady and continued travel by people of at least two municipalities . . . (b) to a more than occasional use by at least two municipalities. The words 'afford means of communication' are of large import, and are used to signify generally that the bridge being on an important road, supplies means of access for several municipalities," McNab v. Renfrew, supra.

An Important Highway.—A road may be an important one in one locality which, having regard to the traffic over it, might be an unimportant one in another locality. In McNab v. Renfrew, supra, the road was one of the two main roads running through the township to the market town, and was held to be an important road.

449.—(2) An order declaring the bridge to be a county bridge may be made by a Judge of the County Court of the county in which it is situate, on the application of the council of the town or township. 3 Edw. VII. c. 19, s. 617*a* (1); 7 Edw. VII. c. 40, s. 21, *redrafted.*

(3) Notice of the application shall be served on the corporation of the county, at least thirty days before the day on which it is to be made. 3 Edw. VII. c. 19, s. 617*a* (3), *last part amended.*

(4) Each corporation shall be entitled to be represented by counsel on the hearing of the application, and the evidence may, if the Judge sees fit, and shall if either party so requests, be given under oath. 3 Edw. VII. c. 19, s. 617*a* (4), *redrafted.*

(5) If the Judge is of opinion that for the reasons mentioned in sub-section 1, the bridge should be declared to be a county bridge, he shall by his order so declare, and in that case he shall determine whether the expense of maintaining and repairing the bridge shall be borne by the corporation of the county or partly by it and partly by the corporation of the town or township, and if he determines that it should be borne partly by each, he shall fix the proportions in which the expense is to be borne, and his declaration and determination shall be embodied in the order.

Shall Fix the Proportions.—In McNab v. Renfrew the C. C. J. found one-half of the traffic over the bridge was extra-territorial, but instead of making an equal division of the expense he added a half as much again because as in some other cases such as town line bridges the county had exclusive jurisdiction, and carried the whole burden; he thought the legislature meant that the county should carry a larger share of the burden. The D. C. varied the order by dividing the expense equally.

449.—(6) If the order declares the bridge to be a county bridge it shall be registered in the registry office of the registry division in which the bridge is situate. 3 Edw. VII. c. 19, s. 617*a* (5), *first part redrafted.*

(7) An appeal shall lie from the order of the Judge to a Divisional Court of the Appellate Division of the Supreme Court, and the proceedings upon and incidental to the appeal shall be the same as in the case of an appeal from a Judge of that Court, sitting in Court. 5 Edw. VII. c. 22, s. 32, *part amended.*

(8) If the order is reversed or varied by the order of the Divisional Court, or if an order declaring the bridge to be a county bridge is made by the Divisional Court, the order of that Court shall be registered as

provided by sub-section 6. 7 Edw. VII. c. 40, s. 23, *amended.*

(9) Where the order of the Judge of the County Court declares the bridge to be a county bridge, except where it is reversed, and subject to any variation of it on appeal, from and after the registration of the order, or where the order has been reversed and an order declaring the bridge to be a county bridge has been made by the Divisional Court from and after the registration of the order of the Divisional Court, the bridge shall be a county bridge. 3 Edw. VII. c. 19, s. 617*a* (5), *last part;* 5 Edw. VII. c. 22, s. 31; 7 Edw. VII. c. 40, s. 22, *redrafted.*

(10) Whenever any expenditure is made by the corporation of the county in maintaining or repairing the bridge a proportion of which the corporation of the town or township is by the order required to bear, that proportion of the expenditure shall be payable by the last named corporation to the corporation of the county on demand. 3 Edw. VII. c. 19, s. 617*a* (6); 7 Edw. VII. c. 40, s. 22, *redrafted.*

(11) Where the application is dismissed, either by the order of the Judge of the County Court or by the order of the Divisional Court, a new application shall not be made until five years have elapsed from the date of the order, and any new application thereafter made may be dealt with without regard to the former order, and the preceding sub-sections shall apply *mutatis mutandis* to the application. 10 Edw. VII. c. 85, s. 14, *redrafted.*

(11*a*) In the case of a bridge crossing a river, stream, pond, or lake the approaches to the bridge whether consisting of embankments or other artificial works to the extent to which they are rendered necessary on account of the waters of the river, stream, pond or lake overflowing the highway on one or on both sides of the river, stream, pond or lake in times of freshets or at

any other time, shall be deemed for the purpose of this section to form part of the bridge.

(11*b*) This section shall also apply to a bridge which it is proposed to construct, including a bridge to replace an existing one and a bridge to replace one that has been carried away or destroyed or so damaged that it is necessary to rebuild it, and the application may be made before the work of construction is begun.

(11*c*) In the case of an application to which the next preceding sub-section applies it shall be the duty of the judge to consider and determine whether a bridge of the length of that which it is proposed to erect is necessary for the purpose for which it is to be erected and if he is of opinion that a bridge of 300 feet or less will be sufficient for that purpose it shall be the duty of the judge so to determine and to refuse to make an order under this section.

(11*d*) Where an application has been made under this section within twelve months before the enactment of sub-sections 11*a*, 11*b* and 11*c* and has been refused but ought to have been granted if those sub-sections had then been in force notwithstanding the provisions of sub-section 11, a new application may be made at any time. 11*a* and 11*d* added by 7 Geo. V. c. 42, s. 21 (1).

(12) In the case provided for by this section the councils of the town or township and the council of the county may at any time enter into an agreement as to the proportions in which the cost of maintaining the bridge and keeping it in repair shall be borne by their respective corporations, or in a case to which sub-section 11*b* applies as to the proportions in which the cost of constructing and maintaining the bridge and keeping it in repair shall be borne by their respective corporations. *Amended,* 7 Geo. V. c. 42, s. 21 (2).

(13) The agreement shall provide that the bridge shall thereafter or after a day to be named be under the exclusive jurisdiction of the council of the county or remain under the jurisdiction of the council of the town or township.

(14) The terms of the agreement shall be embodied in an order of the Judge of the County Court which may be made upon the application of either corporation, and the order so made shall supersede any former order made by him.

(15) If the agreement provides that the bridge is to come under the exclusive jurisdiction of the council of the county the order made under the next preceding sub-section shall so declare.

(16) The order made under sub-section 14 shall be registered as provided by sub-section 6, and shall have the same effect as an order upon an application made under sub-section 2, but the order shall not be subject to appeal. 3 Edw. VII. c. 19, s. 618*b*, *redrafted*. 3 & 4 Geo. V. c. 43, s. 449 (1-16).

450. The council of a county which assumes as a county road or bridge, any highway or bridge within a township, shall with as little delay as reasonably may be, and at the expense of the county, cause the highway to be graded and drained and gravelled, macadamized, or surfaced or paved with other permanent material, or the bridge to be built in a good and substantial manner and shall maintain and keep the same in repair. 3 Edw. VII. c. 19, s. 616 (1), *redrafted*. 3 & 4 Geo. V. c. 43, s. 450.

Statutory Duties may be Performed Without the Formality of a By-law.—Statutory duties imposed by ss. 450 *et seq.* can be performed without the passing of a by-law: Pratt v. Stratford, 1888, 16 A. R. 5.

Township.—Section 436 formerly authorized assumption in the case of townships only. Apparently when s. 436 was amended the necessary change in this section was overlooked.

Shall Cause.—This is an imperative statutory duty. As to remedies in cases where the duty is not performed see titles Mandamus, Indictment, and notes to s. 460, *infra*, for actions for damages.

In a Good and Substantial Manner.—See s. 459.

Assumption by Acts.—Formal assumption by by-law is not necessary in order to give rise to the duty imposed by this section: Re Pembroke & Renfrew, 1910, 21 O. L. R. 366, D. C. In this case a bridge was erected, and a road was opened up, by an owner of land. A government grant and township money was spent on the road, and there was evidence of dedication and acceptance. Subsequently the county under pressure made and paid for repairs to the bridge. This was followed by a period of inaction during which the bridge was repaired by private subscription. In an application under s. 618, now s. 465, the county was held bound to repair by the D. C. The assumption was under s. 607, now s. 460 (6). So that the duty to repair arose under s. 606, now s. 460 (1), rather than under s. 616, now s. 450.

Note the duty to repair which may be cast on the county by s. 460 (6) operating with s. 460 (1).

Shall Maintain.—The word "maintain" as applied to highways and bridges is practically synonymous with "to keep in repair," and certainly includes the obligation in s. 606 (now 460), per Middleton, J.: Re Pembroke and Renfrew, 1910, 21 O. L. R. at 372 D. C.

A bridge was by statute to be supported, maintained and kept in sufficient repair by a certain company. Lord Haldane in delivering reasons for his judgment in the C. A., said: "I do not think 'supported' and 'maintained' add anything to the effect of the expression 'kept in sufficient repair.'" He also considered that these words did not impose the duty of reconstruction to meet the needs of increased traffic: Sharpness v. Atty.-Gen., 1915, 84 L. J. K. B. 917.

Reconstruction of Bridges.—Where this is rendered necessary by the destruction of the bridge, the duty to reconstruct is involved in the duty to repair: R. v. West Riding of Yorkshire, 1770, 5 Burr., at 2594. But apparently there is no duty at common law to reconstruct or widen to meet the needs of increased traffic: R. v. Devon, 1825, 4 B. & C. 670.

In the case of a railway or canal company authorized to cross a highway, and required by their act to construct and maintain a bridge to carry the highway across the railway or canal, there is as a rule no duty to rebuild to meet the needs of increased traffic, the duty being to construct with reference to the existing traffic at the time: Sharpness v. Atty.-Gen., *supra*, followed in Atty.-Gen. v. G. N. Ry., 84 L. J. Ch. 793.

See notes to s. 460 (9).

Specific Duties Imposed by ss. 450 and 451 to be Distinguished from General Duties Imposed by s. 460.—The specific duties imposed on railway and canal companies referred to in Atty.-Gen. v. G. N. Ry. and Sharpness v. Atty.-Gen., *supra*, and in such earlier cases as R. v. Severn, etc., 2 B. & Ald. 646, and R. v. Trustees of Oxford, etc., 12 A. & E. 427, are similar to the duties imposed on counties by ss. 450 and 451 and are to be distinguished from a general duty, such as is imposed by s. 460. These specific duties are imperative and will be enforced by mandamus. The general duty can only be enforced by indictment. See also R. v. Birmingham, etc., 2 Q. B. 47, and R. v. Wycombe, etc., L. R. 2 Q. B. 310, per Burton and Patterson, JJ.A.—Re Moulton and Haldimand, 1885, 12 A. R. 503, in which the history of the sections is traced. In this case a mandamus was not granted, the Court being equally divided. Burton and Patterson, JJ.A., held that a mandamus should have been granted. Hagarty, C.J.O., and Osler, J.A., thought the duty enforceable by indictment, and Osler, J.A., thought that if a mandamus could be granted in respect of the duty imposed by these sections it could be granted in respect of the general duty imposed by s. 531, now s. 460.

See also Hubert v. Yarmouth, 1889, 18 O. R. at 468.

Note.—When Re Moulton & Haldimand was up for decision there was no provision as to mandamus as is now found in s. 348, *infra*.

451. The council of the county shall cause to be built and maintained at the expense of the corporation of the county the bridges mentioned in clauses (*b*) and (*c*) of section 436. 3 Edw. VII. c. 19, s. 616 (2), *amended*. 3 & 4 Geo. V. c. 43, s. 451.

See notes to s. 450.

In Re Moulton & Haldimand, *supra*, Patterson, J.A., said: "I understand the two ss. 534 (450) and 535 (451) to be strictly in *pari materia*. Between them they deal with every one of the subjects brought by s. 532 (436) under the jurisdiction of the county council, and they might, so far as I can perceive, have formed one section instead of two, but for an apparent design to let the directions respecting boundary lines form a separate group, as they do in s. 535 (451). But though the subjects are thus treated in two groups in the place of one, I see no reason to suppose that the same policy was not intended to be applied to them all."

452. Where a river, stream, pond or lake forms or crosses a boundary line between two or more counties, it shall be the duty of the corporations of the counties, and where it forms or crosses a boundary line between a county and a city or a separated town, it shall be the duty of the corporations of the county and the city or separated town to erect and maintain bridges over such river, stream, pond or lake. 3 Edw. VII. c. 19, s. 617 (1); 7 Edw. VII. c. 40, s. 20, *amended;* 3 & 4 Geo. V. c. 43, s. 452.

This formerly was a part of s. 535 referred to in the notes to ss. 450 and 451.

This section refers to the bridges dealt with by ss. 437 and 438.

There is now joint jurisdiction as well as a joint duty to erect and maintain. Sections 437 and 438 read with this section make this clear.

The amendments remove the anomaly discussed in Re Cummings and Carleton, 1894, 26 O. R. 1.

River, Stream, Pond or Lake.—"We must give the legislature credit for having in view something more practical than to leave an important duty like the building of a bridge to fall upon one municipality or another . . . as opinions happen to vary in according or denying to the particular stream, the dignity of a river. The word 'river' is used for another purpose than merely designating a stream which has a certain minimum volume of water, or height of bank, or width of bed.

"A direction to build and maintain all necessary bridges would have been too vague. It would have left room for the contention, that whenever the convenience of travel required a bridge over a ravine or a railway, or even a corduroy causeway, through a swamp, the county must make one. The vagueness is avoided by confining the duty to bridges over rivers. It is in this sense, and for this purpose, that in my opinion the word rivers is used. I think the duty, while confined to what is not improperly called a river, attaches whenever the road is crossed by a stream which requires a bridge, as distinguished from a mere culvert, in order to make the road fit for ordinary travel." Patterson, J.A., McHardy v. Ellice, 1877, 1 A. R. 628.

In The Municipal Act, as it stood in 1877, when McHardy v. Ellice was decided, the words river and stream were apparently used as synonyms and are still so used. In North Dorchester v. Middlesex, 1889, 16 O. R. 68, Ferguson, J., following McHardy v. Ellice, decided that a stream which merely required a culvert was not included within the scope of s. 532 (now s. 436), and he exonerated the County of Middlesex from the duty to erect a bridge over Cuddy Creek, the span of which was nine feet only.

453.—(1) Boundary lines between local municipalities, including those which also form county boundary lines, shall be maintained by the corporation of such municipalities, and they shall also erect and maintain all necessary bridges on such boundary lines.

(2) Sub-section 1 shall not apply to boundary lines assumed by the council of the county or to such bridges as are under the provisions of this Act to be erected or maintained by another corporation. 3 Edw. VII. c. 19, ss. 620 (1); 621, 622, *redrafted;* 3 & 4 Geo. V. c. 43, s. 453 (1-2).

See notes to preceding ss. 450 *et seq.*

Compare s. 439, which gives jurisdiction to the local municipalities in respect of boundary lines.

Townships in adjoining counties held liable: Maw v. King & Albion, 1883, 8 A. R. 249.

Query.—The jurisdiction over county boundary lines is vested in the adjoining townships, unless the lines are assumed by a county. The counties are required to erect and maintain bridges on county boundary lines.

Can one county assume alone? See Victoria v. Peterborough, 15 A. R. 620.

Assumed by the County Council.—See s. 436 (1) and s. 460 (6).

Erected or Maintained by Another Corporation.—Under provisions of ss. 451 and 452, as affected by s. 454.

454. Where the council of a county passes a by-law under sub-section 2 of section 436 it shall be the duty of the council of the local municipality to erect and maintain all necessary bridges from the erection and maintenance of which the council of the county is relieved by the by-law. 3 Edw. VII. c. 19, s. 617 (4); 4 Edw. VII. c. 22, s. 27 (2), *redrafted;* 3 & 4 Geo. V. c. 43, s. 454.

As to the imperative nature of the duty imposed, see notes to s. 450 and the following sections.

See notes to s. 436 (2).

455. All boundary lines, and all bridges over rivers, streams, ponds or lakes forming or crossing a boundary line between two or more local municipalities in a provisional judicial district shall be erected and maintained by the corporations of such municipalities and their councils shall have joint jurisdiction over them; and if the councils fail to agree as to the proportion of the expense to be borne by each corporation the same shall be determined by arbitration. 10 Edw. VII. c. 85, s. 13, *amended;* 3 & 4 Geo. V. c. 43, s. 455.

In a Provisional District.—See The Territorial Division Act, R. S. O. 1914, c. 3, which provides that the several territorial districts shall each form a provisional judicial district.

By Arbitration.—As to effect of joining as a party to an arbitration a municipality not involved: Re Cummings & Carleton, 1894, 26 O. R. 1.

Protection of Bridges.—Section 11 (1) of The Beach Protection Act, R. S. O. 1914, c. 244, provides:—

11.—(1) No person shall remove any stone, gravel, earth or sand from the bed of any river, stream or creek running between two municipalities or over which a bridge has been erected, or through or under which a drainage pipe or water main has been laid by or at the instance of a municipal corporation, so as to endanger the safety of or injure such bridge, pipe or main, without the consent of the council of the municipality or municipalities within whose limits the stone, gravel, earth or sand is to be taken.

A penalty is provided for breach of this section.

Collapse of Bridge under Weight of Traction Engine.—The duty to lay down planks imposed by the Traction Engines Act has been considered in Goodison v. McNab, 1908, 19 O. L. R. C. A. 188; 44 S. C. R. 187, and Linstead v. Whitchurch, 1916, 35 O. L. R. 1, 36 O. L. R. 462. In both of these cases there was great conflict of judicial opinion; in the latter case the bridge was shown to be defective, and the plaintiff was shown to have failed to lay planks as required by the statute. All the judges of the Appellate Division held the municipal corporation liable, Meredith, C.J.O., and Hodgins, J.A., on the ground that there was no absolute duty to lay planks and that where it was not necessary to lay planks in order to protect the surface of the bridge there was no duty to lay planks, while Garrow and MacLaren, JJ.A., thought that a person who had neglected to lay planks could not be heard to complain that the corporation had neglected its prior duty properly to maintain the bridge, which they considered to be the rule laid down in Goodison v. McNab, but they distinguished the latter case on the ground that the plaintiff was a mere passenger and not within the purview of the Traction Engines Act.

Driftwood in Streams.

456.—(1) Where a river or a stream form a boundary line between two or more municipalities in a county, the corporation of the county shall keep it free from all accumulations of driftwood or fallen timber.

(2) Where the river or stream forms a boundary line between two or more counties, the duty mentioned in sub-section 1 shall be performed by the corporations of the counties, and where the river or stream forms the boundary line between a county and a city or separated town, shall be performed by the corporation of the county and the corporation of the city or separated town, and in case of failure to agree in either case, as to the share or proportion of the expense incurred in performing the duty to be borne by them respectively, the same shall be determined by arbitration. 3 Edw. VII. c. 19, s. 619, *redrafted.* 3 & 4 Geo. V. c. 43, s. 456 (1-2).

457.—(1) Where a stream or creek is cleared of all logs, brush or other obstructions to the boundary line between a township and an adjoining township into which the stream or creek flows, the council of the township in which the stream or creek has been so cleared may give notice in writing to the corporation of such adjoining township requesting its council to clear such stream or creek through the municipality.

(2) It shall be the duty of such last mentioned corporation, within six months after the service of the notice, to enforce the removal of all obstructions in such stream or creek within the municipality, to the satisfaction of any person whom the council of the county in which the municipality whose council gave the notice is situate, appoints to inspect the same.

(3) If the corporation receiving the notice neglects to perform such duty, and by reason of its neglect any highway or bridge in either of the townships becomes out of repair, the corporation in default, and that corporation only, shall be responsible for the damages sustained by any person by reason of such want of repair. 3 Edw. VII. c. 19, s. 563, *amended;* 3 & 4 Geo. V. c. 43, s. 457 (1-3).

The imperative duties imposed by ss. 456 and 457 are apparently included in the part of the Act dealing with Highways and Bridges, because the duties are primarily imposed to protect highways and bridges from

the damage which would naturally result from the backing up of waters, by reason of such obstructions.

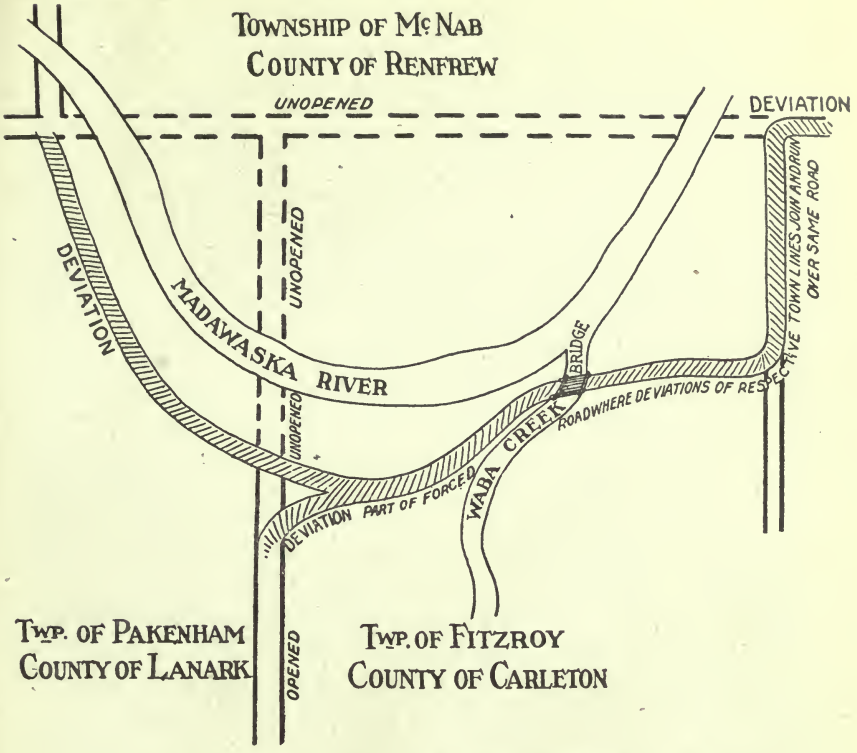
Is there a liability for default in observing the duty imposed by ss. 456 and 457. The general principles to be applied are stated by Duff, J., as follows in Vancouver v. McPhalen, 1911, 45 S. C. R. at 212: "It might be broadly stated, I think, with the support of the great weight of authority, that the breach (by way of omission or non-feasance), by a municipal body of a legal duty created by statute gives rise to an action at the suit of an aggrieved individual where (a) the default is of such a character as to be indictable; (b) the grievance suffered involves damages peculiar to the individual; (c) the damage suffered is within the mischief contemplated by the statute, and (d) where there is no specific provision excluding the remedy of action and the provisions of the statute as a whole, taken by themselves or read in the light of the history of the legislation, do not justify an inference that the legislature intended to exclude that remedy."

For a discussion, see Non-feasance, *infra*.

That Corporation Only Shall be Responsible.—This refers to the liability under s. 460. Apparently the corporation receiving the notice is made directly liable to the person who sustains damages, and the corporation otherwise primarily liable is exonerated.

458. Where, on account of physical difficulties or obstructions existing on a boundary line between municipalities, and in order to obtain a better line of road, a road has been heretofore or is hereafter laid out and opened which does not follow the course of such boundary line throughout, but in some place or places so deviates from it as to lie wholly within one of the municipalities, such road shall nevertheless be deemed to be, for the purposes of this Act, the boundary line between the municipalities; and a river, stream, pond or lake which crosses it where it so deviates shall be deemed to be a river, stream, pond or lake crossing a boundary line within the meaning of this Act. 3 Edw. VII. c. 19, s. 617 (2), *redrafted;* 3 & 4 Geo. V. c. 43, s. 458.

The situation considered in Fitzroy v. Carleton, 1910, 9 D. L. R. 686, was as follows:—



The facts before the Court of Appeal were stated as follows, by Garrow, J.A.:—

No less than three townships and the same number of county boundaries are involved in consequence of the difficulties in road construction caused by a sharp bend in the River Madawaska where these several boundaries meet. The township of Fitzroy is in the county of Carleton, the township of McNab in the county of Renfrew, and the township of Pakenham in the county of Lanark. The boundary line between Fitzroy and Pakenham runs northerly to the southerly limit of McNab which forms the northerly boundary to both Fitzroy and Pakenham at the place in question.

The river in its course towards the Ottawa River flows easterly in the township of McNab until about a mile westward from the junction of the boundary line between Pakenham and Fitzroy with that between these townships and McNab, when it sharply crosses the boundary between Pakenham and McNab, then proceeding easterly crosses the boundary between Pakenham and Fitzroy and again as sharply turns northerly and easterly and regains its original course through the county of Renfrew by crossing the boundary line between Fitzroy and McNab.

It is therefore obvious that if the original boundary lines are to be opened no less than three expensive bridges in close proximity would be necessary, namely, one between the townships of Pakenham and Fitzroy, one between the townships of Pakenham and McNab and one between the townships of Fitzroy and McNab. None of the boundary lines in question

has ever been opened throughout across the loop, and none of these bridges has ever been built, although the neighbourhood has been settled for many years.

The present situation upon the ground is that the obstruction caused by this loop in the river is overcome by a highway built and maintained around the southerly side of the loop, commencing at the east in the boundary line between the townships of McNab and Fitzroy, and ending in the west in the boundary line between the townships of McNab and Pakenham, this having been apparently the order of its construction, that is, from east to west. The boundary line road between the townships of Pakenham and Fitzroy was opened at a later date and apparently ends when it joins the other first mentioned road.

The exact origin of the east and west road around the loop is not at all clear. There was in the early days a mill at or near the bridge in question over the Waba stream in the township of Fitzroy, and at least a portion of the road now in question, possibly all of it in the township of Fitzroy, owes its origin to the efforts of private individuals to reach this mill. And the other portion, namely, that through the township of Pakenham around the bend, had apparently a somewhat similar origin in that it too was originally a mere trespass road. Then the council of the township of Fitzroy passed a by-law to establish a road to the Pakenham boundary line in the line, if not upon the exact site, of the old trespass road, and also of the present travelled road, on the 12th of December, 1853. And the council of the township of Pakenham passed a similar by-law to establish a road from that boundary line to the boundary line between Pakenham and McNab, also upon or near the site of the older trespass road, on the first of November, 1854, thus completing the loop around the bend and giving a continuous highway from east to west. Before the latter by-law was passed, namely, on the 22nd of September, 1854, the township of Fitzroy had apparently passed or attempted to pass a by-law to repeal the former by-law before mentioned. No reason appears for so doing nor does it appear that any notices were given or other steps taken to make the repeal effective, and it is the fact that the road remained open and was continuously used by the public as a highway after the alleged repeal just as before; so that the alleged repeal or attempted appeal may, I think, be disregarded.

Such, then, appears to be the history of the highway in question; first mere trespass roads, followed by municipal recognition, and by user by the public for a period approaching fifty years, while the original allowances for roads during all these years remained and still remain unopened and incapable of use as thoroughfares by reason of the absence of the bridges required to cross the river.

Upon this road around the bend, since the passing of the by-law before mentioned, the townships of Pakenham and Fitzroy have from time to time expended public money in repairs and improvements, and statute labour has been done upon this as upon other highways in the vicinity.

About five years before the trial the two townships united in joint action at or near the boundary line to alter and somewhat shorten the road so as to avoid a gully and improve the road, and this is apparently the only joint action in evidence by any of the several municipalities interested from the beginning.

The township of Fitzroy brought the action against the counties of Carleton, Renfrew and Lanark for a declaration that the shaded highway shown on the above plan was a deviation highway, and asked for the appointment of arbitrators to ascertain the amount payable by each for the maintenance of the deviation highway. Falconbridge, C.J., gave judgment for the plaintiffs. Renfrew and Lanark appealed and the C. A. allowed the appeal of Lanark, but dismissed the appeal of Renfrew, Osler, J.A., dissenting.

The majority of the Court adopted the view that the portion of the shaded highway situated within Fitzroy was a deviation of the boundary line between Carleton and Renfrew, and that these two counties alone were liable for the repair of the bridge on it, holding that as a deviation road must return to the original road, this shaded road did ultimately

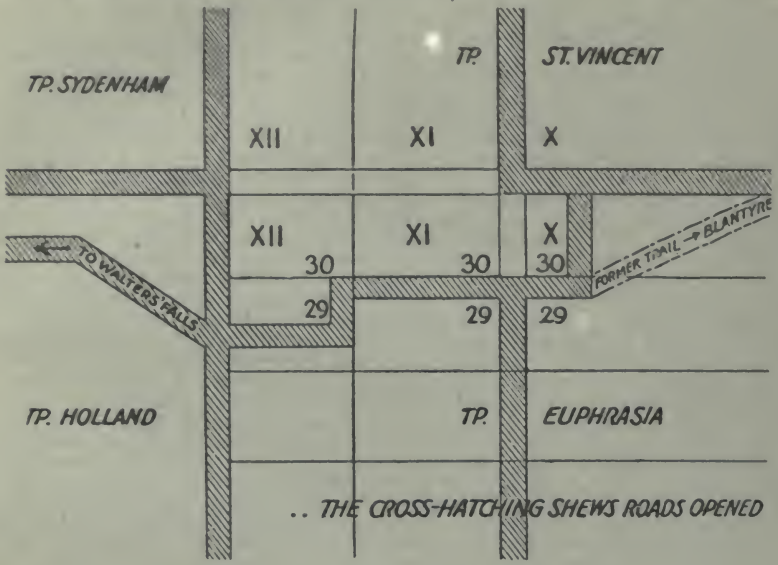
return, and by reason of its extension through Lanark to the original boundary line from which it deviated.

The majority of the Court refused to adopt the view of the trial Judge, that the same shaded highway situated within Fitzroy was a deviation of the boundary line between Fitzroy and Lanark, on the ground that it did not, and could not, come back and rejoin, or come near to, the line between Lanark and Carleton, from which by the hypothesis of the trial Judge it diverged. They, therefore, exonerated Lanark.

Even if the shaded portion through Fitzroy had rejoined the boundary line between Lanark and Carleton according to Osler, J.A., there is no ground for saying that the same road, according to the way it is approached, can be a deviation from roads on two distinct and separate boundary lines running at right angles to each other. He thought that if a deviation at all, it must be either of a road on the boundary between Carleton and Renfrew, or of that on the boundary line between Renfrew and Lanark. He did not consider the line on which Renfrew abutted on the one side and Lanark and Carleton on the other, was a boundary line between two or more counties (as the section then read), but that it was two boundary lines, namely, the boundary line between Carleton and Renfrew and the boundary line between Renfrew and Lanark respectively. If the whole shaded portion within Fitzroy and Pakenham were to be regarded as a single deviation from the road between Renfrew on the north and Carleton and Lanark on the south all three should be liable, but he held that none were, as the case was not within the section.

In the redrafting of the section the words "between municipalities" have been substituted for "between two or more counties," and for between "two municipalities," on which Osler, J.A., based his argument that the east and west road was really two boundary lines. As the section now stands the shaded portion is a deviation of a boundary line between municipalities, and the bridge on it is, therefore, a bridge crossing a boundary line between two or more counties, and would, therefore, be maintainable by the three counties under s. 452, and the reasoning of Osler, J.A., would make all three liable. The redrafting, however, does not appear to have affected the grounds on which the majority of the C. A. exonerated Lanark. The shaded portion forms no deviation of the boundary line between Carleton and Lanark. But it does form a deviation of a boundary line between the three counties. All three now ought to bear the expense as pointed out by Osler, J.A. To hold otherwise is to decide that a deviation need not return to the original line, for the deviation which commenced from the boundary line between Carleton and Renfrew does not return to that boundary line, but to the boundary line between Lanark and Renfrew. The case of Lanark is really the same as the case of Renfrew. The deviation is, therefore, a deviation from a boundary line between three municipalities. Lanark in effect pays nothing for a deviation which renders a bridge unnecessary, to which it would have had to contribute, while the whole burden of the bridge on the deviation falls on Renfrew and Carleton. Maclennan, Garrow and Maclaren, JJ.A., as against Falconbridge, C.J.K.B. and Osler, J.A.

In Euphrasia v. St. Vincent, 1916, 36 O. L. R. 233, App. Div., the understanding arose as to whether a certain road was a deviation road or not. The following plan shows the situation:



In the county of Grey, the townships of Euphrasia, St. Vincent, Sydenham, and Holland, corner south-east, north-east, north-west, and south-west respectively, St. Vincent being north of Euphrasia. That part of the town-line between Euphrasia and St. Vincent from the four corners at the west, east past concessions XII. and XI., has never been opened; in front of concession X. the town-line is open; about half way (east and west) of concession X. of Euphrasia runs a road south through lot 30; then it turns and runs at right angles along and on the northern part of lot 29 west through concession XI., then at right angles a short distance south through the north part of lot 29 in concession XI. (and perhaps XII.), then at right angles west through lot 29 of concession XII. to the town-line of Euphrasia and Holland. This is the road concerning which this litigation is brought—but, after crossing the town-line of Euphrasia and Holland, the road continues in a north-westerly direction through Holland to a hamlet, Walters' Falls.

Riddell, J., thus dealt with the matter in the divisional court:

> The change made by 3 & 4 Geo. V. c. 43, s. 458, is substantial: (1) the provision is made "for the purpose of the Act," and no longer "within the meaning of this section;" and (2) it is no longer "a road which lies wholly or in part between two municipalities," where the deviation is, to get a better line of road, which is provided for; but only, "where, on account of physical difficulties or obstructions existing on a boundary-line . . . and in order to obtain a better line of road, a road has been heretofore or is hereafter laid out and opened which does not follow the course of such boundary-line throughout," does the section apply. The law is now more inclusive in that the provision is effective for all purposes of the Act and not simply of the section; less inclusive in that only such roads are provided for as have been or may be (a) "laid out and opened" (b) on account of physical difficulties or obstructions, and (c) in order to obtain a better line of road. Formerly it was wholly immaterial why the "deviation" came into existence so long as the road "lies . . . between two municipalities" and the deviation "is . . . within one of the municipalities" "only for the

purpose of getting a good line of road" — and that is why so little is said or made of the origin of the road in Township of Fitzroy v. County of Carleton, 9 O. L. R. 686, C.A., although not wholly disregarded (see p. 692)—and why it is "the present condition of the deviation, and not its past history or origin," which, "is to be regarded," because "the getting of a good line of road seems now to be the sole purpose of this deviation" (p. 694). At that time there must have "come a time when it is no longer a question of origin" (p. 697) — now the origin is all-important.

"So too in County of Wentworth v. Township of West Flamborough, 1912, 26 O. L. R. 199, C.A., "its origin and history are of less consequence that the facts existing when the question arises, when the main inquiry must be, is the road now a public highway, and is it in fact serving the public purposes which a road upon the original road allowance would have served?" (p. 201).

"We are untrammelled by authority and we have no assistance from decision of the Courts on the interpretation of the present section.

"It seems to me that the section necessarily implies that some competent authority must be laying out and opening a road intended to follow in the main the course of the boundary-line; that, in the course of such laying out and opening, the road "does not follow the course of the boundary-line throughout." but, "physical difficulties or obstructions" appearing on part of the boundary-line, "in order to obtain a better line of road," it is laid out and opened so as to deviate, as "as to lie wholly within one of the municipalities." "It is the road that may deviate . . . that is to say, the road that was intended to run on the line may (accidentally by reason of inaccurate surveying, or) purposely in order to shun some obstacle (or for some other cause), to get off the line:" per Patterson, J., quoted by Boyd, C., in County of Wentworth v. Township of West Flamborough, 23 O. L. R. 583, at p. 589 (the words in parenthesis are inapplicable here).

"Looking now at the all-important matter, i.e., how the road was "laid out and opened," it is plain that it was not "laid out and opened" with the intention of following the boundary-line even in part; that it did not and was not intended "in some place or places" to deviate from the boundary-line. It was not a deviation, whatever else might be said for it, even assuming that the adoption of the road by the township could be considered a ratification of Walter's actions.

"I pay no attention to the other questions which were raised, thinking these considerations sufficient for the disposal of the case."

In Order to Obtain a Better Line of Road.—Section 617 (2) of R. S. O. 1897, c. 223, did not contain these words, and as the section then stood, it had been held that the deviations intended were those made to obtain a good road. In Re Brant and Waterloo, 1860, 19 U. C. R. at 457. Subsequently in 1903 by 3 Edw. VII. c. 19, this view was adopted and the proviso was added: Provided that such deviation is only for the purpose of getting a good line of road (N.B.—See ss. 759 and 758). While the section stood in this form the point was again considered in Fitzroy v. Carleton, 1905, 9 O. L. R., at 694, by Maclennan, J.A., who considered that the section referred to a deviation line chosen in preference to some other line and so involving comparison with the original line, and that the deviation must be owing to some obstacle presented by the other line.

The same Judge also thought it was not material that the deviation was originally used, or used in part, for some other purpose.

Some difficulty was presented by the use of "is" and not "was," with the apparent result that the present condition of the deviation, and not its past history or origin, is to be regarded. These points have now been cleared up by the redrafted wording.

Deviation Defined.—The term "deviation" indicates a departure from some other course or way which might have been pursued at more or less inconvenience, and is inappropriate where there is none such to follow or deviate from: Per Osler, J.A., Victoria v. Peterborough, 1888, 15 A. R., at 627.

Other Cases.—McBride v. York, 31 U. C. R. 355.

459.—(1) Every iron, steel, concrete or stone bridge constructed by the corporation of a county, and every such bridge exceeding twenty feet (20) clear span constructed by the corporation of a township shall be designed and built in accordance with general specifications approved by the Department of Public Highways.

(2) Plans in duplicate for any such bridges may be submitted by the council of any county or township to the Department of Public Highways, and if they are found to be in accordance with such approved general specifications the certificate of the Department shall be attached, and one of such plans shall be returned to the clerk of such county or township. 6 Geo. V. c. 39, s. 10.

Shall be Built.—The public duty imposed by this section can be enforced if a breach is threatened at the suit of a ratepayer who sues on behalf of himself and other ratepayers, to restrain the county from spending money in breach of this section, or at the suit of the Attorney-General.

460.—(1) Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and in case of default, the corporation shall be liable for all damages sustained by any person by reason of such default. 3 Edw. VII. c. 19. s. 606 (1), *part redrafted;* 3 & 4 Geo. V. c. 43, s. 460 (1).

Scope of Sec. 460 (1).—In Dick v. Vaughan, 1917, 39 O. L. R. 187, App. Div., the plaintiff attempted to get damages from a municipal corporation because it had neglected to strengthen a bridge so that it would be safe for a traction engine to cross, the damages claimed being for the loss sustained by reason of the plaintiffs having to go around another way. Meredith, C.J., in the Appellate Division, pointed out that if the claim were allowed it would establish a distinct and great enlargement of municipal liability. He pointed out that all the actions in which there had been recovery were for damages for injuries in a highway accident caused by neglect of the duty to keep the highway in repairs, and added that he was aware of two attempts to carry the liability further. These cases were: Hislop v. McGillivray, 1887-90, 12 O. R. 749, 15 A. R. 687, 17 S. C. R. 479, in which the action was based upon the total neglect of the municipality to do work upon a road allowance, and the effect of the case is: that a land-owner and occupier has no right of action against a municipality for not repairing an unopened original allowance for road, no matter how much he may suffer specially and directly by reason of the want of such repair, and Cummings v. Dundas, 1907, 13 O. L. R. 384, D.C., the report of which is unsatisfactory, but which was followed by the similar case, Strang v. Arran, 1913, 28 O. L. R. 106, in which by reason of the failure of the municipality to rebuild a bridge the access of the plaintiffs to their properties were cut off, by reason of which they were awarded nominal damages, and the effect of the case is: that where access to land is cut off by default

in the performance in the duty of repair, an action by the owner lies against the municipality for all damages sustained within three months from the commencement of the action.

His Lordship then gave the following reasons for holding that section 460 covered only what may be described as "accident cases":—

"In the first place the municipality's liability is confined (sub-section (1)) to damages sustained, not 'and losses occasioned,' whilst here the plaintiff's true remedy is mandamus or injunction, to save him from sustaining such damages, of which he is in fear. Damages sustained by accident without remedy was certainly the mischief that caused the Legislature to apply the remedy which the Act affords, an action for damages sustained by reason of the disrepair of the road. And I have already referred to the evident long-continued impression that that was the scope of the relief afforded.

"In the next place, there is no right to recover if the action is brought after three months from the time when the damages were sustained (sub-section (2)); a provision not especially applicable to a case such as, for instance, Strang's, in which it was said that the injury was a continuing one.

"And, in the next place, there is the provision (sub-section (4)) that no action shall be brought for any of such damages unless notice of the claim and of the injury complained of are given within the time, and in the manner provided for in the enactment. And, as the words are: 'No action shall be brought for the recovery of the damages mentioned in sub-section (1),' how can any action under that sub-section be excluded?"

Duty to Repair.—The following judicial expositions of the duty to repair have been referred to with approval very often: Harrison, C.J., in Castor v. Uxbridge, 1876, 39 U. C. R. 113.

"The object of the Act is the safety and convenience of the public when lawfully using the highways of the municipality. We should therefore, if possible, give to the Act such fair, large and liberal construction as will best ensure the attainment of that object. When a highway is in such a state, from any cause, whether of nature or man, that it cannot be safely or conveniently used, it may, in a large and liberal sense, be said to be out of repair. Whether the defect be an excavation caused by nature or man, or an addition making an obstruction caused by nature or by man, it may be equally unsafe and equally inconvenient to the public to use the highway. The Statute prescribes no standard of repair, nor does it in any manner declare what is to be deemed non-repair. It would not be practicable for the Statute to do so. It would be absurd to require the municipality to keep all its roads in the same state of repair, or to require the municipality to keep even the same road in the same state of repair during all seasons of the year. The question whether a highway is in repair or not at the time of the occurrence of an accident is, in general, a question of fact. In the determination of the question, it is necessary to take into account the nature of the country, the character of its road, the care usually exercised by municipalities in reference to such roads, the season of the year, the nature and extent of travel, the place of the accident, and the manner and nature of the accident."

Patterson, J.A., in Lucas v. Township of Moore, 1879, 3 A. R. 602:—

"It is now well settled . . . that the obligation expressed by the general phrase 'keep in repair'—a phrase which is applied equally to an allowance for road in a newly surveyed and organized township and to a crowded street in the business part of a city—is satisfied by keeping the road in such a state as is reasonably safe and sufficient for the requirements of the particular locality; and that in deciding whether any municipal council is chargeable with default, regard must be had to such considerations as the means at the command of the council and the nature of the ordinary traffic of the locality."

Armour, C.J., in Foley v. Township of East Flamborough, 1898, 29 O. R. 139:—

> "The word 'repair,' as used in 'The Municipal Act,' has been held to be a relative term; and to determine whether a particular road is or is not in repair, within the meaning of the Act, regard must be had to the locality in which the road is situated,—whether in a city, town, village or township, and (if in the latter), to the situation of the road therein, whether required to be used by many or by few,—to how long the township has been settled, to how long the particular road has been opened for travel, to the number of roads to be kept in repair by the township, to the means at its disposal for that purpose, and to the requirements of the public using the road. All these matters are to be taken into consideration, and from them is to be deduced the quality of the repair necessary to comply with the terms of the Act. And I think that if the particular road is kept in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied."

To the foregoing citations may be added the following more recent discussions of the general duty to repair.

> "This duty has been expressed in many forms by words, but the meaning to be gathered from all of them, is that the highway should be kept in such a state of repair as that persons using it might reasonably expect to be able to do so without danger. . . . The municipality is not required to keep it in perfect repair, and is not required to insure the safety of persons using it." Street, J., in Belling v. Hamilton, 1902, 3 O. L. R. at 322 D.C., citing Castor v. Uxbridge, 1879, 39 U. C. R. 113; Lucas v. Moore, 1879, 3 A. R. 602; Foley v. East Flamborough, 1898, 29 O. R. 139; 23 A. R. 43.
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> "Repair or the want of it is, of course, a relative term to be determined by a consideration of all the surrounding circumstances, including the extent of the defect and the means available for making the necessary repairs. Garrow, J.A., in Hogg v. Brooke, 1904, 7 O. L. R. 273, C.A.
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> "Having regard to the common law respecting highways and their repair, the condition of this new country and the obvious purposes of this legislation and that of the same character which preceded it, there is no difficulty in giving to the word repair the broad and elastic meaning of sufficient from time to time for the reasonable needs of the traffic, having regard to the financial means of the municipality to meet such needs, so that whilst in the earliest stages of the settlement of the country, a road which would be sufficient for a team of oxen and a rough wagon, or it might be even a 'stone boat,' might comply with the statutory requirement, in these days in some places nothing less than a well-paved way will do, though the obligation in all cases is comprised in the one and same word 'repair.'" Meredith, C.J.C P., in Weston v. Middlesex, 1913, 30 O. L. R. 23.

The limits of the duty to repair are indicated in Cummings v. Dundas, 1905, 10 O. L. R. 300; 6 O. W. R. 169, where Street, J., held that the corporation was under no duty to replace a part of the road bed which had been so completely destroyed when a rapid stream changed its course, that there was nothing of it left to repair. There was no evidence to shew that the street could be restored by any reasonable expenditure. The plaintiff unsuccessfully sought damages for depreciation to his lands resulting from the destruction of the street. This was reversed on appeal, see 13 O. L. R. 390. In McCormick v. Pelee, 1890, 20 O. R 288, a highway was washed away by the waters of Lake Erie. The plaintiff unsuccessfully applied for an injunction and damages. Boyd, C., said: "To give the relief asked would be to require the municipality, not merely to repair, but to restore, what they are not called upon to do by law. Any ordinary reparation at the point in question would be evidently ineffectual, even if the way were reinstated: no road can be, with reasonable outlay, maintained along the lake shore at this place without the erection of walls

or embankments or other expedients for resisting the encroachment of the lake. And this is not the work of municipalities under the general law now invoked."

The general duty to repair imposed by this section can be enforced only by indictment, and not by mandamus: Re Moulton and Haldimand, 1885, 12 A. R. 503, and is to be distinguished from specific duties which are only ministerial, and which may be enforced by mandamus: ibid., p. 508, as for example the specific duties imposed by s. 459.

With regard to the general duty to repair under s. 400, the council have a discretion which should not be interfered with by mandamus. They are, however, in case of default, subject to indictment, and to an action for damages under the section.

The statutory duty to repair is not, on principle, to be treated differently to any other statutory duty: see McPhalen v. Vancouver, 1911, 45 S. C. R. 194; Vancouver v. Cummings, 1912, 46 S. C. R. 457. It must be noted in jurisdictions, as in England, where the duty to repair is transferred from an authority not liable for non-feasance to a municipal corporation, that there is an exception in the general rule, and in such cases the municipal corporation is not liable for non-feasance unless made so expressly: ibid. and Cowley v. Newmarket, 63 L. J. Q. B. 65 H. L. Failure to obey a statutory duty is simply negligence: Garrow, J.A., Goodison v. McNab, 1909, 19 O. L. R. 214. But the nature of the liability resulting from the neglect of the statutory duty must, in each case, be determined by reference to the statute itself: Atkinson v. Newcastle, 1877, 2 Ex. Div. 441; 46 L. J. Ex. 775. And where a specific remedy is given by the statute it thereby deprives the person who insists upon a remedy or any other form of remedy than that given by the statute: Halsbury, L.C., in Pasmore v. Oswaldwistle, [1898] A. C. 387; 67 L. J. Q. B. 635, at 637.

The liability for default in the duty of making repairs must be distinguished from the liability resulting from nuisance. It is only by way of exception that consideration of negligence enters into the sphere of the law of nuisance.

It is now clearly established that under ordinary circumstances no action lies for injury occasioned by the execution of statutory duty unless it has been negligently performed: Alverstone, C.J., in Lambert v. Lowestoft Corporation, 1901, 70 L. J. K. B. 333. The remedy in the absence of negligence in the carrying out of a statutory duty of the kind imposed by s. 460, where land is injuriously affected, is under Part XV. of the Act: Hammersmith v. Brand, 1869, L. R. 4 H. L. 171; 38 L. J. Q. B. 265. But if there is negligence there is as a general rule a right of action: Geddes v. Bann Reservoir, 1878, 3 A. C. 430; Pratt v. Stratford, 1888, 16 A. R. 5; New Westminster v. Brighouse, 1892, 20 S. C. R. 536.

Where the operations of the corporation disturbed the soil of frontagers the proof of negligence was held immaterial in an action for damages: Boyd v. Toronto, 1911, 23 O. L. R. 425, but compare this holding with the rule in New Westminster v. Brighouse, supra.

Making Repairs.—For acts which a municipal corporation may do in the discharge of its duty to keep in repair a highway under the jurisdiction of its council without passing a by-law as distinguished from acts done for the improvement of a highway, which must be authorized by by-law. See Croft v. Peterborough, 1856, 5 C. P. 35, 141; Reid v. Hamilton, 1856, 5 C. P. 269, 287, both cited with approval by Meredith, C.J.O.; Taylor v. Gage, 1913, 30 O. L. R. 75, at 85. App. Div: Pratt v. Stratford, 1887, 14 O. R. 260; 16 A. R. 5. Idington, J., in Shawinigan v. Shawinigan, 1912, 45 S. C. R. 585, at 603, referring to the Pratt case, speaks of it as one of those cases in which, "where a duty had been imperatively imposed upon a municipality and had to be discharged in obedience to a statute, things necessary to be done to obey the law have been held impliedly as within a council's absolute power."

In the Pratt case the plaintiff's injury was caused by raising the grade of the highway on which his lands abutted, and Hagarty, C.J.O., based his judgment for the corporation on the ground "that the acts in consequence of which the plaintiff claims damages were lawfully done by the defendants, under statutable powers and duties: that they had a right to

do these acts without the formality of a by-law as part of the ordinary duties imposed on them in the maintenance of roads and bridges: 16 O. A. R. at p. 12.

The corporation may make a reasonable use of the roadside for the purpose of making necessary repairs, and are not acting negligently in occupying part of it with material. If an unfinished work cannot fairly be considered dangerous or a trap to persons having ordinary eyesight, the corporation will not be liable: Belleisle v. Hawkesbury, 1904, 8 O. L. R. 694, following Macdonald v. Yarmouth, 1898, 29 O. R. 259. Warnings should be placed sufficiently by day or by night to lead travellers to avoid obstructions or unfinished work which can fairly be considered dangerous or a trap.

"Where a road is so constructed or altered as to present at one part, two paths, both of which exhibit the appearance of having been used by travellers, and one leads to a dangerous place and the other is quite safe, it is the duty of those in charge of the road to indicate in a manner not to be mistaken by day or by night, that the unsafe path is to be avoided and if it cannot otherwise be done to put up such an obstruction as will turn the traveller from the wrong track. Boswell v. Yarmouth, 1879, 4 A. R. 353, cited with approval in Thomas v. N. Norwich, 1905, 9 O. L. R. 670 D.C. In the latter case the obstruction placed was a mere stick of wood laid at right angles, and the corporation was held to be negligent.

In Ince v. Toronto, 1900, 27 A. R. 414, Osler, J.A., said: "I cannot take into consideration the method in which the sidewalk . . . was constructed. That method was adopted on the deliberate judgment of competent engineers. In Guelph v. Guelph, 1914, 30 O. L. R. at 477, it was held that the municipality would have acted properly and without negligence, if it had relied on the advice of competent engineers. Where, however, work is in fact undertaken without expert advice, and expert advice should have been obtained, this is negligence, but it is not enough to entitle a plaintiff to succeed: ibid. See Schwoob v Michigan Central, 1905, 5 O. L. R. 86. In London v. Goldsmith, 1889, 16 S. C. R. 231, Ritchie, C.J., said: "I think it would be most unreasonable to hold that because in the opinion of an engineer the grade could be slightly improved the street should be held to be out of repair;" and see Hays v. Columbia, 1912, 141 S. W. 3, where a city was held not to be liable for injuries resulting from a danger inherent in the plans adopted by it, the defect in that case being the use of platforms laid on girders without being fastened down.

But note that a municipal corporation is not discharged from liability by employing competent or other persons to perform its statutory duty to repair. The question is not who was guilty of negligence? but is, was there any negligence in following the plan? Meredith, C.J.C.P., in Weston v. Middlesex, 1913, 30 O. L. R. at 28. A municipal corporation is not to be found liable to an action merely because engineers or experts come after the event, and say that some other construction than the one adopted would have been safer: Crafter v. Metropolitan, 1866, L. R. 1 C. P. 300; 35 L. J. C. P. 132.

In Maloney v. Guelph, 43 O. L. R. 313, the Mayor of Guelph, who was ex officio a member of the Board of Commissioners of Public Works, was injured by an explosion of dynamite, which took place in an effort to blow up a dam, the work being under the charge of the engineer of the Board. The Mayor was in the danger area and was struck. The App. Div. held that the city was liable to him by reason of the negligence of the engineer in not protecting the place of operation: Meredith, C.J.O., in giving the judgment of the Court, said:

> "I know of no reason why a member of a municipal council which has directed work to be done by its engineer, who from curiosity or from any other motive is present when the work is being done and is injured owing to the negligence or want of skill of the engineer in doing it, may not recover from the corporation damages for the injuries he has sustained; and, if he may, there is no reason why a member of a board to which the council had delegated the performance of its duties may not, in the like circumstances, recover."

NOTICE OF WANT OF REPAIR.

Prima facie the statutory duty to repair is imperatively obligatory and its consequences can only be got rid of by some valid excuse for a failure to discharge the duty so imposed. . . . The same principles of law must be adhered to in applying it (the statute), as in applying other statutes imposing any like duty to repair.

"Notice to or knowledge on the part of the authorities of a want of repair never formed part of the statute.

"American and Ontario cases are cited to shew that some such notice or knowledge of non-repair must be proven by a plaintiff claiming to recover by virtue of the statute. I do not say that no such cases exist as would carry the doctrine of notice or knowledge thus far, for there has been a good deal of confusion of thought in that regard, but no case cited to us from the Ontario authorities carries it so far. Numerous dicta can be found apparently doing so. I think we must discard them, and also such cases, if any, as carry the doctrine so far. . . .

"The case of Castor v. Uxbridge, as relied on, is no authority for the proposition. . . .

"It is to be observed that the case (Castor v. Uxbridge) was one arising out of the clear wrong doing of some one who had no official relation with the municipality or colour of right to do what he had done. . . .

"It is, if I may be permitted to say so, that kind of case alone which can properly give rise to the question of notice, when it is sought to apply the doctrine to the cases where the road had merely worn out of repair. I think it is entirely misplaced.

"I am, despite dicta to the contrary, prepared to hold that, unless in some such case as I have suggested, the question of notice or knowledge does not arise, and that in all cases where the accident has arisen from the mere wearing out, or apparent wearing out or imperfect repair of the road, there arises upon evidence of accident caused thereby, a presumption without evidence of notice that the duty relative to repair has been neglected. The municipality is bound to take every reasonable means through its overseeing officers to become acquainted with such possible occurrences, and if it has done so can possibly answer the presumption. . . .

"In this case the sidewalk was found in the condition described (a hole fourteen inches square in the cement sidewalk of a busy city street, which tripped the plaintiff). It clearly was not the result of malice, but of work for a useful purpose, presumably done by the appellant or someone acting under its express authority. . . .

"If it (the city) failed to make such stringent regulations and provide for such supervision by its own officers thereof so as to protect the public and keep itself well informed of all that was being done, then it was . . . negligent. (Idington, J., Vancouver v. Cummings, 1912, 46 S. C. R. 457.)

When the duty to know is considered, defendants must be held equally responsible if it was only through their culpable negligence that they did not know: Mersey Docks Trustees v. Gibbs, L. R. 1 H. L. 93.

Sources of recurring and repeated danger on a street are to be watched and guarded against by the municipality: Davis v. Corry, 154 Penn. St. 598; McGaffigan v. Boston, 149 Mass. 289; Gignec v. Toronto, 1906, 11 O. L. R. 616. Notice where necessary must be notice to or knowledge of the council or an administrative officer, not merely notice to or knowledge of individual councillors: Rice v. Whitby, 1898, 25 A. R. at 107.

Where there is no actual notice the inferring of such notice after the lapse of a reasonable time dating from the origin of the defect is proper and permissible, but the question as to the length of time sufficient to raise such inference depends altogether on the circumstances of the case and varies accordingly: Rice v. Whitby, supra, at 200.

In McNiroy v. Bracebridge, 1905, 10 O. L. R. 360, there was a broken plank which caused an angular depression not over two inches at the deepest. The defect was slight and on a quiet street, and there was periodical weekly supervision. Held that notice was not to be attributed to the corporation.

On the other hand in Durochie v. Cornwall, 1893, 23 O. R. 355, affirmed 21 A. R. 279; 24 S. C. R. 301, the place of defect had been in bad condi-

tion for over a week, and was on the principal and most frequented street and the corporation was held liable.

A trap was within a short distance of the Street Commissioner's office, and from ten to twenty city officials passed over it every day, and policemen were passing it every few minutes. The City claimed unsuccessfully that no notice, actual or constructive, of the defect was proved. As the source of danger had existed two weeks, notice was attributed to the authorities: Gignec v. Toronto, 1906, 11 O. L. R. 611, D.C. and A.C.

DEFAULT IN REPAIRING.

General observations by judges as to the nature of the statutory duty to repair are to be interpreted by reference to the particular circumstances of the case in which each occurred, and are not to be applied generally. For this reason it is advisable to consider together cases arising out of similar circumstances. Sidewalk cases present many similarities. Other groups deal with obstructions and excavations, shying or runaway horses, guard rails, lighting, injuries to children, areas, snow and ice, bridges, streets and township roads, overhanging signs.

SIDEWALKS.

A crossing may be regarded as a part of the adjoining sidewalk: Kingston v. Drennan, 1896, 27 S. C. R. 46, and a great difference in level between the sidewalk and the crossing was not excused although due to the observance of a by-law: ibid.

Small projections in a sidewalk may render the corporation liable even though the plaintiff knew of the existence of the obstacle and had even seen people tripping over it: Roach v. Port Colborne, 1913, 29 O. L. R. 69. Here a pipe protruded from a cement walk, two inches in front of the plaintiff's house. Boyd, C., after reviewing the authorities, held the corporation liable.

Ray v. Petrolia, 1874, 24 C. P. 73, decides only that a depression of an inch and a quarter in a board sidewalk cannot be called a want of repair.

In Ewing v. Toronto, 1898, 29 O. R. 197, the accident was due to a hinge standing one inch and one sixteenth above the level of the walk, and the decision was against municipal liability. But in Ewing v. Hewitt, 1900, 27 A. R. 296, which was an action in respect of the same injury, Burton, C.J.O., at 299, expressed a doubt of the correctness of the decision in the earlier case. In Massachusetts a projection of an inch and a quarter has been held to constitute a defect: Redford v. Woburn, 1900, 176 Mass. 520: O'Brien v. Woburn, 1904, 184 Mass. 598.

A difference in level of three-quarters of an inch between granolithic blocks at a frequented part of a city is not sufficient want of repair to make the city liable; Anderson v. Toronto, 1908, 15 O. L. R. 643.

A cement walk corrugated at the time of construction became so worn as to become smooth and slippery in wet or frosty weather,—held non-repair: Huth v. Windsor, 1915, 34 O. L. R. 249, 542. But see Crafter v. Metropolitan R. W. Co., 1866, L. R. 1 C. P. 300, as to the line between suggestions of possible precautions which may be taken and evidence of negligence.

Missing Plank in Old Sidewalk.—"The sidewalk was old and its constitution had become extremely enfeebled, the stringers not being sound enough to retain the planks securely. It was in a condition which called for constant care and inspection, the more so as the street was one of the main streets of the town, or one on which there was a good deal of traffic. Then the plank, the absence of which caused the hole in the walk into which the plaintiff fell, had been out of its place for a week. . . . Under all the circumstances the defendants should have known of the condition of the walk earlier, and should have repaired it. The action, therefore, will lie . . . Osler, J.A., McGarr v. Prescott, 1902, 4 O. L. R. 280 C. A.

An inspector who had twelve miles of wooden sidewalk in his district, used to walk over it about three times in every two weeks. If he noticed a plank that he thought dangerous he reported the defect, and on the follow-

ing day the city's repair gang replaced the plank with another. The repairers also remedied other defects when discovered by them. The trial judge found as a fact that sidewalks of the age of the one in question are liable to concealed defects from interior decay rendering them dangerous, and that no proper inspection to discover such defects was made by the city, and awarded damages. The judgment was upheld by the Court of Appeal: Iveson v. Winnipeg, 1906, 16 M. R. 352.

Loose Plank in New Sidewalk.—The plank had been loose for two or three weeks before the accident, but there was no evidence to shew that the city's servants had knowledge of it, and many persons, including an inspector of sidewalks, had walked over it without noticing it. Action failed: Forrest v. Winnipeg, 1909, 18 M. R. 440.

Loose planks laid by a third party to protect a sidewalk across which wagons are being hauled, constituted a dangerous trap. Held that the normal condition of the sidewalk was disturbed, and that it was a primary duty of the municipality to see that in its altered state it was kept in proper repair and that at a busy and much frequented place it should have been kept in excellent repair. No evidence was given by the city to show that any attention was given to the place. The city was held liable: Gignec v. Toronto, 1906, 11 O. L. R. 611, D.C. and C.A.

Allowing Surface of Sidewalk to Become Smooth.—In Huth v. Windsor, 1915, 34 O. L. R. 245-542, the corporation was held liable for injuries resulting from the action of frost on a sidewalk worn smooth. Meredith, C.J. O., in giving the judgment of the Appellate Division, said:

> "This is not the ordinary case of a sidewalk constructed with a smooth surface, but there was the recognition by the appellant of the necessity of doing something to prevent just such a dangerous condition from arising, by reason of the action of the frost, as occurred. With that object in view, in constructing the sidewalk, the surface was roughened, but this roughening was allowed to wear off; and, therefore, there was removed that which the appellant recognized ought to be provided for the safety of the travelling public.
>
> "I think we may rest our judgment upon that ground."

Shying Horses.—The true rule to be applied where two causes combine to produce an injury both in their nature proximate, the one being the defect in the highway and the other some occurrence for which neither party is responsible (as the act of a frightened horse), is that the corporation is liable, provided that the injury would not have been sustained but for the defect in the highway. This is the New Hampshire rule, which is followed in Ontario: Sherwood v. Hamilton, 1875, 37 U. C. R. 410; Steinhoff v. Kent (1887), 14 A. R. 12; Foley v. East Flamborough, 29 O. R. 39; Atkinson v. Chatham, 1898, 29 O. R. 518; 26 A. R. 521; 31 S. C. R. 61; Thomas v. N. Norwich, 1905, 9 O. L. R. 666, and for a full discussion see the remarks of Meredith, C.J., in Little v. Smith, 1914, 32 O. L. R. 518.

If the running away of the horse is occasioned by the negligence of the plaintiff the New Hampshire rule does not apply. See Steinhoff v. Kent, supra.

There are many cases in which horses have shied at obstructions or been frightened by noises where the road itself was not defective. Thus in Maxwell v. Clarke, 1879, 4 A. R. 460, a horse shied at blocks of wood left alongside the highway by a third party, and threw the plaintiff off and injured him. The obstruction had previously frightened the horses of several other persons, and had been on the road for three weeks. The plaintiff was non-suited. Patterson, J.A., delivering the judgment of the Court, quoted with approval the principle laid down by Bigelow, C.J., Mass., in Kingsbury v. Dedham, 13 Allen 186, as follows: "A town is not liable for every object which renders a way unsafe or inconvenient for travellers to pass over it, but only for such as not only render the way unsafe and inconvenient, but also defective and out of repair, and the injury must be attributable to the defect or want of repair."

In Roe v. Lucknow, 1894, 21 A. R. 1, as the plaintiff's horse was being driven past the town waterworks the engineer blew the whistle in

the ordinary course of work and frightened the horse. The trial judge applied Fletcher v. Rylands, L. R. 1 Ex. 265, and gave damages. This was reversed by the Court of Appeal. Hagarty, C.J.O., said that the evidence should at least "shew that the thing complained of was likely to cause horses to shy." Osler, J.A., said: "The true ground of the defendants' liability in a case like the present is that by placing and using on their land something that was calculated to interfere with the convenient use of the adjoining highway they were guilty of a nuisance to the highway. Their liability cannot be placed on any higher ground than if they had done the act complained of on the highway itself. . . . What the defendants have done is prima facie not unlawful; there must be evidence of dangerous character shewing its effect on horses of ordinary steadiness before it can be said to be a public nuisance, and that evidence is wanting here."

In O'Neil v. Windham, 1897, 24 A. R. 341, the plaintiff's horse was frightened by a pile of ties placed by a third party on the untravelled part of the highway. Burton, C.J.O., said: "I have more than once expressed my regret that it had not been left to the legislature to define the subjects for which municipalities should be liable if it was thought that the liability should be extended beyond what the words "keep in repair," in their natural and obvious meaning would seem to imply. The powers of the municipalities to deal with obstructions are provided for in a different section and the construction placed upon the words, keep in repair, has always appeared to me to be an unnatural one. . . . In some respects this is a stronger case (than Maxwell v. Clarke, supra), as in that case the cordwood encroached upon the travelled part of the road." He then quoted with approval the words of Bigelow, C.J., Mass., given above. The corporation was held not responsible.

In Kirk v. Toronto, 1904, 8 O. L. R. at 739 C.A., Osler, J.A., points out the duty which exists upon persons bringing things calculated to frighten ordinary horses upon the highway without taking reasonable precautions to prevent accidents of such kind, and the municipal corporation was in that case held liable, but on the principle of Penny v. Wimbledon, 1899, 2 Q. B. 72 C. A. (See Independent Contractors, infra, p. 996).

A recent case is Colquhoun v. Fullerton, 1913, 28 O. L. R. 102, App. Div. The plaintiff's horse shied at a milkstand standing on the road allowance, but a foot or two south of the travelled portion. There was no evidence that the horse touched the stand. The corporation was at no time aware of the existence of the stand. It was contended that the position of the stand in such close proximity to the travelled portion of the highway created a condition of non-repair, and Rice v. Whitty, 25 A. R. 191, was cited. Mulock, C.J.O., said: "It was not necessary for the court to decide, and it did not decide by that judgment that such an obstruction where it merely frightens horses and thereby causes damage creates a condition of non-repair within the meaning of s. 606 (now 460). . . . On this point we are bound by Maxwell v. Clarke, 4 A. R. 460, and O'Neil v. Windham, 24 A. R. 341, and Riddell, J., expressed dissatisfaction with the reasoning in the last mentioned cases, but pointed out that it was for the legislature or a superior court to overrule them.

For liability of a third party in respect of objects brought on a highway or placed near it which frighten horses, See Forsythe v. C. P. R., 1905, 10 O. L. R. 78; McIntyre v. Coote, 1909, 19 O. L. R. 9; 13 O. W. R. 1098. An independent contractor is not relieved from liability by the fact that the corporation has otherwise negligently allowed the highway to get out of repair: Howarth v. McGugan, 1892, 23 O. R. 396. But servants of the corporation may be exonerated on the principle respondeat superior: McDonald v. Dickenson, 1897, 24 A. R. 31. See also Wilkins v. Day, 12 Q. B. D. 110.

Misfeasance and Non-feasance.—Want of repair may be due to misfeasance or non-feasance. In England, Nova Scotia, and New Brunswick, where the statutory duty to repair was merely transferred from a pre-existing authority or body not

liable for damages for mere non-feasance in respect of such a duty, municipal corporations have in like manner been held not to be liable in the case of non-feasance unless the statute transferring the duty has expressly or by necessary implication created such a liability: Russell v. The Men of Devon, 2 T. R. 667; Cowley v. Newmarket, [1892] A. C. 345; Pictou v. Geldert, [1893] A. C. 524, 63 L. J. P. C. 37; St. John v. Campbell, 1895, 26 S. C. R. 1; Montreal v. Mulcair, 1898, 28 S. C. R. 458; Vancouver v. McPhalen, 1911, 45 S. C. R. 194; McClelland v. Manchester, 1912, 81 L. J. K. B. 98.

In Ontario, Manitoba and the Western Provinces the municipal Acts give an action for default in performance of the statutory duty. S. 606, s.-s. 1 of The Municipal Act of 1897 was as follows. 606 (1) Every public road . . . shall be kept in repair by the corporation; and on default of the corporation so to keep in repair, the corporation besides being subject to any punishment provided by law, shall be civilly responsible for all damages sustained by reason of such default, but the action must be brought within three months after the damages have been sustained. This section was by a long line of decisions held to refer only to non-feasance: see Glynn v. Niagara Falls, 1913, 29 O. L. R. 521, 31 O. L. R. 1 C. A., and cases of misfeasance were held to lie beyond the statute and unaffected by the requirements as to notice and time of giving—now found in s.-s. 3 and 4 of s. 460.

In addition to the decisions as to the scope of s. 606 which led to many refinements as to the difference between misfeasance and non-feasance in 1896 by 59 Vict. c. 118, s. 5, an Act to amend the Judicature Act, it was provided that all actions against municipal corporations for damages in respect of injuries sustained through non-repair of highways should be tried by a judge without a jury. S. 5 was by many decisions held to refer only to cases of non-feasance with the result that there was much discussion of fine distinctions between misfeasance and non-feasance on applications to strike out jury notices. While the law stood in this position the distinction between misfeasance and non-feasance was of the utmost importance. See Denton, Municipal Negligence, p. 15 et seq.

S. 5, which became s. 104 of the Judicature Act, R. S. O. 1897, c. 51, s. 104, amended 5 Ed. VII. c. 22, s. 46, was finally held to apply to all cases in which the highway was out of repair whether the want of repair was due to misfeasance or to non-feasance: Brown v. Toronto, 1910, 21 O. L. R. 230. S. 104 is now s. 54 of R. S. O. 1914, c. 56, and now apparently all actions against a

municipal corporation by reason of default in keeping a highway or bridge in repair must be tried by a judge without a jury in the county which constitutes the municipality or in which it is situanted; see Holmested, Jud. Act, p. 214.

By 3 & 4 Geo. V. c. 43, s. 460, s.-s. 102, s. 606, s.-s. 1 of the Act of 1897, was redrafted and amended by providing that no action should be brought under s. 460, s.-s. 1, whether the want of repair was the result of misfeasance or non-feasance after the expiration of three months from the time the damages were sustained.

This amendment would seem to indicate that the action given by s. 460, s.-s. 1 is not to be confined to cases of non-feasance as has been the case in the past, and if this view be correct the notice of claim required by s. 460, s.-s. 4 must be given in all cases both of misfeasance and non-feasance.

On the other hand, if s. 460, s.-s. 1 is still to be confined to cases of non-feasance then cases of misfeasance lie entirely outside of the provisions of s. 460, s.-s. 4, as to notice of claim, and the distinction between misfeasance and non-feasance remains of great importance so far as the necessity for notice of claim is concerned. And if the action given by s. 460, s.-s. 1 is confined to cases of non-feasance, the nature of the liability in cases of misfeasance is to be determined in every case by a consideration of the statutory duty to repair and the consequences intended by the legislature when imposing that duty. From this point of view the statutory action mentioned in s. 460, s.-s. 1 and the notice of claim required by s. 460, s.-s. 3 are intended to fix the rights of persons injured by non-feasance, that is to deal with the class of cases in which there is no liability in England, Nova Scotia and New Brunswick, leaving cases involving misfeasance to be governed by the principles of construction generally applicable to statutes imposing duties.

Such general principles, however, involve a liability for non-feasance; see Baron v. Portslade, 1900, 2 Q. B. 588, 69 L. J. Q. B. 899, where a statutory duty to cleanse sewers was under consideration. The non-feasance rule was invoked in argument but was ignored in the judgment delivered by Lord Halsbury and concurred in by Smith and Vaughan Williams, L.JJ.; see remarks of Idington, J., in Vancouver v. McPhalen, supra, at p. 207 (a loose board case apparently treated as non-feasance), where he goes on to say: "The sooner the distinction between non-feasance and misfeasance as applicable to actions on a statute of which the plain language indicates it can be as grossly violated by an omission to do something as by doing a wrongful act forbidden by it, is discarded the better, and I would do it without resorting to metaphysical subtleties the ordinary mind cannot follow easily. The

distinction can and does find a proper field of operation in some statutes but not in this class so far as I can see." And in the same case Duff, J., said:—

"It might be stated broadly, I think, with the support of the great weight of authority, that the breach (by way of omission or nonfeasance) by a municipal body of a legal duty created by statute, gives rise to an action at the suit of an aggrieved individual where, (*a*) the default is of such a character as to be indictable, (*b*) the grievance suffered involves damages peculiar to the individual, (*c*) the damage suffered is within the mischief contemplated by the statute, and (*d*) where there is no specific provision excluding the remedy of action and the provisions of the statute as a whole, taken by themselves or read in the light of the history of the legislation, do not justify an inference that the legislature intended to exclude that remedy. In other words, I think the effect of the actual decisions is that where there is a legal duty having attached to it the sanction of indictment which has been created by statute and conditions (*b*) and (*c*) are present, then in general it rests with those who deny the remedy by action to point to something in the statute itself or in the circumstances in which it was passed indicating an intention to exclude the remedy. I think that is established by a series of decisions of high authority; but there are dicta of very eminent judges (I shall be obliged to refer to them more particularly) which appear to conflict with this proposition, and it will be sufficient to take a narrower ground, which is quite broad enough for the purposes of this case, and is, I conceive, demonstrably conformable both to the authorities and to most of the dicta referred to. The ground upon which I think the liability of the corporation may be put consistently with every relevant decision and with almost if not quite all the dicta I have seen, is this: where a municipal corporation acting under powers conferred by the statute creating it, constructs a work for use of the public, and invites the public to use it, the corporation having the ownership of and full authority to control the work, and to regulate the use of it by the public; and the statute creating the corporation in express terms imposes upon it the legal duty and at the same time gives it full authority to take all the necessary measures to prevent that work becoming a danger to the public making use of it in the exercise of their right, and owing to the unreasonable neglect of the corporation to perform this duty the work does become a public nuisance, then, in order to resist successfully a claim for reparation by one of the public who has suffered a personal

injury in consequence of the existence of the nuisance (while properly using the work in the exercise of the public right), the corporation must shew something in the statute indicating an intention on the part of the legislature that the remedy by action shall not be available in such circumstances."

The learned judge then proceeded to discuss the cases of which Cowley v. Newmarket, supra, is the leading example, and reaches the conclusion that they create an exception to the general rule, and decided that the reasoning on which they are based could not be resorted to in determining the extent of the liability of the Vancouver corporation, as the English common law rule under which the inhabitants of parishes through which highways passed were responsible for their repair, was never introduced into British Columbia. In the result the corporation was held liable.

The tendency in England is strictly to limit the classes of cases comprised within the non-feasance rule. Lord Halsbury, in the House of Lords, in Shoredich v. Bull, 90 L. T. 210, said "when the question is raised in a direct form it may be worth while to consider whether or not that which has been described as an act of non-feasance in several of the cases . . . may not be considered misfeasance."

In McClelland v. Manchester, 1912, 1 K. B. 118, 81 L. J. K. B. 98, where the corporation had opened up a street right down to a dangerous ravine and where as it happened there was another street which had been previously opened up on the other side of the ravine and in line with the new street, so that at night when lighted the two streets presented the appearance of a continuous street, and the plaintiff, a stranger, turning down the new street in a car plunged into the ravine, Lush, J., in giving judgment for the plaintiff, said:—

> "It was urged for the defendants that whatever duty they might be under they did not create the nuisance, namely, the unfenced ravine, and that what in fact caused this accident was an omission by the defendants to fence or to light or to warn or whatever it may be, that this was non-feasance and not misfeasance and that consequently the defendants were not liable. This, in my opinion, involves a misconception as to what is meant in law by non-feasance. The meaning of non-feasance in this connection and the reasons why a highway authority is not liable for non-feasance have been so often explained that it is not necessary to go in any detail into it. . . . If a highway authority, therefore, leaves a road alone and it gets out of repair, there is, of course, no doubt that

no action can be brought although damage ensues. But this doctrine has no application to a case where the road authority has done something, made up or altered or diverted a highway and has omitted some precaution which if taken would have made the work done safe instead of dangerous. You cannot sever what was omitted or left undone from what was committed or actually done and say that because the accident was caused by the omission therefore it was non-feasance. Once establish that the local authority did something to the road and the case is removed from the category of non-feasance. If the work is imperfect or incomplete it becomes a case of misfeasance and not non-feasance, although damage was caused by an omission to do something that ought to have been done. The omission to take precautions to do something that ought to have been done to finish the work is precisely the same thing in its legal consequence as the commission of something that ought not to have been done, and there is no similarity in point of law between such a case and a case where the local authority has chosen to do nothing at all."

"It is no doubt true that when a road is dedicated as a highway the public, or the road authority, if they accept it, take it as it is with all its defects. But if a road authority undertake a duty with regard to it, and make it up, and open it to the public as a made-up street, they must, in my opinion, exercise due care and have due regard to the safety of those who will use it. It is, I think, clear law that when a local authority undertakes and performs a duty, whether they are bound by statute to do so or whether they have an option to perform it or leave it unperformed, however it arises, they are bound to exercise proper and reasonable care in its performance, and that there is no difference in this respect between a public body and a private individual who does an act which, if carelessly done, may cause injury to others." Again: "They had general powers, permissive, not imperative, to make up any street within their district in the way they thought fit, and they were bound, as it seems to me, to act reasonably in the exercise of those powers."

In Masters v. Hampshire, 1915, 84 L. J. K. B. 2194, where a local authority allowed ditches made prior to its becoming highway authority to become overgrown with grass, and the plaintiff not seeing the ditch fell into it, a divisional court considered it a mere non-feasance. Bailhache, J., said: "If a highway authority, in the course of making or maintaining a highway, does something which is out of the normal course of things and does it imperfectly or does it so that it becomes a danger unless kept in a constant state of repair. in either case non-repair is treated as misfeasance. If, on the other hand, all they have done is to treat the road in a nor-

mal way and having done so have left it alone and the result is it gets out of repair, then this is non-feasance and the road authority is not liable." . . .

In Papworth v. Battersea (No. 2), 1912, 1 K. B. 583, C.A., a bicycle rider was injured in passing over a grating which was in fact dangerous even for a careful cyclist, although properly constructed in accordance with standard practice at the time it was made. The highway authority was held not to be negligent and not having discovered the danger, and not to be liable, though the work subsequently turned out to be dangerous. Pickford, L.J., in referring to the statement of the law given by Lush, J., in McClelland v. Manchester Corporation, 1912, 1 K. B. 118, said:—

"That seems to me to be an accurate statement of the duty of the local authority when carrying out its statutory powers. I do not think that a higher duty is imposed. I do not think that there is an absolute duty imposed of making the road safe. If the local authority do something which turns out to be dangerous, but in doing it exercise reasonable care and skill, in my opinion they are not responsible. In the course of making up this road the Wandsworth District Board had, in order to prevent the surface water from remaining on it, to make an escape for the water into the subjacent sewer. For that purpose they made a hole in the roadway and a gully for the water to pass through and they had then to make the road fit for persons to pass along it by placing a covering over the hole. Having exercised reasonable care and skill in doing that according to the best opinion prevailing at the time, in my opinion they are not responsible because the grating was found some years afterwards to be dangerous. If the state of things had been such that, as time went on, it became clear that the grating so placed was dangerous, and if the local authority who laid it or their successors allowed it to remain so, they might be responsible, because it might be said that they were negligent in not having altered it. Any such case as that has been negatived by the finding of the jury. That is sufficient to dispose of the case."

Children Injured on Highways.—If a child is injured by reason of the default of the corporation in keeping the highway in repair, his own contributory negligence does not debar him from recovering, as the doctrine has no application to a child of tender years. Sangster v. Eaton, 1893, 25 O. R. at 82 (affirmed in the C. A. and S. C.—see 21 A. R. 624, and 24 S. C. R. 708), Winnipeg Electric v. Wald, 1909, 41 S. C. R. at 439.

And the negligence of the mother or attendant in not taking reasonably proper care of the child will apparently not prevent recovery by the child. Sangster v. Eaton, supra, and Winnipeg Electric v. Wald, supra.

But a boy of five years may be guilty of contributory negligence if he does not take due care of himself which is to be expected of a child of that age—as for example, if in broad daylight he runs up against an obvious obstacle on the pavement of a street. Plantza v. Glasgow Corpn., [1910] S. C. 786, Ct. of Sess., Mews' Digest, 1910.

In Mangan v. Atherton, 1866, 35 L. J. Ex. 161, the defendant placed a crushing machine in a public market for exhibition, and

a child was injured by putting his fingers between the cog wheels while another child was turning the handle. Bramwell, B., said: "If the machine had been painted with poisonous paint and the plaintiff had sucked the paint would the defendant have been liable? Would it not have been the fault of those who allowed the child to be there unprotected?" This conclusion, apparently, is not in harmony with the latest decisions, see Cooke v. Medland, 1909, A. C. 229, 78 L. J. P. C. 76, where Lord Atkinson says that the authorities establish: "that public streets, roads and public places may not unlikely be frequented by children of tender years and boys of this character," and later his Lordship refers to the right of a boy or child to be on a public street as one of the public. So that apparently negligence by a person in charge of a child in permitting him to be unattended in a public street will not deprive a child of an action.

In Ontario, Falconbridge, J., thought that children using the street as a playground could not complain of a state of non-repair, but this view was not accepted by the Divisional Court, see Ricketts v. Markdale, 1899, 31 O. R. 180 and 610. In the D. C., Boyd, C., discussed at length the right of children to use highways.

"The judgment of my brother Falconbridge, who tried this case, is favourable to the plaintiffs' right to recover, except in one respect, viz., that the child who was killed had no right to be at play on the streets, and as to one so using the street, the municipality was under no obligation to repair or keep unobstructed.

"The decisions relied upon are some English, some American, and one Canadian, though none of them authoritatively decided the point as to our Court.

"The English cases are to be broadly distinguished from Canadian on historic grounds. The English highway is the outcome of dedication by private proprietors, who still remain owners of the soil, subject to the public right of easement; that is, a mere right to pass and repass. Hence it was held if the public right of way (= street or highway) be used by one for any purpose, lawful or unlawful, other than that of passage, he is a trespasser: Crompton, J., in The Queen v. Pratt (1855), 4 E. & B. at p. 868. That, probably, is to be modified, as stated by Esher, M.R., in Harrison v. Duke of Rutland, [1893] 1 Q. B. p. 146. But in Ontario there is no private proprietorship in the soil of public roads. The land, at first the waste land of the Crown, held for the beneficial use of the public, was, in course of settlement, surveyed so as to allocate road allowances, which became the streets and highways of the country.

"The freehold of these highways and 'public communications' remained in the Crown; jurisdiction and control over them was committed to the municipal councils, while the possession and enjoyment of them was vested in the municipality: see Mun. Act, ss. 532 (2), 599-601. Now, when possession is vested in the municipality, that means and embraces all the inhabitants of the locality included in the political corporation—men, women and children: Mun. Act, s. 2 (10), and s. 5.

"In England, the repair of public roads originated in immemorial custom, whereas, in this Province, the obligation is ascertained by statute, and so cast upon the local municipality. The measure of the duty to repair is to be found in the language of the Legislature.

"In American States the condition of the highway much resembles that which obtains in Ontario. But there are a few States where the legislation as to repairing streets is limited, so that the duty arises only for the benefit of travellers. The cases cited below are drawn from the Courts of these exceptional States.

"Whereas, in our law, the obligation is made to extend to all persons. Thus, R. S. O. c. 223, s. 606: 'Every public road, street . . . shall be kept in repair by the corporation, and on default . . . the corporation . . . shall be civilly responsible for all damages sustained by any person by reason of such default.' So in s. 608, the case of damages sustained by any person by reason of obstruction in the highway is provided for, and s. 612.

"When the course of legislation is regarded, it becomes manifest that while the primary purpose of the highway is for public travel and passage, yet there are many other modes of user which are recognized as permissible and legitimate, so long as public convenience is not interfered with.

"The Act to Regulate Travelling on Public Highways, c. 236, is not confined to travellers, but extends to other persons being upon the highway: see s. 4. Dogs and swine may be at large upon the streets, and so may drunk persons, if not disorderly: R. S. O. pp. 1899, 2549 and 2562.

"There may be retail selling, and crying and vending of small wares in the streets, p. 2594. Hotel runners and others may importune travellers; beggars and malformed persons may appeal for help in the streets: pp. 2602, 2607.

"In the matters foregoing there may be regulations or there may be restrictions according to local requirements, but the permission to be on the streets is assumed, unless the particular by-law prohibits.

"So, as to children; a child who is found begging or wandering about at late hours in any street, may be taken in charge by the constable: c. 259, s. 7. See also p. 3509. And children are not to be in the streets at nightfall if the municipality enacts the 'Curfew-bell' by-law: c. 259, s. 21. So it is recognized that children are in the habit of riding behind waggons, etc., and that they amuse themselves by coasting or tobogganing on the streets. I deduce the conclusion that children may play on the highways when there is no prohibitory local law, and where their presence is not prejudicial to the ordinary user of the street for traffic and passage."

See also Robinson v. Havelock, 1914, 32 O. L. R. 25 and Latham v. Johnson, 1913, 1 K. B. 398.

Unlawful Use of the Highway.—The owner of an unlicensed motor car has been held to have no right of action for injury occasioned to his car by a defect in the highway. In Greig v. City of Merritt, 1913, 24 W. L. R. 328, 11 D. L. R. 852; Etter v. City of Saskatoon, 1917, 3 W. W. R. 1110, 39 D. L. R. 1; Roe v. Wellesley, 1918, 43 O. L. R. 214, which cases apparently follow a line of Massachusetts cases ending with Koonsky v. Quellette, 1917, 226 Massachusetts, 474, which cites Dudley v. North Hampton Street R. W. Company, 1909, 202 Massachusetts, 443, 89 N. E. 25. In the latter case the Supreme Court of Massachusetts was called upon to construe the effect of a statute which provided that no automobile should be operated upon any public highway unless it was registered, etc. Dudley, the plaintiff in this action, was a resident of Connecticut. He has fully complied with the laws of Connecticut, and had a right to operate his machine on the highways of Massachusetts for a period not exceeding 15 days. After being in Massachusetts more than 15 days, Dudley's automobile collided with the defendant's trolley car. The Massachusetts Court held that Dudley was a trespasser against the rights of all persons lawfully controlling or using the public highways of Massachusetts. In Massachusetts there was a statutory prohibition against using the highways of that State with an automobile unregistered and unmarked.

In Connecticut the Supreme Court of Errors in Hemming v. City of New Haven, 1910, 82 Conn. 661, 74 Atl. 892, held that failure of an automobile owner to comply with an Act requiring automobiles to be registered and imposing a fine for failure to do so, did not prevent recovery against the city for injuries caused by driving into an excavation negligently left on the street. The Court distinguished Dudley v. North Hampton, *supra*, saying:

> "The statute relative to automobiles provides for the registering of automobiles and the placing of numbers on machines so registered. The penalty to any person having failed to register or display his number was not more than $100, or imprisonment not more than 30 days, or both. The plaintiff was violating the statute relating to the registering of automobiles, but that fact does not relieve the defendant. This statute imposed an obligation upon the plaintiff to register his automobile, and for its violation prescribed a penalty. The statute goes no further, and it cannot be held that the right to maintain an action for damages resulting from the omission of the defendant to perform a public duty is taken away because the person injured was, at the time his injuries were sustained, disobeying a statute law which in no way contributed to the accident.
>
> "A traveller with an unregistered and unnumbered automobile is not made a trespasser upon the street, neither did it necessarily follow that the property which he owned is outside of legal protection when

injured by the unlawful act of another. There is some real and more apparent conflict of opinion in the many cases treating of the relation between an illegal act and coincident injury. In doing an unlawful act a person does not necessarily put himself outside the protection of the law. He is not barred of redress for an injury suffered by himself, nor liable for an injury suffered by another, merely because he is a lawbreaker. In actions to recover for injuries not intentionally inflicted, but resulting from a breach of duty which another owes to the party injured—commonly classed as action for negligence—the fact that the plaintiff or defendant at the time of the injury was a lawbreaker may possibly be relevant as an incidental circumstance, but is otherwise immaterial unless the act of violating the law is in itself a breach of duty to the party injured in respect to the injury suffered. Monroe v. Hartford Street Ry. Co., 76 Con. 2061, 56 Atl. 500. The registration of the plaintiff's machine was of no consequence to the defendant. His failure to register and display his number in no way contributed to cause the injury. The accident would have happened if the law in this respect had been fully observed. The plaintiff's unlawful act was not the act of using the street, but in making a lawful use of it without having his automobile registered and marked as required by law. The statute contains no prohibition against using an unlicensed and unnumbered automobile upon the highways and streets of the State." See also Godfrey v. Cooper, 1920, 46 O. L. R. 565.

Breach of a Municipal By-law is not Negligence, Though it May be Evidence of Negligence.—Love v. Machray, 1912, 20 W. L. R. 505.

Nuisances to Highways.—It is an indictable nuisance to do any act which renders a highway dangerous or which obstructs the public in the lawful user thereof, and action will lie against the person causing the nuisance if brought by one who has sustained special damage.

A municipal corporation which causes a nuisance is liable in the same manner as any tort-feasor. The liability is not in any way dependent on the existence of a duty to repair the highway.

Where a condition amounting to nuisance results from acts done in the exercise of statutory powers or in the performance of statutory duties, special principles are applied which distinguish these cases from nuisances arising from illegal acts or from acts not done under the color of statutory authority. In the latter cases the question of negligence is not always material but in the former liability depends on negligence. This will appear from a consideration of the following cases.

The leading case on nuisances to highways is Bathurst v. McPherson, 1878, L. R. 4 App. Cas. 256, 48 L. J. P. C. 61. In this case the corporation, by reason of the construction of a barrel drain and of their neglect to repair it whereby a dangerous hole was formed which was left open and unfenced, caused a nuisance in the highway. "The ratio decidendi was that the defendants had caused a nuisance on the highway. It was entirely independent of the questions whether there was an obligation to keep the highway in repair and whether any person injured by the breach of such duty could maintain an action. The case was not treated

as one of mere nonfeasance and indeed it was not so. The defendants had created a nuisance. Having made the drain, and failed to keep it in such a condition that the road would not fall into it, they were just as much liable as if they had made the excavation without constructing the drain, and the road had consequently subsided and become founderous. If any person other than the defendants had lawfully made the drain, and the same result had ensued, such person would undoubtedly have been liable to an action just as much as if he had dug a hole in or placed an obstruction on the highway and his liability would have been the same whether the municipality were or were not bound to repair the highway. The owner of land adjoining an highway has been held liable to an action if he digs a hole so close to the highway as to create a nuisance to passengers lawfully passing along it. Why should the municipality be less liable than any other person in respect of the same acts merely because a road is vested in them and certain powers or duties in relation to its repair are committed to them? A study of other parts of the judgment . . . renders it clear that the decision did not in any way depend on the question whether the defendants were liable to an action in respect of the non-repair of the highway. . . ." See Discussion of Bathurst v. McPherson in Sydney v. Bourke, 1894, 64 L. J. P. C. at 144.

Another leading case which is much discussed in cases of nuisance to highways is the well known Rylands v. Fletcher, supra, which lays down the rule that 'although you are using your land in a non-natural way—that is to say although you have brought there beasts which you are bound to keep there—you are not liable for every consequence of the escape of those beasts, but you are only liable for what are called the natural consequences to the common knowledge of mankind.'

Per Farwell, L.J., in West v. Bristol Tramways Co., infra.

Rylands v. Fletcher was applied in Jones v. Festiniog Ry. Co., 1868, 37 L. J. Q. B. 215, where a railway company with no statutory powers authorizing them to use locomotives were held responsible for fires started by sparks from their locomotives.

There are exceptions to the rule in Rylands v. Fletcher, such as are shewn by Vaughan v. Taff Valley Ry., 29 L. J. Ex. 247, and The King v. Pease, 4 B. & Ad. 30. "In the latter case, the defendants were authorized by act of parliament to make a railway which ran by the side of a highway and by a subsequent act they were authorized to use locomotives upon the railway. Horses upon the highway were frightened by the locomotives but it was

held by the Court of King's Bench that the defendants were not liable to be indicted for a nuisance as the act of parliament had given unqualified authority to use the locomotives. In Vaughan v. Taff Valley Ry. Co. the principle was carried somewhat further. The company were expressly authorized under s. 86 of the Railway Clauses Act, 8 Vict. c. 20, to use locomotives and as a necessary consequence to carry fire along the railway, and the Exchequer Chamber decided that the case was an exception from the common law rule of liability. Cockburn, C.J., said, "Where the legislature has sanctioned the use of a particular means for a given purpose it appears to me that that sanction carries with it this consequence that the use of the means itself for that purpose (provided every precaution which the nature of the case suggests has been observed) is not an act for which an action lies independently of negligence." See remarks of Blackburn, J., in Jones v. Festiniog Ry. Co.

"It is now clearly established that under ordinary circumstances no action lies for injury occasioned by the exercise of statutory duty unless it has been negligently performed." Per Alverstone, C.J., in Lambert v. Lowestoft Corporation, 1901, 70 L. J. K. B. 333, citing Geddis v. Bonn Reservoir, 3 App. Cases 430 (H.L.)

West v. Bristol Tramways, 1908, 2 K. B. 14, 77 L. J. K. B. 684, is a late illustration of the application of the rule laid down in Rylands v. Fletcher and Jones v. Festiniog Ry. Co. The Tramways Company were authorized by their special act to "pave with wood" certain portions of their line. They used creosoted blocks and the fumes arising from the blocks injured the plants of the plaintiff, who was a market gardener. The defendants were held liable on the principle that where a statute enabling the defendants to do a certain work does not authorize the particular thing used to be used, there is a common law liability for damage caused thereby although there is no negligence. The principle resembles that of Rylands v. Fletcher, which in the view of Farwell, L.J., in West v. Bristol, is based on the cardinal underlying consideration of the non-natural user of land. While the plaintiff in West v. Bristol was an owner of land adjoining the highway would not the defendants have been liable on the same principle had the plaintiff suffered damage from inhaling the fumes of the creosote while using the highway?

In Roe v. Lucknow, 1894, 21 A. R. 1, the defendant corporation used a steam whistle for the purposes of their lawfully operated water-works which were situated alongside of a highway. The whistle which made a very loud, piercing noise, frightened the

plaintiff's horse. Osler, J.A., said—". . . the true ground of the defendants' liability in a case like the present is, that by placing and using on their own land something that was calculated to interfere with the convenient use of the adjoining highway they were guilty of a nuisance to the highway. Their liability cannot be placed on any higher ground than if they had done the act complained of on the highway itself . . . what the defendants have done is not primâ facie unlawful, there must be evidence of its dangerous character . . . before it can be said to be a public nuisance and that evidence is wanting here. . . . I think the plaintiff here fails also to shew that the use of the whistle on the occasion in question was a wanton or unnecessary act, done out of the usual course of business so as to bring the defendants within such cases as Manchester v. Fullarton, 14 C. B. N. S. 54; Stott v. Grand Trunk, 24 C. P. 347." Both Hagarty, C.J., and Osler, J.A., refused to apply the principle of Rylands v. Fletcher, L. R. 1 Ex. 265, 3 H. L. 330. But Maclennan, J.A., dissenting, applied Rylands v. Fletcher as explained in Jones v. Festiniog, supra, p. 733. He thought it could not be contended that the defendants had any statutory authority to use a steam engine or a whistle and that the defendants would have been liable if the sparks from their steam engine had set fire to a passing load of hay and could see no distinction between that case and the one at bar.

Apparently the distinction, according to Osler, J.A., was that fire is dangerous to the common knowledge of mankind while proof is required that a whistle is dangerous; see Farwell, L.J.'s, remarks about Rylands v. Fletcher, supra.

The liability of a municipal corporation for nuisance to a highway apart entirely from any question of statutory duty to repair, under s. 460, is illustrated in Sutton v. Dundas, 1908, 17 O. L. R. 556. The live wires of the Dundas Electric Company were directly beneath and about six feet lower than a fire alarm wire of the corporation of Dundas. The fire alarm wire broke away and fell across the live wire beneath, with the result that both were melted at the point of contact. The live wire in consequence fell to the ground and caused the instant death of the plaintiff's husband. The trial judge found that the fastening of the fire alarm wire was defective and insufficient and that the town corporation was guilty of negligence in allowing it to remain above the live electric wires defectively supported and also found that the Electric Company were guilty of negligence in allowing the fire alarm wire to remain over their wire which was imperfectly insulated without guards or other devices. Gloster v. Toronto El.

Light Co., 1906, 38 S. C. R. 27; Citizens Light v. Lepitre, 1898, 29 S. C. R. 1; Royal Electric v. Hévé, 1902, 32 S. C. R. 462, were applied, in all of which cases negligence was held to be a necessary element of the cause of action and the view adopted that persons transmitting electricity along a public highway (presumably by statutory authority) fall short of being insurers but are bound to exercise the greatest possible care and to use every possible precaution for the protection of the public.

In Glynn v. Niagara Falls, 1914, 31 O. L. R. 1, the defendants as part of their lighting system maintained on a highway an arc light which was lowered and raised by a chain attached to it. When the light was in position the chain hung down along the pole which supported the light to within four or five feet of the ground. Some months previous to the accident in question a person had leaned against the chain and received a severe shock and the city's lamp-trimmer was notified of the defective condition of the system at the point in question but the defect was not remedied. It was held that the defendants in causing such a dangerous condition were maintaining a nuisance upon the public street and Bathurst v. McPherson, as explained in Sydney v. Bourke, was applied.

Boyd, C., who tried the case, stated in giving judgment that he was impressed with the view that the danger in question was not a matter within the purview of the Municipal Act in the clauses relating to the liability to repair. And Mulock, C.J., on appeal held that the question was not one of non-repair but of nuisance, that there was negligence amounting to misfeasance, and Riddell, J., spoke of the negligence as misfeasance. Both Boyd, C., and Mulock, C.J., found that there was knowledge of the source of danger followed by neglect to take steps. The element of neglect in Bathurst v. McPherson in leaving the excavation after notice of its existence was mentioned in the judgment.

Areas.—A municipal corporation can under s. 483, s.-s. 3, permit owners to make and use areas, and by clause 6 of the same sub-section is made liable for any want of repair of the highway which may result from the construction, maintenance or use of such areas with a remedy over. As to the remedy over see s. 464.

Section 483, s.-s. 3 (b) adopts the construction placed on the corresponding provisions of c. 639 of the Act of 1897, which was given by the Divisional Court in Minns v. Omemee, 1902, 8 O. L. R. 508. An area when open should be guarded in such a way as to give a "reasonable assurance of safety," Homewood v. Hamil-

ton, 1901, 1 O. L. R. 266. The plaintiff in that case had defective eyesight and stubbed his toe on a doorstep adjoining the area and in consequence fell backward into the area, which was guarded merely by placing a keg at each corner of the opening. Rose, J., dismissed the action but his judgment was reversed by the Divisional Court and damages awarded against the city. The court cited with approval from the judgment of the Court of Appeal of New York, Davenport v. Ruckman and New York, 37 N. Y. 568, as follows:—

> "The streets and sidewalks are for the benefit of all conditions of people and all have the right, in using them, to assume that they are in good condition and to regulate their conduct upon that assumption. A person may walk or drive in the darkness of the night, relying upon the belief that the corporation has performed its duty and that the street or the walk is in a safe condition. He walks by a faith justified by law, and if his faith is unfounded and he suffers an injury, the party in fault must respond in damages."

The Divisional Court in Homewood v. Hamilton, supra, also cited with approval from Smith v. Wildes, 1887, 143 Mass. 556 as follows:—

> "The defendants caused a trap-door to be opened, leaving a hole in the sidewalk of a much frequented street and put up no rail, rope, or other barrier to keep persons from walking into the hole, and had nobody there whose special business it was to look out for and warn persons who might be approaching. Those who were at work there were there for the purpose of doing the work, and not for the purpose of warning passers-by. Under such circumstances the question of the defendants' negligence must be left to the jury."

In Minns v. Omemee, supra, an open area was left unguarded while being used at night. Boyd, C., in delivering judgment, said: "The whole trouble arose from the isolated act of the defendant's servants in taking in the barrel after dark without providing a light or guard on the street. This was not known to the municipality and it is not shewn they had the means of guarding against it." The learned Chancellor questioned the authority of Homewood v. Hamilton and stated that if bound by the latter case he would dismiss the action on the ground that it had not been brought within the time limited by the Act. In the Divisional Court the judgment of Boyd, C., was upheld. Meredith, C.J.C.P., in delivering the judgment of the Divisional Court, after discussing s. 639, s.-s. 3, and s. 606-610, corresponding to s. 483, s.-s. 3 and s. 460, as to the matters involved in the case, said:— ". . . as between the municipality and the appellants (the plaintiffs) the construction of the opening and the permission given . . . to maintain it did not relieve the respondents (the municipality) from their responsibility under s. 606 (now s. 460, s.-s. 1) to keep the sidewalk in repair and they remained answerable under the sec-

tion if it became out of repair owing to the negligence of Graham in the maintenance and user of the opening." The case was, however, not decided on this ground but on the ground that the liability of the corporation could not be greater than was declared or created by s. 606 (s. 460, s.-s. 1), and that as the action had not been commenced within the time limit it must be dismissed as against the corporation but not as against Graham. This, apparently, involved in effect a finding that the negligence of Graham was non-feasance, as to which see infra p. 952.

As to the general question of the liability of a municipality for the negligence of its licensee who makes an area or opening in the highway in jurisdictions which have no statutory provisions corresponding to 460, s.-s. 7, see remarks of Meredith in Minns v. Omemee, at p. 512, citing Bower v. Peate, 1876, 1 Q. B. D. 321, 45 L. J. Q. B. 446, where the rule is laid down that

"A man who orders work to be done from which in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief and cannot release himself of his responsibility by employing some one else, whether it be the contractor employed to do the work from which the danger arises or some independent person, to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted."

In Bower v. Peate the Queen's Bench Division referred to and followed Pickard v. Smith, 10 Com. B. N. S. 470, where the plaintiff fell into a cellar opening left open by the negligence of a coal dealer's servants, and the owner of the cellar was held liable: and to Gray v. Pullen, 34 L. J. Q. B. 265, where there was a statutory duty on the defendant to make a road good and he had employed an independent contractor to open a trench across the road and to restore the road. The defendant was held responsible. See also Tarry v. Ashton, 45 L. J. Q. B. 260, where defendant had a lamp hanging over a highway and employed a contractor to keep it safe. From these authorities it would appear that making an opening in a highway is a work of the kind referred to in Bower v. Peate. The contrary view has been generally held in the United States, see Elliot on Roads, 2nd ed., p. 634 and cases there cited.

Obstructions and Excavations Made by Strangers.—In O'Neil v. Windham, 1896, 24 A. R. 341, a horse took fright at a pile of ties piled on the roadside. There was no contact with the obstruction. The municipality was held not liable, see title "Shying horses." Burton, C.J.O., said: "I have more than once expressed my regret that it had not been left to the Legislature to define the subjects for which municipalities should be liable, if it was thought that liability should be extended beyond what the words "keep in repair" in their natural and obvious meaning would seem to imply. The powers of the muni-

cipality to deal with obstructions are provided for in a different section and the construction placed upon the words "keep in repair" has always appeared to me to be a very strained and unnatural one."

In O'Neil v. Windham the court considered itself bound by Clark v. Maxwell, 1879, 4 O. A. R. 460, which decision both Barton C.J.O., and Osler, J.A., did not fully approve of. These cases are probably to be confined to damage resulting from horses shying where damage is not caused by contact with the obstruction.

The general rule, though unsatisfactory, as pointed out by Barton, C.J.O., is that the words "keep in repair" have been held to involve a duty on the part of the corporation in the case of obstructions or excavations made by strangers against the will of the municipality and tortiously to it when such render the highway out of repair.

"A town is not liable for every object which renders a way unsafe or inconvenient for travellers to pass over it; but only for such as not only render the way unsafe and inconvenient but also defective or out of repair; and the injury must be attributable to the defect or want of repair." Kingsbury v. Dedham, 13 Allen. 186 (Mass.), adopted by the Ontario Court of Appeal in the following language: "The language used in these judgments as well as the decisions themselves are entirely pertinent to the case before us and in accord with what we conceive to be the proper construction of our statute." Patterson, J.A., delivering the judgment of the Court in Maxwell v. Clarke, 1879, 4. A. R. at 470.

In Atkinson v. Chatham, 1899, 26 A. R. 521, where a telephone pole stood for several years eleven and one half feet from the centre line of a sixty-six foot street with the knowledge of the corporation, Maclennan, J.A., ruled that they must be held liable for the accident unless they could shew that it was placed and maintained where it stood by competent authority, and Moss, J.A., thought the presence of the pole constituted a want of repair of the highway for which the defendants were responsible. The Supreme Court reversed the decision but on another ground, 31 S. C. R. 61.

In Kelly v. Whitchurch, 1905, 11 O. L. R. 155, 12 O. L. R. 83, D. C., Mabee, J., found that the highway was out of repair in that piles of logs were lying for some distance strewn over the road allowance and that the particular pile that caused the injuries extended out to within a few feet of the beaten road. The council was shewn to have had full knowledge of the condition of affairs. The contention of the defendants that the highway was not out of

repair because there was an open space between the logs was overruled and damages were awarded. The D. C. upheld the judgment.

In Howse v. Southwold, 1912, 27 O. L. R. 29, the plaintiff sustained injuries by coming in contact with a telephone pole placed upon the highway without authority. Middleton, J., said: "I have not been referred to any case which would justify me in holding that mere failure to remove an obstruction placed upon the highway by a third person constitutes misfeasance . . . I rest my decision entirely upon the ground that there is no liability on the part of municipalities arising from the placing of obstructions on the highway by third parties, save the liability arising from failure to repair imposed by s. 606" (now s. 460). On appeal to the Divisional Court the reasons given by Middleton, J., were approved. Britton, J., said: Even if express notice or knowledge could not be established, the pole was there for so long a time that notice and knowledge would be implied." And he added that the liability was for non-repair, not a liability for the act itself or placing the pole on the highway. The action was dismissed on the ground that there was no misfeasance and that the action was barred by the three months' limitation.

460.—(2) No action shall be brought against a corporation for the recovery of damages occasioned by such default, whether the want of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained. 3 Edw. VII. c. 19, s. 606 (1), *part amended*. 3 & 4 Geo. V. c. 43, s. 460 (2).

The defence that the action is barred must be pleaded. Consolidated Rules, S. C. O. 1913, s. 143, and apparently the section should be specified: Dodge v. Smith, 1901, 1 O. L. R. 46.

The Time when the Damages were Sustained.—"If as the result of an act done to-day damage results a year later, the cause of action arises not at the date of the act but a year later, when the damage results. No cause of action arises from the act if it at that date created no damage. The right of action arises not from the act, but from the resulting of damage from the act. . . . There is, however, a further case . . . namely, a continuing act which produces subsequently from day to day a recurrent damage. There is thus created within the principle which I have stated a fresh cause of action every day." Per Buckley, J.: Harrington v. Derby Corporation, [1905] 1 Ch. 206; 74 L. J. Ch. 230.

'A damage inflicted once for all which continues unrepaired,' must be distinguished from 'a new damage recurring day by day in respect of an act done it may be for once and for all at some prior time, or repeated, it may be, from day to day.' *Ibid.* "For one cause of action all damages

incident to it must be recovered once and once only; so that if, for instance, by the removal of the soil the defendant causes the walls of a house to crack, the plaintiff's cause of action is one and one only, and that none the less because the house does not all at once shew all the damage done to it, but manifests subsequently by degrees that damage had been done." *Ibid.* A continuing cause of action is where there is 'a new damage recurring day by day.' In the latter case the action must be brought within three months after the last damage was sustained. The damages recoverable will be only such as are sustained by reason of damage or injury suffered within the period of three months or such portion of the period as had elapsed at the time the action was commenced. The full extent of the damage may not be disclosed till later, but the damages awarded will be based on the possibility of such disclosure as in the case of the house mentioned above.

Continuing Damage.—Non-repair of a bridge giving rise to special damage. Recovery only for period not barred: Noble v. Turtle Mountain, 1905, 15 M. R. 519.

The public Authorities Protection Act, 1893, 56 & 57 Vict. c. 61, s. 1 (*a*) (Imp.), is as follows:—

(*a*) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof. Under this provision Buckley, J., thought the plaintiffs could recover for a greater period than six months and up to the period of six years limited by the Statute of Limitations: Harrington v. Derby, supra, p. 231. (An action for damages for pollution of river by sewage.)

In Strang v. Arran, 1913, 28 O. L. R. 106 A.D., there was continuing damage by reason of the non-restoration of a bridge. The plaintiff was awarded damages for three months less one day.

Three Months.—This means three calendar months. The Interpretation Act, R. S. O. 1914, c. 1, s. 29 (*a*).

There is no power to extend the time fixed by statute, and where the time ends on Sunday the party has no further time to do the act unless the statute expressly provides that it may be done on the following day: McLean v. Pinkerton, 1882, 7 A. R. 490, at 495.

After the Expiration of.—The day on which the damages were sustained must be excluded in the computation of the time: Goldsmiths Co. v. West Metropolitan, 1904, 1 K. B. 1; 72 L. J. K. B. 931, C. A. It is therefore immaterial during what time of the day the damages were sustained, because the law in such a case takes no notice of a part of a day. Ibid.

Misfeasance or Non-feasance.—See notes to s.-s (1), supra.

460.—(3) Except in case of gross negligence a corporation shall not be liable for a personal injury caused by snow or ice upon a sidewalk. 3 Edw. VII. c. 19, s. 606 (2), *amended.* 3 & 4 Geo. V. c. 43, s. 460 (3).

Gross Negligence.—This has been defined to mean very great negligence: Kingston v. Drennan, 1896, 27 S. C. R. 46.

In snow and ice cases the effect of unusual weather in bringing about the dangerous condition resulting in the injury is the usual line of defence. See Snow and Ice, supra.

Snow and Ice on Sidewalk. Gross Negligence.—Two questions arise in the cases: (1) Was a proper system of dealing with snow and ice on sidewalks provided? and (2) Was there gross negligence on the part of civic employees in not carrying out the system? *What is a proper system?* In many Ontario cities the duty of dealing with snow and ice so that the

sidewalks on which their property fronts shall be kept passable and reasonably safe for pedestrians, is imposed on property owners. In other cities the corporation undertakes to perform the work itself, and the system adopted is to remove the snow by horse-drawn plows, and to deal with the danger from slippery surfaces by harrowing them or sanding them. When a winter thaw is followed by frost at night with the result that miles of street are rendered slippery and dangerous, during the period between six and seven o'clock on the following morning, difficult questions of fact arise. See German v. Ottawa, 1917, 56 S. C. R. 80

The question whether there is gross negligence must depend upon: (1) notice of the existence of a dangerous condition, which the city authorities actually had, or which should be imputed to them; (2) their opportunity of remedying it; (3) the state of the weather immediately prior to the accident; (4) the relative situation of the place where the accident occurred. See remarks of Anglin, J., in German v. Ottawa, 1917, 55 S. C. R. 80, where there has been a thaw followed by a drop in the temperature during the night with the result that miles of sidewalk are in a dangerous condition.

Personal Injury.—This is in contrast with injury to property or interference with rights of access or other rights.

(4) No action shall be brought for the recovery of the damages mentioned in sub-section 1 unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered post to the head or the clerk of the corporation, in the case of a county or township within thirty days, and in the case of an urban municipality within seven days after the happening of the injury, nor unless where the claim is against two or more corporations jointly liable for the repair of the highway or bridge, the prescribed notice was given to each of them within the prescribed time.

(5) In case of the death of the person injured, failure to give the notice shall not be a bar to the action, and, except where the injury was caused by snow or ice upon a sidewalk, failure to give or insufficiency of the notice shall not be a bar to the action, if the court or judge before whom the action is tried is of the opinion that there is reasonable excuse for the want or insufficiency of the notice and that the corporation was not thereby prejudiced in its defence. 3 & 4 Geo. V. c. 43, s. 460 (4-5).

The first requirement as to notice was inserted in the Municipal Act in 1894 by 57 Vic. c. 50, s. 13, which provided that notice of the accident and the cause thereof should be served within thirty days in all cases, but did not contain the provisions now found in sub-section 5 as to want or insufficiency of the notice.

In 1896 by 59 Vic. c. 51, s. 20, an amendment was made which provided that the notice should be given within seven days when the claim is against a city, town or incorporated village.

In consequence of Leizert v. Matilda, 1897, 29 O. R. 98; 1899, 26 A. R. 1, in 1899 by 62 Vic. (2), c. 26, s. 39, there was added the provision now found at the end of sub-section 4 as to claims against municipalities jointly liable.

The provisions of these sub-sections appear in almost their present form for the first time in 1903, 3 Edw. VII. c. 19, s. 606, at which time the provisions now found in sub-section 5 first appeared.

In the consolidation of 1913, 3 and 4 Geo. V. c. 43, s. 460, the sub-sections appear in a re-drafted and amended form, the principal change being that the words "notice of the accident and the cause thereof" were struck out and the words "notice of the claim and of the injury" inserted.

The sub-sections as passed in 1913 were carried forward without change into the Revised Statutes of 1914, in the form given above.

Similar Legislation.

ENGLAND.—The Public Health Act, s. 264, and The Metropolis Local Management Act, s. 106, both provided for notice of action to be given to Local Government Authorities. Both these sections were repealed by the Public Authorities Protection Act, 1893, s. 1 (d), which provides that if a successful plaintiff has not given the public authority an opportunity to offer amends the public authority may be awarded costs as between solicitor and client against him.

NOVA SCOTIA.—The Municipal Act and the Towns Incorporation Act each require notice of action to be given to municipal officers where an intended action is to be brought in respect of acts done under the statute. Notice to municipalities themselves is not necessary except where required by special Act as in the case of the City of Halifax.

NEW BRUNSWICK.—The Municipalities Act and The Towns' Incorporation Act have similar provisions to those in the Nova Scotia Acts. See Christie v. St. John, 1892, 30 N. B. 492; 21 S. C. R. 1, where an unsuccessful attempt was made to hold that notice to a municipality was necessary.

MANITOBA.—The Municipal Act prior to 1907 required notice of the "claim or action" to be given to the municipality. By 7 and 8 Edw. VII., c. 27, s. 11, notice of the action and cause thereof within seven days is required and provisions were added similar to the Ontario provisions as to the want or insufficiency of the notice.

SASKATCHEWAN.—The Rural Municipality Act and The Village Act both require notice "of action" to be given within one month. The Town Act and The City Act contain no requirements as to notice.

ALBERTA.—The Town Act and The Rural Municipality Act both require notice "of the accident" to be given within one month, and contain provisions similar to the Ontario provisions as to the want or insufficiency of the notice.

BRITISH COLUMBIA.—The Municipal Act requires notice "setting forth the time, place and manner in which damage has been sustained," to be left and filed with the municipal clerk within two calendar months and contains provisions similar to those of the Ontario Act as to want or insufficiency of the notice.

OTHER SIMILAR LEGISLATION.—Municipal Acts in the United States and many private Acts in all jurisdictions require notice of action to be given.

Notice a Condition Precedent.—The giving of a proper notice is a condition precedent to the right to bring an action under sub-section 1 unless the want or insufficiency of the notice is excused in accordance with the principles set out below: Egan v. Saltfleet, 1913, 29 O. L. R. 116 at 118 App. Div. Notice is not necessary except in the case of an action under sub-section 1 for damages. Thus an action for an injunction for breach of the duty imposed by sub-section 1 could be brought without notice. Flower v. Low Leyton Local Board, 1877, 5 Ch. D. 347, 67 L. J. Ch. 621 C. A., decided under s. 264 Public Health Act.

If a right of action exists against the municipality apart from sub-section 1, no notice is necessary: McCarthy v. Vespra, 1895, 16 P. R. 416; The Public Authorities Protection Act, R. S. O. 1914, c. 89, s. 17; Scottish v. Toronto, 1896, 24 A. R. 208.

It was the practice in England before the Judicature Acts to set up in the declaration the giving of the notice of action where such notice of action was required to be given, and while under English order XIX, Rule 14, Ontario Rule 146, neither party need allege the performance of any condition precedent as the averment is implied, the safer course to follow will be to set up the giving of the notice required by the statute in the Statement of Claim and to give evidence at the trial proving the giving of the notice.

Giving of a notice of action was set up in the declaration in Kent v. Great Western Railway, 3 C. B. 417. In the Irish case Lawrenson v. Hill, 10 Ir. C. L. R. 498, in an action against a justice of the peace for acts done in the execution of his office, it was held that the proof of notice is a necessary part of the plaintiff's case and must be given by him though the want of it is not relied on in the pleading by the defendant.

If notice has not been given or if an insufficient notice has been given and the circumstances are such as to lead the plaintiff to believe that he is warranted in bringing his action notwithstanding such want or insufficiency, the Statement of Claim should strictly speaking disclose the facts on which the plaintiff intends to rely and these should be proven as a part of his case. In prac-

tice, however, the pleader frequently says nothing about the notice in the Statement of Claim and if the defendants do not set up want or insufficiency of the notice the plaintiff will then plead the excuse in reply. This course technically amounts to a departure. See Bullen and Leake, 1905, p. 157, and 1915 ed., 122-123.

Want or insufficiency of notice of action must be pleaded by the defendants. The Judicature Act, R. S. O. 1914, c. 56, Rule 143; Verrett v. McAuley, 1884, 5 O. R. 313; Bond v. Conmee, 1889, 16 A. R. 398; Coutlee's S. C. Dig. 806-807; Longbottom v. Toronto, 1896, 27 O. R. 198.

Contents of the Notice. — Since the amendment of 1913 notice must be given "of the claim and of the injury." Prior to that time the Statutes required notice "of the accident and the cause thereof." The amendment was in part, no doubt, due to the decision of the Divisional Court in Strang v. Arran, 1913, 28 O. L. R. 106, where an action was brought for damages sustained by reason of default under sub-section 1 which did not arise from accident. The Court held that notice was not necessary.

Ever since the consolidation of 1903, the marginal notation "notice of action" has appeared. In Bushnell v. Hammond, 1904, 73 L. J. K. B. 1005 C. A., the court looked at a side-note in order to understand properly the provisions of a sub-section. Collins, L.J., said: "The side-note, also, though it forms no part of the section, is of some assistance inasmuch as it shews the drift of the section." The side-note may shew the subject matter with which the section deals. The use of the term "action" in the side-note and the term "claim" in the body of the section throws light on the meaning to be given to "claim" and has a bearing in determining what constitutes a sufficient notice.

(a) **Claim.**—The term "claim" is defined by Webster "as a demand made of right or supposed right; a calling on another for something due or supposed to be due, as a claim for wages or services."

In the Manitoba Municipal Act before the amendment of 1907 the word "claim" was used as synonymous with "action" and notice of the claim or action was required.

In Iveson v. Winnipeg, 1906, 16 M. R. 359 C. A., will be found a full discussion of the essential elements of such a notice of claim, and in view of the similarity now existing between the Manitoba and Ontario Statutes the Iveson case may be found to

throw more light on the essential contents of the notice so far as "claim" is involved than the Ontario decisions before the amendment of 1913.

In the Iveson case the contents of the notice of claim were determined by reference to the nature of the claim as revealed by the principal sub-section. "Such claim is the right to damages sustained by any person by reason of the default of the corporation in keeping the highway in repair . . . the plaintiff must notify the defendants that he has a claim for damages which he has sustained because of the default of the defendants in keeping the highways of the city in repair." Per Howell, C.J.M., Iveson v. Winnipeg, supra.

"All that is essential in the notice is that it should be sufficiently clear and explicit to shew the ground of complaint—the cause of action. . . . The first objection to the notice is that the date of the accident is not given. To this it may be answered that the statute does not require in express terms that a date shall be given. . . . The statute does not in words call for any degree of clearness or exactitude in the form or contents of the notice. It appears to me that if the notice contains facts and details sufficient to reasonably inform the officers of the corporation of the nature of the claim and who is bringing it so as to enable them to make investigation, it would be sufficient." Per Perdue, J.A., Iveson v. Winnipeg, supra.

In Mitchell v. Winnipeg, 1907, 17 M. R. 166 C. A., 6 W. L. R. 35, Richards, J.A., said: "The notice, I think, is sufficient but I arrive at this conclusion with some hesitation. It is not a notice of action but it may be treated as a notice of claim although its wording is rather that of a request than of a demand."

Under a Maine statute requiring a written notice of "a claim for damages," it was held that the statute fairly implied that the amount of the claim should be stated on the ground that if it were small the corporation might prefer to pay it rather than have a contest, and if extravagantly large they might want to investigate. Lord v. Saco, 32 Atl. 887, 87 Me. 231.

Amount was held necessary under a similar provision in Iowa. Marsh v. Banton County, 39 N. W. 713, 714, 75 Iowa 469.

On the contrary, in Rhode Island it has been held that the notice need not state the amount claimed.

In Iveson v. Winnipeg the plaintiff was allowed to recover a greater amount than the amount stated in the notice.

It would follow as a logical consequence that the Manitoba Court of Appeal do not consider it essential for the amount of the claim to be stated.

The place where the injury was sustained should be stated with sufficient particularity to enable the defendants to locate the scene of the accident and if this is done a mistake is immaterial. Iveson v. Winnipeg, supra.

In Jones v. Bird, 5 B. & Ald. 845, 24 R. R. 585, Bayley, J., held that a notice of action did not require the same precision as a declaration and was sufficient if it called the attention of the defendants to the general nature of the injury so that they might go to the scene and see what the ground of complaint was; and Best, J., added that the object of the notice was to give the defendants an opportunity to tender amends and ought not to be scanned very closely. In Smith v. West Derby, L. R. 3 C. P. D. 423, 47 L. J. C. P. 607, Grove, J., said that a notice of action was not required to be framed with the strict formality of a pleading. See argument of counsel in Madden v. Kensington Vestry (1892), 1 Q. B. 614, 61 L. J. Q. B. 527. In that case Denman, J., said, speaking of a notice under s. 106 Metropolis Local Management Act: "Where the place mentioned in the notice as in the case before us is not calculated to and does not mislead, I cannot consider any ground for non-suiting the plaintiff has arisen. Here it appears that the gird in question was at a point in the Uxbridge road within twenty feet of Silver Street; and it certainly cannot be considered to be an outrageous description even if it were described as being Silver Street. To hold that this notice would put the Local Board in a difficulty is absurd; the place has been named in such a way that it is impossible they could be misled by it although it is not stated with absolute correctness."

The Privy Council in Union Steamship Co. v. Melbourne Harbour Commrs., 1884, 9 A. C. 368, 53 L. J. P. C. 59, discussed the essentials of a notice given under an Act which required the notice to "clearly and expressly set forth the nature of the intended action and the cause thereof," and held that the notice in question did not clearly and explicitly set forth the cause or nature of the action though it enumerated certain facts of the accident in question. Counsel cited Smith v. West Derby and Jones v. Baird, and Sir Robert Collier giving the judgment of the court said: "Some cases have been quoted for the purpose of shewing that notices of action are not to be construed with extreme strictness, a rule to which their Lordships subscribe."

A claimant gave May 7th as the date instead of May 6th, but mentioned circumstances which fixed the time. His notice was held sufficient. Street, J., said: "In my opinion the notice . . .

should state the time and place of the accident with reasonable particularity so as to identify the occasion and so long as no mistake is made in either of these matters of a nature calculated to deceive or mislead the corporation to its prejudice the notice will not be vitiated": McInnis v. Egremont, 1903, 5 O. L. R. at 715. See also Green v. Holt, 51 L.J.Q.B. 640; Langford v. Kirkpatrick, 1876, 2 A. R. 513.

Objection was taken to a notice of accident as insufficient as it described the accident as having taken place opposite C.'s store when in fact it was opposite T.'s shop. McMahon, J., said. "It is not necessary under the statute to mention the exact locality . . . reasonable information as to locality so as to enable the corporation to investigate is all that can be called for": McQuillan v. St. Mary's, 1899, 31 O. R. 401.

Notice not specifying precise part of highway held good: Young v. Bruce, 1911, 24 O. L. R. 546 D. C.

(b) **Injury.**—It is now necessary to give notice of the injury. This means particulars of the harm actually suffered by the person making the claim or done to his business, property or rights. The purpose of this statement is to enable the defendants to prepare a defence as to the quantum of damages sustained.

Under a statute requiring a specification of the nature of the injuries a notice which merely stated that a horse was greatly injured was held to be utterly defective: Lord v. Saco, supra.

The New Hampshire statute which closely resembles the Ontario statute, requires a statement giving a description of the injury, the extent thereof and the damages claimed. The object of the statement is to enable the town authorities to investigate the alleged defect in the highway and the extent of the injury sustained by the traveller: Noble v. Portsmouth, 30 Atl. 419. In this case a greater sum was awarded than the amount mentioned in the statement.

An informal letter which leaves it open to conjecture what legal proceedings were in contemplation and against whom they were to be brought is not a sufficient notice of action: Lewis v. Smith, Holt N. P. 27; Union Steamship v. Melbourne, 9 A. C. 565.

A conditional notice is insufficient: Norris v. Smith, 10 A. & E. 188, 50 R. R. 374; Walker v. Halifax, 4 R. & G. 371, N. S. R. 16, 371, [1893] A. C. 530.

A notice on behalf of two persons, one of whom proved to be dead, was held insufficient: Pilkington v. Riley, 3 Exch. 739.

A notice was given duly and action was commenced and discontinued and a new action brought. The notice was held sufficient: Jones v. Simpson, 1 C. & J. 174.

Where a statute simply requires a notice of action a notice in general terms will be sufficient: O'Brien v. Halifax, 19 N. S. 393.

Signature by the claimant has been held unnecessary: Curle v. Brandon, 1905, 15 M. R. 122.

Plaintiff not described as administratrix though such in fact not fatal: Curle v. Brandon, supra.

The fact that a notice may turn out to contain allegations which cannot be substantiated cannot affect the validity of the notice as a statutory notice. Per Kennedy, L.J.: Jolly v. Brown, 1914, 2 K. B. 120 at 130.

A notice may probably be given in several documents if the references made are such as to incorporate them as one notice.

An injured man gave verbal particulars of the injury and of its cause to an officer who wrote it down and made a report of it to the company. Within the time limit the plaintiff's solicitor applied in writing for compensation for the injury adding, "particulars of which have already been communicated to your superintendent." The Court of Appeal held that the solicitor's letter did not refer to the report by the superintendent in terms sufficient to incorporate its contents and upheld non-suit: Keen v. Millwall Dock, 1882, 8 Q. B. D. 482.

Continuing Damage. See Strang v. Arran, 28 O. L. R. 106; Noble v. Turtle Mountain, 1905, 15 M. R. 514, 2 W. L. R. 144.

Summary.—In giving notice of the claim and the injury the following should be stated:—

1. Name of the claimant;
2. A definite claim for a sum as damages;
3. Names of all municipal corporations held responsible;
4. Time when damage sustained;
5. Place where sustained;
6. Particulars of the injury suffered whether to the person, rights, business or property, and extent of same.

Time, place and amount are probably non-essential. The essentials are facts and details sufficient to inform the defendants of the nature of the default, the person injured thereby, the name of the claimant, the names of the corporations liable, the extent of the injury suffered, so as to enable investigation to be made, together with a definite claim for damages.

CAUTION.—In jurisdictions which require notice of "action" the notice should contain a definite unconditional statement that action will be brought and the names of the proposed defendants in addition to the particulars mentioned above and other special statutory requirements should be carefully complied with.

TIME.—Within thirty days after, means within thirty consecutive periods of twenty-four hours each from the time of the day when the accident happened: Cornfoot v. Royal Exchange Assn., 1904, 1 K. B. 40 C. A.; Yeoman v. The King, 1904, 2 K. B. 29 C. A.

PROOF.—The production of the notice served and proof of service thereof will be the best evidence. Apparently if original copy is retained and given in evidence by the person making the service, its production will be accepted on the same principle that a copy of a notice to produce is admitted. Service should be made strictly as required by the statute.

If the notice actually reaches the proper officer in time it will be sufficient: Mitchell v. Winnipeg, 1907, 17 M. R. 166 C. A.

Where a plaintiff failed to give any proof of notice of action beyond a minute of the City Council stating that a letter from the plaintiff's solicitor claiming damages had been read before the council and a notice to defendants to produce the letter had not been complied with. Held that plaintiff could not succeed for want of sufficient notice of action: Robinson v. Halifax, 11 N. S. R. 375.

Want or Insufficiency of the Notice.—It is important that all the essentials should be included in the notice and that the notice should be given within the statutory time. If the notice is not given in time or is insufficient, two conditions must be fulfilled before the plaintiff can succeed, firstly, there must be a reasonable excuse for the want or insufficiency of the notice and, secondly, the corporation must not have been prejudiced in its defence. This double requirement is a very onerous one, but the legislature has not seen fit to dispense with it in spite of repeated comment by the courts. See Egan v. Saltfleet, 1913, 29 O. L. R. 166, App. Div.

"The fact that the corporation is not prejudiced in its defence does not excuse the plaintiff's inaction unless some reasonable excuse is made to appear." Per Boyd, C., Anderson v. Toronto, 1908, 15 O. L. R. 643, 11 O. W. R. 338.

There has been some question as to whether or not the statute leaves it to the discretion of the trial judge to decide whether or not reasonable excuse exists and whether or not the defendants have

not been prejudiced. It has been definitely settled that there is an appeal from the trial judge's finding. Sedgewick, J., in Kingston v. Drennan, 1897, 27 S. C. R. 46, at 61 Rob. & Hugg, p. 53, dealing with an appeal from a finding by the trial judge that want of notice was excused, said: "The rule is universal, however, that when the statute gives a judge discretion to do a particular thing, his decision will not be interfered with by an appellate court unless he has made a palpable mistake or has acted on an erroneous principle." But note that the wording of the sub-section has since been changed and see the remarks of Meredith, J., in O'Connor v. Hamilton, 1904, 8 O. L. R. at 399, Mulock, C.J.Ex., in Morrison v. Toronto, 1906, 12 O. L. R. 333 at 340.

In Pipher v. Whitchurch, 1917, 39 O. L. R. 244, App. Div., the question came up as to whether or not sufficient notice has been given. The judgment of the Appellate Division was applied by Meredith, C.J.O., who said as follows:—

"The liability of the appellant for the consequences of the accident having been established in the Linstead case, the only question remaining is as to whether this action must fail because, as is contended, the prescribed notice of the accident was not given to the appellant. That ground of defence is based on the provisions of sub-sec. (4) of sec. 460 of 3 & 4 Geo. V., ch. 43, now sec. 460 of ch. 192 of R. S. O. 1914. The sub-section provides that 'no action shall be brought for the recovery of the damages mentioned in sub-section 1, unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered post to the head or clerk of the corporation in the case of a county or township within thirty days . . . after the happening of the injury. . . .'

"The respondent contends that the notice required by the sub-section was given; but that, if it was not, or if the notice was insufficient, it should be held that there was reasonable excuse for the want or insufficiency of the notice, and that the appellant was not thereby prejudiced in its defence (sub-sec. (5)).

"It was omitted on the argument that the person in charge of the engine was killed as a result of the accident, and that due notice in *writing* of the claim of his personal representative and of the injury complained of was given by the personal representative within thirty days after the happening of the accident. The Reeve of the municipality was informed of the accident, and visited the scene of it on the morning after the accident happened, and he then learned of the injury that had been done to the respondent's engine, of the death of the person who was in charge of it, and that the injury and death had been caused by the collapse of the bridge.

"No formal notice in writing of the respondent's claim or of the injury complained of was served within thirty days of the happening of the injury; but, on the 20th August, 1913, and within the thirty days, a letter was written by Charles A. Thompson & Company to the Reeve informing him that Thompson & Co were instructed to look after the respondent's engine and have it tested to 250 lbs.; that that had been done, and it was now in proper running order, and that they enclosed 'an account of all repairs, etc., on same;' and that, if everything was satisfactory to the council, and the money sent to the writers, they would see that all the items were paid.

"The account that was enclosed was headed 'Whitechurch County in account with Chas. A. Thompson,' and the items of the account, aggregating in amount $207.65, are headed, 'Account for repairs to L. Pipher's Engine,' and one of these items is 'getting engine out of bridge, hauling blocks and man and team.'

"On the 19th September, 1913, the clerk of the municipality wrote to Thompson, informing him that he had been 'instructed by the reeve and council to acknowledge receipt of your letter to the reeve and account for repairing Mr. Pipher's engine, and to notify you that the council disclaims any liability in the matter and refuses to pay the account.'

"According to the testimony of the respondent, he instructed Thompson to send the account which Thompson sent to the reeve.

"I am unable to say that the learned Junior Judge was wrong in holding that, under the circumstances, the notice given by Thompson was a sufficient notice to satisfy the provisions of the statute. The notice was given by direction of the respondent; it was in form a claim for the expense incurred in repairing the engine; and the account shewed by its heading, and the item I have quoted from it indicated, that the repairs were rendered necessary by something that happened to the engine which made it necessary to get it out of a bridge; and, as I have stated, it was known to the reeve that the respondent's engine had broken through the bridge; and therefore there was no doubt as to the claim having reference to that event, and its being based on the liability of the appellant to make good the loss; and it was apparently so treated by the council, as evidenced by the clerk's letter to Thompson on the 19th September, 1913.

"If, however, the notice was not sufficient, I am of opinion that there was reasonable excuse for the want or insufficiency of the notice, and that the appellant 'was not thereby prejudiced in its defence.'

"That the appellant was not prejudiced in its defence is beyond question; and, although it is not so clear that there was the reasonable excuse which is requisite, I am of opinion that reasonable excuse within the meaning of the statute is made out.

"Notice of the claim was given in due time by Thompson acting for and by the direction of the respondent, and it was reasonable, I think, for the respondent to believe that the sending in of Thompson's account, which shewed that it was for repairs to the respondent's engine, and indicated that these repairs were necessary in consequence of the happening of the accident the occurrence and results of which were known to the reeve, was sufficient, and that a more formal notice was not necessary; and, although the cases have gone a long way towards making the curative provisions of the Act useless in most cases, there is no decided case which makes it necessary for us to hold that, under the peculiar and special circumstances of this case, reasonable excuse has not been shewn."

Reasonable Excuse.—"What may constitute reasonable excuse for not giving notice is not defined and must depend very much on the circumstances of the particular case. It is not easy therefore to lay down any general principle for determining what is reasonable excuse. A verbal notice would be an insufficient notice. Some reasonable excuse would still be required for not having given the notice in writing. Hence mere knowledge by the employer of the accident from any source is, standing alone, not enough to excuse the want of such notice. When there is actual knowledge or verbal notice (though this serves mainly to shew that the defendants have not been prejudiced in their defence by the lack of written notice) it may be regarded as an element of the excuse but something more is required, whether personal to the individual injured or to the employer or to both. Nor is the fact of the accident by itself a reasonable excuse for not giving notice

if it is not accompanied by some disabling circumstance, mental or physical. In the present case it is enough to say that the plaintiff was not misled by any one into not giving notice and was under no disability except that of ignorance of the law, which can hardly be invoked as an excuse for omitting to observe the requirements of the Act."

. . . "I have not thought it necessary to refer to the provisions of the Workmen's Compensation Act which were considered in Armstrong v. Canada Atlantic Ry. Co., 1902, 4 O. L. R. 560 C. A. They probably admit of a more elastic administration than does the section of the Municipal Act." Per Osler, J.A., O'Connor v. Hamilton, 1905, 10 O. L. R. at 536, 6 O. W. R. 227 C. A.

In Armstrong v. Canada Atlantic R., 1902, 4 O. L. R. 560, 22 C. L. T. 379, the notoriety of the accident, the defendants' knowledge of it and of the fact that the workman's representative was making a claim upon them in respect of it, and the additional fact that the employers took the claim into consideration, but never gave the plaintiff a final answer, were held to warrant a holding that reasonable excuse had been shewn for the want of notice. As explained in O'Connor v. Hamilton, infra, there was a misleading of the plaintiff.

For a very full discussion of circumstances which constitute a reasonable excuse, with a full report of a cross-examination of the plaintiff by W. R. Riddell, with a view to shew that no sufficient excuse existed, see Morrison v. Toronto, 1906, 12 O. L. R. 333 D. C., 7 O. W. R. 547, 607. In this case Mulock, C.J.Ex., said . . . "Defendants' counsel contended that the plaintiff's cross-examination shewed that if his attention had been called to the statutory requirements or if they had been present to his mind, he could have given the required notice and that, therefore, no sufficient excuse existed for his failure in doing so. This conclusion does not follow from the premises but involves a confusion between mere knowledge and will power. One may understand his duty but not possess the necessary directive will power to enable him to perform it, and such a disability must be within the saving clause of the amending statute, if it is to have any force. Assuming the plaintiff to have known the law, his condition during the seven days, and for some time thereafter, was such that he was mentally incapable of directing his thoughts to any legal question growing out of the accident; of deciding what course should be taken in order to preserve his rights and of causing the necessary steps to that end to be taken." In the same case Anglin, J., said: "My difficulty in the present case arises from statements elicited from the

plaintiff upon cross-examination—that he saw his wife on the day after the accident; that he discussed the circumstances with members of his family immediately after it happened and that if at that time he had known that the law required notice to be served within a certain period he would have told his wife to have such notice served. But read in the light of the rest of the evidence, I think the last statement should be taken to mean that if his attention had been aroused and the necessity for giving such notice sufficiently impressed upon him, he would have assented to its being given—not that he was during at least the first week following the accident, himself capable of the effort of his mind and will requisite to have enabled him, had he been cognizant of the statutory requirement to give of his own initiative spontaneously and unaided any direction or instruction as to notice. That he was not so capable, that his attention was not directed to the requirement of notice, and that he was physically unable to serve such notice himself are upon the whole evidence fair conclusions.

The plaintiff was in the hospital twenty-four weeks, during the first thirty days enduring great physical pain. Little during that time would she think of her court remedies. Per Sedgewick, J., Kingston v. Drennan, 1897, 27 S. C. R. at 61, Rob. & Hugg 53.

If the notice of the injury is such as to cause the plaintiff to become for the time incapable of considering his situation except as sufferer, a sufficient excuse arises: Anderson v. Toronto, 1908, 15 O. L. R. 643, 11 O. W. R. 338.

In Egan v. Saltfleet, 1913, 29 O. L. R. 116 App. Div., Meredith, C.J.O., giving the judgment of the court, said:—

"For upwards of two weeks there was nothing in the physical condition of the appellant to prevent his complying with the requirements of the statute," and added:—

"I cannot refrain from expressing my regret that the Legislature had not seen fit to dispense with the necessity for shewing reasonable excuse for the want of the notice. I see no reason why the want of it should bar the right to recover where it is shewn that the corporation has not been prejudiced by the notice not having been given within the prescribed time."

Workmen's Compensation Acts.—Cases under Workmen's Compensation Acts are frequently helpful in determining what amounts to reasonable excuse or prejudice to defendants. In applying such cases to the Municipal Act the special provisions in Workmen's Compensation Acts which make such cases an unsafe guide should be noted. See remarks of Osler, J.A., in O'Connor

v. Hamilton, supra, and of Garrow, J.A., in Giovinazzo v. C. P. R., 1908, 19 O. L. R. 325, C. A., 13 O. W. R. 1200. With the foregoing caution the following Workmen's Compensation cases are submitted:—

Reasonable Excuse.– "By the conduct of the defendants the plaintiff was thrown off his guard as to seeking legal advice and as to informing himself about giving and as to giving the statutory notice": Smith v. McIntosh, 1906, 13 O. L. R. 118 D. C., 8 O. W. R. 472.

"Upon such a question as this it would be I think wholly illogical and unreasonable to hold that ignorance is an excuse under one act and not an excuse under the other." Per Garrow, J.A., Giovinazzo v. C. P. R., 1909, 19 O. L. R. 325 App. Div., 13 O. W. R. 1203.

"It seems to me that where the defendants had an immediate knowledge of the accident and the injuries of the plaintiff, and were from time to time informing his parents, who were apparently asserting a claim for compensation and negotiating with them for a settlement, that the insurance company had the matter in hand and could do nothing until the plaintiff was dismissed by the medical authorities, this should form a reasonable excuse for any want or insufficiency of a notice such as contemplated by the Act. Per Sutherland, J., delivering the judgment of the App. Div. at p. 203, in Gower v. Glen Woollen Mills Limited (1913), 28 O. L. R. 193.

Injury not apparent when received. Tibbs v. Watts, Blake, Bearne & Company, Ltd. (1909), 2 B. W. C. C. 164.

Mistaken belief as to cause of suffering. Stinton v. Brandon Gas Company, Ltd. (1912), 5 B. W. C. C. 426.

Belief that injury was slight. Refuge Assurance Co., Ltd. v. Millar, 5 B. W. C. C. 522.

Employer having full knowledge and paying half wages, written notice after four months sufficient. Ralph v. Mitchell, 6 B. W. C. C. 678.

Verbal notice to foreman at the time. Hewitt v. Stanley Brothers, 6 B. W. C. C. 501, 109 L. T. 384, C. A., [1913] W. C. & I. Rep. 495.

Ignorance of the true nature of the injury. Ellis v. Fairfield Shipbuilding and Engineering Co., Ltd., 6 B. W. C. C. 308; Court of Session, Scotland, [1913] W. C. & I. Rep. 88, Ct. Sess.

The injured man (who ruptured himself) was ignorant of anything serious and thought it a mere trick. Zillwood v. Winch, 7 B. W. C. C. 60 C. A.

Latent injury—notice given as soon as it was discovered serious. Howard v. Rowsell & Matthews, 7 B. W. C. C. 552 C. A.

"Then what is the reasonable excuse? . . . Speaking for myself, I think the safer ground is to say that unless you can make out that the injury from the accident is latent, not at first apparent . . . or that the accident is apparently so trivial that it would be absurd to expect the workman to give notice of it. I think it is not 'reasonable cause' for not giving notice." Clapp v. Carter, 7 B. W. C. C. 28, [1914] W. C. & I. Rep. 80, 110 L. T. 491, 58 Sol. Jl. 232 C. A.

That injured man labours under an error as to the seriousness of the injury which he has suffered. Smith and Leishman v. Flood, 52 Sc. L. R. 471, 8 B. W. C. C. 613.

"That a man who is labouring under an error as to the seriousness of the injury which he has suffered has reasonable cause for not giving the notice enjoined by the statute, is a proposition I am prepared to affirm." Smith and Leishman v. Flood, 52 Sc. L. R. 471, 8 B. W. C. C. 613, Court of Session.

Insufficient Excuse.—A collier got a splinter of coal in his eye. He could not continue work that day. He stayed away from work, but did not consult a doctor until four days after the accident. The eye became worse. Written notice was given a week after the accident. The man ultimately lost the sight of the eye. It was admitted that the delay in giving notice might have prejudiced the employers, but it was contended that the injury was at first so trivial that the delay was reasonable. It was found that the man honestly thought he was going to get better. Held, that notice was not given in accordance with the Act. The mere fact that the man thought he would recover was not reasonable cause for delay. Further, an injury cannot be considered trivial when it seriously hinders a man in doing his ordinary work. Fox v. Barrow Haematite Steel Co., Ltd., 84 L. J. K. B. 1327, C. A.

That injured man hoped to recover from injury to tongue. Potter v. John Welch & Sons, Ltd. (1914), 7 B. W. C. C. 738, 83 L. J. K. B. 1852, [1914] 3 K. B. 1020, 112 L. T. 7, 30 L. T. R. 664 C. A.; Webster v. Cohen Brothers (1913), 6 B. W. C. C. 92, C. A., 108 L. T. 197, 29 T. L. R. 217, C. A.

That injured man hoped to recover from injury to head which allowed him to go on working for some months. Clapp v. Carter, 7 B. W. C. C. 28, C. A.

Verbal complaint. Lacey v. John Mowlem & Co., Ltd., 7 B. W. C. C. 135.

Ignorance of the Act. Judd v. Metropolitan Asylums Board (1912), 5 B. W. C. C. 420, C. A.

Summary.—The following have been held to be insufficient excuses:—

1. Ignorance of the law.
2. Infancy.
3. Belief that injury is not serious.
4. Pain and suffering not resulting in incapacity.
5. Knowledge of claim by corporation.
6. Treating about claim with corporation.

The following have been held to be reasonable excuses:—

1. Incapacity to direct attention to legal questions resulting from the injury.
2. Conduct of corporation in misleading claimant.

Prejudice to Defendants.—"With regard to this matter of prejudice, I only want to say one word. The statute requires that notice should be served, and if it is not served the party who should have served it is in default, he must excuse that fault, and I think the burden of proof in the first instance rests upon that party. But if he gives evidence from which it may be reasonably inferred that the employer has not been prejudiced I think then the burden of proof is shifted from his shoulders on to the shoulders of his employer, and if the employer is in a position to prove that notwithstanding that evidence he is prejudiced in some particular matters, he is bound to do so. If he omits to do so . . . then my opinion is that it is not open to him to conjecture . . . that he might have done this or he might have done that." Per Lord Atkinson: Hayward v. Westleigh Colliery Co., Ltd., 8 B. W. C. C. 278, H. of L., 84 L. J. K. B. 661, [1915] A. C. 545, 111 L. T. 1001, 31 T. L. R. 215, H. L.

Delay in notice cannot be set up as a defence after liability admitted by payment of compensation. Turnbull v. Vickers, Ltd., 7 B. W. C. C. 396.

No notice in writing given. Held that the Judge's finding, upon the facts and circumstances proved that the company were not thereby prejudiced in their defence, being supported by some evidence, the question whether it was the proper finding upon the evidence was not a question of law and was not open upon an appeal. Alberta Supreme Court *en banc.* Re Barrie and Diamond Coal Co., Limited (1914), 2 W. L. R. 700.

In the following cases the employer was held to be prejudiced: Nicholls v. Britton Ferry W. D. C. (1915), 8 B. W. C. C. 42, C. A.; Taylor v. Nicholson & Sons (1915), 8 B. W. C. C. 114, C. A.; Eydmann v. Premier Accumulator Co. (1915), 8 B. W. C. C. 121, C. A.; Hodgson v. Robins, Hay, Waters & Hay (1914), 7 B. W. C. C. 232, C. A.; Ford v. Gaiety Theatre Co., Ltd. (1914), 7 B. W. C. C. 197, C. A.; Hughes v. Coed Talon Colliery Co., Ltd. (1909), 2 B. W. C. C. 159, C. A.; Wadsell v. Russell & Sons (1915), 8 B. W. C. C. 230, C. A.; Dalgeish v. Garkide & Co., Ltd. (1914), 7 B. W. C. C. 535, C. A.; Hancock v. British Westinghouse Electric Co. (1910), 3 B. W. C. C. 210, C. A.; Jackson v. Vickers, Ltd. (1912), 5 B. W. C. C. 432, C. A.; Cottman v. Morrison & Mason, Ltd. (1914), 7 B. W. C. C. 194, C. A.

Death.—Without the provision dispensing with notice in case of death, notice will still be necessary. See the remarks of Meredith, J.A., Giovinazzo v. C. P. R., 1909, 19 O. L. R. 339, citing Johnston v. Dominion of Canada Guarantee, 1908, 17 O. L. R. 642, 11 O. W. R. 363, 12 O. W. R. 980. See also Curle v. Brandon, 15 M. L. R. 122, 24 C. L. T. 279, 1 W. L. R. 76.

It is important in jurisdictions where there are no provisions corresponding to those in s-s. 5 of the Ontario Act that notice should be given by or on behalf of the intended administrator and action could even be commenced in his name before letters of administration issued and when letters issue they will take effect as of the date of death.

Waiver and Estoppel.—Under sub-section 5 questions of waiver and estoppel as such do not arise on the principle of expressio unius est exclusio alterius. The statute has expressed the two conditions and the two conditions only of (1) reasonable excuse, and (2) lack of prejudice, which must be established in order to excuse the want of the insufficiency of the notice.

Under Acts similar to the Saskatchewan Acts, which simply require notice of a certain kind to be given and have no provisions corresponding to those contained in sub-sections 5 and 6, if no notice or an insufficient notice has been given the plaintiff may shew that the want or insufficiency of the notice has been waived by the defendants or that they are estopped from setting up such want or insufficiency.

In New York, Iowa and Maine it has been held that municipal authorities cannot waive statutory requirements as to notice of claim or action: Borst v. Sharon, 24 N. Y. App. Div. 599;

Starling v. Bedford, 94 Iowa 194, 62 N. W. 674; Veazie v. Rockland, 68 Me. 511.

In the Iowa case above mentioned the decision was based on the ground that a section which said "no action shall be brought unless notice is given" was mandatory. In this connection reference might be made to the holding of the House of Lords in Young v. Leamington, 52 L. J. Q. B. 713. In other jurisdictions, however, it has been held that statutory requirements as to notice as well as formal irregularities in the notice may be waived: Krieseler v. Le Valley, 122 Mich. 576; Hoyle v. Putnam, 46 Conn. 56.

Many cases dealing with waiver will be found in the Michigan Reports.

The English authorities seem to indicate that municipal authorities may waive the statutory requirements as to notice or may be estopped from pleading lack of compliance with the statute.

The question of waiver was raised in Martins v. Upcher, 3 Q. B. 622. This was an action against a magistrate who upon receiving a notice of action had tendered amends which were refused by the plaintiff. The court held that the mere act of the magistrate did not amount to a waiver of the necessity of proving that notice of action had been given.

There was some correspondence between plaintiffs and defendants in Midland v. Withington Local Board, 52 L. J. Q. B. 689. Notice of action was given after the time limited by the statute had elapsed and the plaintiffs contended that there had been a waiver of notice in the letters written about the claim before the time was up. Brett, M.R., said:—

"With regard to the suggested waiver I can see no ground for the suggestion; the defendants gave a truthful answer to a question put to them and I am of opinion that they did nothing to mislead the plaintiffs or which can be construed as a waiver." And Lindley, L.J., said:—

"I do not think there was any . . . waiver nor have the defendants done anything to deprive themselves of the right to set up the defences given by the statute, for more would be required than the letter written by them in reply to the question asked by the plaintiffs to oust their then right to set up the want of notice and the limit of time reserved and fixed by the statute."

In an Ontario case decided before the provisions in sub-section 5 were enacted the plaintiff claimed that verbal notice to the reeve resulting in an investigation by him and a refusal by the corporation to recognize the claim amounted to waiver of notice,

but his contention was overruled: Jones v. Stephenson, 1900, 32 O.R. 226, D.C.

When the statutory right of action is barred by failure to give notice it cannot, like an action arising out of contract, be revived by a subsequent express or implied agreement; see Hurst v. Parker, 1 B. & Ald. 92; nor can subsequent acts of the municipality amount to waiver or estop the municipality from setting up the want of notice if action is brought. Acts relied on as amounting to waiver or resulting in estoppel must have occurred before the action was barred and have induced the plaintiff to refrain from taking a step required by the statute: Wright v. Portland, 118 Mich. 23, 76 N. W. 141; Holtham v. Detroit, 98 N. W. 754, and many cases cited in both the foregoing cases.

A defence of want of notice was met by shewing that the defendants by promising settlement led the plaintiff to believe that a suit to enforce his claim was unnecessary and the court held that the defendants were estopped from pleading the statute: Renackowsky v. Detroit, 122 Mich. 613, 81 N. W. 581.

A city council acted on a claim as presented and gave the claimant the right to suppose they were willing to treat his notice as sufficient. Their conduct was held to amount to a waiver of notice: Lindley v. Detroit, 90 N. W. 665, and many cases on waiver therein cited.

460.—(6) This section shall not apply to a road, street or highway laid out or to a bridge built by a private person or by a body corporate until it is established by by-law of the council or otherwise assumed for public use by the corporation. 3 Edw. VII. c. 19, s. 607, *amended;* 3 & 4 Geo. V. c. 43, s. 460 (6).

Established by By-law or Otherwise Assumed.—Mill street, in the township of Arran, was not an original road allowance, but was laid out by private individuals. The registration of a plan shewing it; the sale of lands according to the plan; the user by the general public as a highway; the performance of statute labour on it for a considerable number of years followed by the action of the council in voting money for the repair of a bridge on it were held by the Court to amount to an offer of dedication on the one hand and an acceptance on the other, and to constitute an assumption of the street and bridge for public use within the meaning of s. 607 (now 460 (6)): Strang v. Arran, 1913, 28 O. L. R. 112, A. D.

Re Pembroke and Renfrew, 1910, 21 O. L. R. 366. The Divisional Court had under review an order of a County Court Judge, made under s. 618 of the Municipal Act of 1903, declaring that the county was liable to maintain a certain bridge. The liability depended on whether or not the bridge had been "otherwise assumed for public user by the corporation." It was held that making and paying for repairs amounted to assumption, and that subsequent inaction did not affect the original assump-

tion. The statement of Armour, C.J., in Hubert v. Yarmouth, 1889, 18 O. R. 458, 467, adopted by Meredith, C.J., in Holland v. York, 1904, 7 O. L. R. 533, that the acts relied on to prove assumption "must be clear and unequivocal, and such as clearly and unequivocally indicate the intention of the corporation to assume the road," was approved. In Holland v. York, *supra*, the council by by-law authorized payment to private persons of the cost of building a sidewalk on a highway laid out by a private person. This was held to amount to assumption of the highway within the meaning of the section. It was pointed out by Meredith, C.J., that the purpose of s. 607 (now 460 (6)) is to relieve the municipality from liability to repair an actual highway for the repair of which it would be otherwise liable.

Hubert v. Yarmouth, *supra*, was an action to compel a corporation to maintain and repair a street laid out by a private person. The evidence was that statute labour had been performed on it with the consent of the pathmaster, and on one occasion with the consent of the reeve and the councillor for the ward. This was held not to amount to assumption, and in any event the remedy was indictment.

460.—(7) Nothing in this section shall impose upon a corporation any obligation or liability in respect of any act or omission of any person acting in the exercise of any power or authority conferred upon him by law, and over which the corporation had no control, unless the corporation was a party to the act or omission, or the authority under which such person acted was a by-law, resolution or license of its council. 3 Edw. VII. c. 19, s. 611, *amended;* 3 & 4 Geo. V. c. 43, s. 460 (7).

(Section 611 was first introduced in the Municipal Amendment Act, 1896, 59 Vict. c. 51, s. 22.)

Railway Crossings.—Before the last mentioned statute it had been held . . . that a prior neglect by a railway company of its statutory duty with respect to approaches to crossings did not excuse the municipal corporations from their statutory obligation to keep such approaches as part of the highway in repair: Mead v. Etobicoke, 1889, 18 O. R. 438; Fairbanks v. Yarmouth, 1897, 24 A. R. 273; per Street, J.A., in Holden v. Yarmouth, 1903, 5 O. L. R. at 584. In the latter case the plaintiff's horse was startled by some noise from a train standing near a level crossing, the approach to which had been graded up about four feet to reach the level of the track leaving an unrailed declivity at each side. The horse turned sharply and ran down the declivity. The trial Judge found the absence of a rail was one of the proximate causes of the injury which resulted, but the municipal corporation were exonerated from liability by reason of s. 611.

The present sub-section was passed in consequence of the decisions Mead v. Etobicoke and Fairbanks v. Yarmouth, *supra*.

As to the liability of the railway company in respect of a crossing or bridge carrying a highway over a railway, see Dom. Ry. Act, R. S. C. 1906, c. 37, ss. 238 to 243, inclusive.

The duty to maintain a bridge over a highway involves repairing the roadway on the bridge, as it is part of the bridge: Lancashire v. Bury Corporation, 14 A. C. 417; 59 L. J. Q. B. 85.

The duty to repair approaches to a railway crossing rests on the railway company, and the municipality is under no liability: Moggy v. C. P. R., 1886, 3 M. R. 209, and there is a statutory duty to fence these: Dom. Ry. Act, s. 242 (2). The English rule is the same: North Staffordshire v. Dale, 21 L. J. M. C. 147; Hertfordshire County Council v. Great

Eastern R. C., [1909] 2 K. B. 403. In the latter case the company's special Act did not impose any obligation to repair approaches to crossings excepting the part between the gates on either side of the railway. The C. A. applied the common law principle that where, under statutory authority, bridges and roads are interfered with by a body of persons for their own benefit, a duty is cast on them to restore the means of communication which involves the obligation to keep the substituted means of communication in repair. The Court refused to construe the company's special Act as excluding the operation of the common law doctrine. See also Hertfordshire C. Council v. New River Co., [1904] 2 Ch. 513; 74 L. J. Ch. 49.

Licensees.—Areas, telephone poles, hydrants of private water companies, etc., if placed by the authority of a by-law, resolution or license, are not within the section. See notes to 460 (1) for liability of municipal corporations in such cases.

460.—(8) A corporation shall not be liable for damages under this section unless the person claiming the damages has suffered by reason of the default of the corporation a *particular* loss or damage beyond what is suffered by him in common with all other persons affected by the want of repair. 3 & 4 Geo. V. c. 43, s. 460 (8).

(*See* Winterbottom v. Lord Derby (1867), L. R. 2 Ex. 316.); 36 L. J. Ex. 194.

Winterbottom v. Derby is mentioned at the end of s.-s. 8 in c. 43, as given below. This inclusion of the case in the section by reference must be noted. In Winterbottom v. Derby the plaintiff, by reason of an obstruction to a highway, was obliged to incur a certain expenditure in order to remove the obstruction and exercise the right of passing. That kind of pecuniary damage was held not to be such a special damage as would enable the plaintiff to maintain an action. Kelly, C. B., further said: "Looking at all the authorities and especially at Iveson v. Moore, 1 Ld. Raymond, 486, and the last and greatest of all the cases, Rickett v. Metropolitan, L. R. 2 H. L. 175; 34 L. J. Q. B. 257; 36 L. J. Q. B. 205 (A. of L.), I think the true principle of the law is, that he only who has sustained damage peculiar to his own person, or to him in the exercise of his trade or calling, is entitled to maintain this action. A person who merely passes along a highway and meets with an obstruction and turns back or thinks fit to remove the obstruction for the purpose of raising the question of the right to the highway in a Court of law, cannot do so."

Rickett v. Metropolitan, *supra*, is discussed under title Compensation, *supra*. According to this case and Hubert v. Groves, 1 Esp. 148, an interruption to business is not a peculiar damage within the rule. Where an obstruction of the highway by vans and horses darkened the plaintiff's shop and rendered it necessary to light gas, it was held that the damage was particular and direct, not merely consequential, and substantial, and that these three conditions must always be present: Benjamin v. Storr, 1874, L. R. 9 C. P. 400; 43 L. J. C. P. 162.

Particular loss or damage is not the same as special damage in its technical sense: Mayne on Damages, 1909, P. 532, citing Rose v. Groves, 5 M. & Gr. 613 H. L., but note that in Lyon v. The Fishmongers' Coy., L. R. 1 A. C. 662; 46 L. J. Ch. 68 H. L., it is stated that the judgment in Rose v. Groves went not on the ground of public nuisance accompanied by particular damage to the right of a man to step from his own land on to the highway is something quite different from the public right of using the highway. The public have no right to step on to the land of a private

proprietor adjoining the road: Lyon v. Fishmongers' Coy., 1 A. C. 682; 46 L. J. Ch. 68 H.L.; also Fritz v. Hobson, 1880, 14 Ch. 542; 49 L. J. Ch. 321—from which it would appear that a state of non-repair might give rise to particular injury by interfering with the private right of a man to step from his own land on to a highway. In Fritz v. Hobson, where building operations interfered with the plaintiff's access, the plaintiff was held to have made a case of particular injury, and Rickett v. Metropolitan was distinguished on the ground that the obstruction was at a considerable distance and temporary.

In Boyd v. Great Northern, [1895] 2 I. R. 555, it was held that the plaintiff, a medical doctor, was held an unreasonable time by the gatekeeper at a level crossing on a railway, and that he was entitled to damages.

The authorities are discussed at length in O'Neil v. Harper, 1913, 28 O. L. R. 637 (A.D.) See title Compensation, *supra*, where the same principle of peculiar damage is applied.

460.—(9) Where a bridge which it is the duty of a corporation to repair is destroyed or so damaged that it is necessary to rebuild it the Ontario Railway and Municipal Board may, upon the application of the corporation, relieve it from the obligation to rebuild the bridge if the Board is satisfied that it is no longer required for the public convenience or that the re-building of it would entail a larger expenditure than would be reasonable, having regard to the use that would be made of the bridge if it were re-built.

(10) The relief may be granted on such terms and conditions as the Board may deem just, and such notice of the application shall be given as the Board may direct.

(11) The next preceding two sub-sections shall not affect the costs of any pending action. 3 & 4 Geo. V. c. 460 (9-11).

Duty to Build Bridges.—This exists under ss. 450, 451, 452, 453, 454, 455, 458 and 459, and is an imperative duty, and the liabilities resulting from misfeasance or nonfeasance in connection therewith is discussed under general title Bridges, *supra*.

No Longer Required for Public Convenience.—Public convenience is to be distinguished from private convenience. A bridge would be for private convenience in cases where certain persons suffered a peculiar loss or damage from its absence, while all other persons were unaffected by its absence.

A Larger Expenditure Than Would be Reasonable.—Where public convenience requires a bridge, nevertheless, if the cost will be excessive when the prospective user is considered, the Board may grant relief. It should be borne in mind that the duty to repair and the duty to build bridges, is to be ascertained by reference to the means of the municipality on which the duty is imposed. See title Duty to Repair, *supra*, but lack of means is not a ground on which the Board can grant relief.

Relief on Terms.—The Board as a condition of granting relief might require payment of compensation to persons who would suffer peculiar loss or damage by reason of the absence of the bridge, even though it had no direct power to award compensation, and even though apart from the order of the Board, they would have no right to such compensation: G. T. P. v. Fort William, 1910, 43 S. C. R. 412, but note dissenting judgments.

There are many sections of The Railway Act, R. S. O. 1906, c. 37, in which the power to impose terms and conditions where an application is made to the discretion of the Board, is expressly given without any limitation, see ss. 233 (3a), 253 (20), 250 (3). In other cases the power to provide for payment of compensation in the discretion of the board is conferred, s. 249 (3). In other cases the discretion of the Board with regard to terms and conditions is limited to a particular subject-matter as public protection and safety, s. 227 (3a). The Board again, in the exercise of some of its most important functions, acts under sections which make no reference to terms or conditions, see ss. 158, 159, 222, 223 (see 42 S. C. R. at 425). In view of the foregoing diversity of language on the point of the power of the Dominion Board to impose terms and conditions, it was contended that a general authority to grant or refuse involves an authority to impose an unlimited range of conditions and terms. This view was rejected by Duff, J., in G. T. P. v. Fort William. but the majority of the Court held *intra vires* an order by which compensation was ordered in a case where it was not otherwise payable

461. A corporation shall, in the absence of an agreement to the contrary, keep in repair all crossings, sewers, culverts and approaches, sidewalks and other works made or constructed by it or by any person with the permission of its council, upon any toll road in or passing through the municipality, and in case of default shall be liable, as in the case provided for by section 460. 3 Edw. VII. c. 19, s. 608, *amended;* 3 & 4 Geo. V. c. 43, s. 461.

Works on Toll Roads.—Section 69 of The Toll Roads Act, R. S. O. 1913, c. 210, provides for the right of a municipality to set out trees along the side of a toll road. Section 70 empowers the council or any person with the permission of the council to construct sidewalks on toll roads, and to grade the land for the purpose. Section 71 gives the council the right to construct crossings, lay sewers, construct watercourses and approaches and to raise and lower the grade of the toll road, and generally confers all other rights and privileges over sidewalks, culverts and approaches, as in the case of an ordinary highway.

This s. 461 imposes a like liability upon the council in respect of works done under the authority of ss. 69 to 71, *supra*, as 460 imposes in the case of an ordinary highway.

An Agreement to the Contrary.—This must mean where under s. 70, *supra*, a sidewalk is constructed by some person with the consent of the corporation, or where the roadside is altered pursuant to such consent, and the corporation and the person so authorized have agreed that the latter alone shall be liable in case of default, and under the duty to keep in repair.

The corporation might undertake a work authorized by s. 71, on condition that the duty to repair should rest by agreement on parties requesting the work to be done by the council.

462.—(1) Where two or more corporations are jointly liable for keeping in repair a highway or bridge, there shall be contribution between them as to the damages sustained by any person by reason of their default in so doing.

(2) Any action by any such person shall be brought against all such corporations, and any of them may require that the proportions in which such damages and the costs of the action are to be borne by them shall be determined in the action.

(3) In settling such proportions, either in the action or otherwise, regard shall be had to the extent to which each corporation was responsible, either primarily or otherwise, for the act or omission by reason of which the damages became payable or are recoverable, and the damages and costs shall be apportioned between them accordingly. 3 Edw. VII. c. 19, s. 610, *redrafted;* 3 & 4 Geo. V. c. 462 (1-3).

Contribution Depends on the Statute.—This section is to be distinguished from s. 464, *infra.* Section 462 deals with a case where the duty to repair is cast equally on two or more municipalities, that is where there is joint liability to repair. Before this section was passed, an action was brought by one Gray, against the township of Sombra, to recover damages for injuries sustained by reason of the non-repair of a boundary line between the townships of Sombra and Moore, which were jointly liable for the repair of the road. Sombra served notice on Moore claiming contribution under the Consolidated Rules of the S. C., and an order was made that Moore should be bound by the judgment, and all questions between the townships were reserved till after the trial. Gray recovered judgment against Sombra. Subsequently after trial of an issue between the townships on the question of contribution judgment was given that Moore was liable to indemnify Sombra against Gray's judgment. This was under s. 531 of the then Act, now s. 464. The Court of Appeal held that s. 531 did not apply to a case where the corporations were jointly liable, and set aside the judgment against Moore, on the ground that the statute gave no remedy by contribution: Sombra v. Moore, 1889, 19 A. R. 144. As a consequence, s. 462 was passed.

Joint Liability.—Gray could have sued Sombra and Moore together in the first instance: Maw v. King and Albion, 1883, 8 A. R. 248, is an instance of this procedure.

At common law there is no contribution between joint tort-feasors and a recovery of judgment against one is a bar to further action against the others: Houldsworth v. City of Glasgow Bank (1880), 5 App. Cas. 329; Merryweather v. Nixon (1799), 8 T. R. 186. The plaintiff may select one or more to sue. Section 462 defines the liability of the municipalities jointly liable, and forms a code in itself which varies the common law liabilities pending in respect of a joint tort.

Note also that ss. 465 to 469 provide machinery for dealing with neglect or refusal to act in cases of joint liability to repair.

See Longmore v. McArthur, 1910, 19 M. R. 641.

Shall be Brought Against all.—While joint tort-feasors cannot insist on being sued together, it is at common law the right of persons jointly liable to pay a debt, to insist on being sued together: Kendall v. Hamilton, 4 A. C. 515; 48 L. J. C. P. 705, and if all the necessary parties are not brought before the Court, the others may be added by amendment. If an action is brought against some only of the corporations jointly liable the others may be added under Con. Rule S. C. 134.

If, however, the time limited by s. 460 (2), has passed, or the notice required by s. 460 (4) has not been given and the want is not excused under s. 460 (5), the action is barred. See s. 460 (4), and Leizert v. Matilda, 1899, 26 A. R. 1. In the latter case Osler, J.A., said: "In any case within (610 now 462), the plaintiff would fail altogether if he sued one of them alone. The statute makes his cause of action a joint one since it can be enforced only by means of a joint action against all the tort-feasors."

Contribution.—A judgment against corporations jointly liable involves a finding of fault or responsibility on the part of both. As between the corporations both of whom are responsible, the doctrine of contributory negligence is not to be applied to exonerate one. But the degree of responsibility of each is to be determined, and the damages apportioned accordingly. In case of an unregistered by-law under s. 444, one corporation might be required to pay all, or if one corporation placed an obstruction under circumstances, which if a stranger had done it, the corporations would not be liable, then the corporation placing the obstruction might be required to pay all. If one corporation placed an obstruction which remained so long that the other corporation, if it had had sole jurisdiction, would have been liable, then a degree of responsibility would rest on that other, and it should bear part of the loss.

May Require Apportionment in the Action.—See Consolidated Rules S. C. O. 1913, 165 and 170.

463.—(1) Where an action may be brought against a corporation by a person who has sustained damages by reason of its default in keeping in repair a highway or bridge, no action shall be brought by him in respect of it or to recover such damages, or any part of them, against any member of the council or officer or employee of the corporation personally, but the remedy therefor shall be against the corporation. 3 Edw. VII. c. 19, s. 612 (1), *redrafted.*

Note.—Sub-sections 2 and 3 of old section 612, relating to actions pending on 7th April, 1896, struck out as spent.

(2) A mere contractor with the corporation or an officer or employee who is such contractor, by reason of whose act or omission the damages were caused, shall not be deemed an employee within the meaning of subsection 1. 3 Edw. VII. c. 19, s. 612 (4), *redrafted;* 3 & 4 Geo. V. c. 43, s. 463 (1-2).

Respondeat Superior.—The doctrine of *respondeat superior* applies to make a master liable for all acts done by a servant or agent in the course of the service. It applies to municipal corporations. The leading case is Mersey Docks Trustees v. Gibbs, 1864, L. R. 1 H. L. 93; 35 L. J. Ex. 225. It does not apply to all officers appointed by a municipal corporation: see *infra*, p. 595. But Pollock says, "it must be established that the servant is a wrongdoer and liable to the plaintiff before any question of the master's liability can be entertained." Torts, 9th ed., p. 87.

Before this section was passed an action—McDonald v. Dickenson, 1897, 24 A. R. 31—was brought against certain municipal officers under the impression that the time for bringing the action against the corporation had lapsed. The acts complained of consisted in piling tiles by a roadside while a culvert was under construction. The plaintiff's horse shied at the tiles and injury resulted. The work was in charge of two members of the council. Boyd, C., gave judgment for the plaintiff against these two members of council, but dismissed the action as against two other defendants, who had merely been hired to draw the tiles to the culvert. On appeal this was reversed, and the action dismissed. The Court consisted of Burton, Osler and Maclennan, JJ.A. Burton, J.A., applied the doctrine of *respondeat superior*, saying: "No doubt in the case of a wrongful tortious act, all persons concerned in the wrong are liable as principals. Here, however, the act in which the defendants were engaged was in itself legitimate, and for any act of neglect or omission they would not be liable to the party suffering the injury, for in such case they could be regarded only as servants, and then their neglect is chargable only to their principal." Osler, J.A., said " . . . I am with all deference wholly unable to understand how the maxim *respondeat superior* has any application to the case. . . . What the defendants have here committed is a direct breach of that duty to take care, which they owed to everybody who was likely to be affected by what they were doing, viz., the placing in the road of objects which, unless sufficiently protected or guarded, were likely to frighten horses. . . . The obligation which they neglected was one which rested upon them in their individual character, quite apart from their position as servants of the corporation, though it might also involve the corporation in liability, because what they did, though done in an improper manner, was done by them in the course of their employment. Maclennan, J.A., following Roe v. Lucknow, 1893, 21 A. R. 1, held there was no evidence of negligence, but Osler, J.A., dissented from this, considering the case within the exception in Roe v. Lucknow, see *supra*, p. 965.

Section 463 was apparently passed in consequence of the conflicting views above given. The section makes it plain that where the corporation is liable for default, no action shall be brought in respect of the same damages against any member of council, officer or employee. If s. 460 (1) is still to be confined to cases of nonfeasance, s. 463 must also be so confined, in which case the views of Osler, J.A., *supra*, indicate that in cases of misfeasance the servants of the corporation may still be sued, even though the corporation is also liable. But see *supra*, p. 954.

In Biggar v. Crowland, 1906, 13 O. L. R. 164, a committee of council in laying out a drain to be dug by contract, drove a stake into the centre of the highway, which caused injury to the plaintiff. Mulock, C.J., regarded the case as one of misfeasance, and he cited and applied Bayley v. Manchester, 1873, L. R. 8 C. P. 148; 42 L. J. C. P. 78, as follows: "The principle to be deduced from the authorities on this subject is, that where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable, even though the acts done may be the very reverse of that which the servant was actually directed to do."

A Mere Contractor.—In Saunders v. Toronto, 1899, 26 A. R. 265, the city hired a number of men to remove sweepings, some driving the city horses and carts, and some, like the plaintiff, driving their own horses and carts. The plaintiff got his pay weekly, in the same manner as all other labourers. The majority of the C. A., Moss, J.A., dissenting, held that his

business was an independent one, while admitting that the question was one of fact, reversing the unanimous decision of the D. C., 29 O. R. 273. For discussion of persons hired, with horses and vehicles, see also Fleuty v. Orr, 1906, 13 O. L. R. 59 D. C., and O'Donnell v. Clare County Council, 1913, 47 I. L. T. 41 C. A.

In Hardaker v. Idle District Council [1896] 1 Q. B. 335; 65 L. J. Q. B. 363, the plaintiff was employed to construct a sewer which involved cutting under gas pipes. The inspector of the council had the right of fully superintending and supervising the execution of the works and of giving directions thereon. The C. A. held, notwithstanding this, that the true relationship was that of principal and contractor.

The test to distinguish the relation of master and servant from that of principal and contractor is, can the corporation, while the work is going on, order the dismissal of a particular workman, or order any step to be taken which is considered desirable? Can it give any special directions for doing the work in a special way, or is that entirely in the power of the other? Dixon v. London (1876), 1 App. Cas. 632; 46 L. J. Q. B. 617 (H.L.)

464.—(1) Where an action is brought to recover damages sustained by reason of any obstruction, excavation or opening in or near a highway or bridge placed, made, left or maintained by any person other than the corporation or a servant or agent of the corporation, or by reason of any negligent or wrongful act or omission of any person other than the corporation, or a servant or agent of the corporation, the corporation shall have a remedy over against such other person for and may enforce payment of the damages and costs which are recovered against the corporation.

(2) The corporation shall be entitled to such remedy over in the same action, if the other person is a party to the action, and it is established in the action as against him that the damages were sustained by reason of an obstruction, excavation, or opening so placed, made, left or maintained by him.

(3) The corporation may in such action have the other person, if not already a defendant, added as a party defendant or third party for the purposes of the remedy over; and such person may defend the action as well against the plaintiff's claim as against the claim of the corporation.

(4) If such person is not a party defendant, or is not added as a party defendant or third party, or if the cor-

poration has paid the damages before an action is brought to recover the same, or before a recovery thereof in an action against the corporation, the corporation shall have the remedy over, by action against such person, but he shall be deemed to admit the validity of the judgment obtained against the corporation, only where a notice has been served on him, pursuant to Rules of Court, or where he has admitted, or is estopped from denying the validity of such judgment.

(5) Where such notice has not been served, and there has been no such admission or estoppel, and such person has not been made a part defendant or third party to the action against the corporation, or where the damages have been paid without action, or without recovery of judgment against the corporation, the liability of the corporation for such damages, and the fact that the damages were sustained under such circumstances as to entitle the corporation to the remedy over, must be established in the action against such person to entitle the corporation to recover in the action. 3 Edw. VII. c. 19, s. 609, *redrafted;* 3 & 4 Geo. V. c. 43, s. 464 (1-5).

Obstructions Resulting from Wearing Away of Roadbed or Sidewalk.—Many objects such as street car rails, valve boxes, sewer gratings, area and man-hole coverings, etc., are now placed in highways by third parties acting under statutory powers with, and sometimes without, the consent or license of the municipal authorities. When by reason of the wearing away of the highway due to the nonfeasance of the city authorities these become dangerous and cause damage, the third party is not liable unless the structure has become or was originally defective, and the damage was due to such defect: Moore v. Lambeth Water Works, 1886, 17 Q. B. D. 462; 55 L. J. Q. B. 304; Oliver v. Horsham L. Board, [1894] 1 Q. B. 332; 63 L. J. Q. B. 181. In the latter case the local authority placed a grating as sewer authority, and as highway authority allowed the grating to wear away, thus causing an obstruction. The plaintiff failed under the English rule as to nonfeasance, but in Ontario would have succeeded under s. 460 (1).

Balzer v. Gosfield, 1889, 17 O. R. 700 D. C., was decided under this section. The township of Gosfield constructed a ditch under a drainage by-law on a road assumed by the county of Essex. The ditch was unfenced and encroached to nearly one-half of the width of the road. Judgment was given for the plaintiff against the county and under this section for the county against the township, for the amount of the plaintiff's judgment, including his costs. W. R. Meredith, Q.C., for the township, contended that as the ditch was constructed under a drainage by-law the construction was legal and no action could be maintained. The D. C. held that it was a matter of indifference to the plaintiff what occasioned the defect as the road was clearly out of repair.

Atkinson v. Chatham, 1899, 26 A. R. 521; 31 S. C. R. 61, was a case in which the city claimed indemnity under this section because of damages sustained by reason of a telephone pole placed in the highway by the Bell Telephone Company. There was much discussion of this section in the C. A., but the S. C. held that the pole was placed in the streets by the third party but by the authority of the city, and that it was lawfully placed where it was, outside the portion of the highway appropriated by by-law for the use of horses and carriages, and so was not a nuisance of which persons lawfully using the highway could complain. The Court also held that the pole was not the *causa causans* or any part of the cause of the accident, which was the running away of the plaintiff's horses. This finding of course disposed of any question of indemnity under this section. The views of the C. A. should be noted. Maclennan, J.A., holding that the pole was a dangerous obstruction and that it was placed where it was illegally whether or not there was consent and approval by the city, and he considered that the section assumes liability by the municipal corporation for the obstruction, which must be either for consenting to its being placed in the first instance or for allowing it to remain, and he added: "It is a case of joint tort-feasors committing and continuing the same wrong, and the Legislature has said, in that respect changing the rule of the common law, that the municipality shall be entitled to indemnity. I therefore think that upon the very language of the statute, even if the city has expressly assented to the placing of this pole, it would be no bar to a claim for indemnity."

Moss, J.A., considered that the pole as placed was a dangerous obstruction, that the municipal corporation had not been shewn to have sanctioned its location and that *prima facie* the city was entitled to indemnity under the section. He disagreed with the view that the sanction of the municipal corporation would relieve the telephone company from liability to the city, and he discussed the origin and purpose of the section as follows:— "Before the legislation the Courts of Ontario had determined that a municipal corporation which had been held liable in damages by a person injured through an obstruction placed on its highways by a third person and allowed to remain there for a sufficient time to affect the corporation with notice of its existence, could not recover from the third person the damages and costs for which it had been rendered liable: Vespra v. Cook, 1876, 26 C. P. 182. In that case Mr. Justice Gwynne pointed out that no case had been cited to establish the liability at common law of one who has committed one public nuisance to indemnify a person who has been guilty of an independent public nuisance, namely, the continuance of the first in existence, from the consequences of such continuance, and observed that as a claim in the nature of indemnity the action was not maintainable unless under the provisions of a positive statute." Moss, J.A., then traced the history of the section which was first passed in 1887 by 50 V. c. 29, s. 33, and added: "In every one of the amendments is to be seen an intention to extend the right of the municipal corporation to recover over against the person or corporation whose act or omission led to the injury, and the only express exception is where the act or omission was that of a servant or agent of the municipal corporation."

Servant or Agent.—A by-law required the location of telephone poles to be approved by the city engineer. There was no such officer. The street surveyor approved of the location of a pole. Moss, J.A., thought that the act of placing the pole was not the act of a servant or agent of the city acting in the performance of his duty as such servant or agent, but the Supreme Court held that it was: Atkinson v. Chatham, *supra*.

In Bonn v. Bell Telephone Coy., 1899, 30 O. R. 700, the D. C. took the view that the effect of Canadian legislation is to legalize the obstruction created by poles of telephone companies so far that they cannot be abated or complained of as a public nuisance, but it still leaves open the question whether the company may not suffer in damages for particular injury to a traveller if the obstruction be found to be dangerous. But see Atkinson v. Chatham, 1900, 31 S. C. R. 61.

Defendant Added for the Purposes of Remedy Over.—In Stilliway v. Toronto, 1891, 20 O. R. 98, the city obtained an order adding the third party as a defendant and asked a remedy over against him. The jury having found that the third party occasioned the accident, the Court allowed the plaintiff to amend and claim damages directly from the third party, and the action was dismissed as against the city with costs. An appeal was entered on the ground amongst others that the plaintiff having failed as against the city could not succeed against the third party as he was made a party defendant only for the purpose of indemnifying the city, but the D. C. supported the judgment. See also McIntyre v. Lindsay, 1902, 4 O. L. R. 448, where judgment was given over against a gas company acting with the consent and license of the town.

If the plaintiff adds both defendants he may be compelled to elect which he will proceed against: Baines v. Woodstock, 1905, 10 O. L. R. 694; Cons. Rule 67, S. C. O. 1913; Hinds v. Barrie, 1903, 6 O. L. R. 656 C. A.

In Rice v. Whitby, 1898, 25 A. R. 191, D., who was moving a house, left it on the highway at night without a light. The plaintiff sued the corporation who caused D. to be added under this section. The C. A. held the corporation not liable because they had no notice and dismissed the action as against D. because the plaintiff did not make him a party and therefore could not claim to hold him liable in the action. This course would appear to be the correct one rather than that followed in Stilliway v. Toronto, *supra*.

In Baskerville v. Ottawa, 1892, 20 A. R. 108, the plaintiffs were abutting land owners who erected a terrace to conform to a street grade fixed by the city. Subsequently the city by agreement permitted a railway company to build along the street, stipulating that they conform to the grade. The railway company raised the grade but left the highway in good repair and free from obstruction. The plaintiffs sued the city and the city added the railway company under this section. Judgment was given against both defendants with a proviso that the city should recover from the railway company. This was reversed in the C. A. on the ground that judgment could not be given against the company directly and the city was not a wrongdoer. The company were held liable to the plaintiffs in a separate action. In this Parkdale v. West, 12 App. Cas. 602, was followed. See also McKelvin v. London, 1892, 22 O. R. 70 D. C., approving Balzer v. Gosfield, *supra*.

The damages sustained must be by reason of acts which *quoad* highway cause damage to the plaintiff. Where a dam placed on the highway by the license of the corporation burst and caused damage to lands below, this section was held not to apply: Ward v. Caledon, 1892, 19 A. R. 69.

In Organ v. Toronto, 1893, 24 O. R. 318, ice formed on a sidewalk by reason of water brought down from the roof of a building. The plaintiff suffered injury and sued the city, and on application of the latter the owner and tenant of the building were made party defendants. The owner only was held liable over. (For ice forming and resulting in injury, see Skelton v. Thompson, 1883, 3 O. R. 11).

In McCann v. Toronto, 1897, 28 O. R. 650, the city failed in a claim over against its own contractors because of a finding that the contractors were not negligent and the city was.

Erdman v. Walkerton, 1892, 15 P. R. 12, for the difference between a defendant and a third party.

Notice Pursuant to Rules of Court.—See R. S. O. 1913, 165 *et seq.*, and Holmested's Judicature Act, 1915, p. 612.

Liability of Third Party for Obstruction.—Where a defendant unlawfully obstructs the highway and by the intervention of a third person, the obstruction is moved to a place where injury results to a person lawfully using the highway, the intervention of the third person will not relieve the defendant from liability for the condition of the structure at the time of the accident: Rigby v. Hewitt, 1850, 5 Ex. 240; Hill v. New River Co., 1868, 9 B. & S. 303; Clark v. Chambers, 1873, 3 Q. B. D. 327; Tessier v. Ottawa, 1917, 41 O. L. R. 205. Where obstructions are liable to be moved,

if they are moved it is a natural and direct outcome of the original neglect for which the defendant is responsible: Harrison v. Great Northern R. W. Co., 1864, 3 H. & C. 231; Collins v. Middle Level Commissioners, 1869, L. R. 4 C. P. 279; Paterson v. Blackburn Corporation, 1892, 9 Times L. R. 55 C.A., and Illidge v. Goodwin, 1831, 5 C. & P. 190; Tessier v. Ottawa, 1917, 41 O. L. R. 205.

See also Toronto Hydro-Electric Comm. v. Toronto Railway Co., 45 O. L. R. 470.

465.—(1) Whenever there is a dispute between the councils of any two or more corporations as to the corporation on which the obligation to build and maintain or to build or maintain a bridge or to keep in repair a highway rests, the High Court may upon the application of any or either of the corporations determine the matter in dispute on an originating motion; or the Court, if of opinion that the matter in dispute cannot satisfactorily be determined on an originating motion, or that for any other reason it ought not to be so determined, may direct that an action may be brought or that an issue be tried for the purpose of determining the matter in dispute, and the Court may in either case compel by mandamus the performance of the obligation by the corporation upon which it is found to rest.

(2) Except in the cases provided for by section 468, where the dispute is as to the proportions in which the corporations should contribute to the cost of erecting and maintaining or of erecting or maintaining a bridge or of keeping in repair a highway, the matter in dispute shall be determined by arbitration. *New.* *See* 3 Edw. VII. c. 19, s. 618; 7 Edw. VII. c. 40, s. 27; 3 & 4 Geo. V. c. 43, s. 465 (1-2).

Dispute as to the Obligation to Erect and Maintain.—The dispute to be settled under this section must be one as to whether or not there is a duty to repair. Where the duty is acknowledged and the dispute as to the action to be taken, see s. 467, or if as to the proportions in which contribution is to be made, see s. 468. The earlier disputes are to be settled by arbitration except when they arise between counties, in which case the Municipal Board decides, see s. 469.

The Supreme Court.—Formerly this duty was imposed on the County Court Judge. See reference after (2) *supra.*

Purpose of the Section.—The purpose of the section is to give an aggrieved municipality a summary and effectual remedy when any other municipality charged with the duty of erecting or repairing a bridge or keeping in repair a highway, fails to discharge that duty, per Middleton, J., Re Pembroke and Renfrew, 1910, 21 O. L. R. 373 D. C.

Reviewing Decision of County Council.—In re Pembroke and Renfrew, *supra*, Middleton, J., said: "I desire to be free to consider the very important question whether the decision of the county council (as to necessity for a bridge), can be reviewed. . . . It must not be assumed too readily that Brooks v. Haldimand, 1878, 3 A. R. 73, is no longer law or that that case was successfully distinguished in the judgments of Burton and Patterson, JJ.A., in re Moulton and Haldimand, 1885, 12 A. R. 503:" see notes to s. 452.

Mandamus.—See judgment of Patterson, J.A., in Re Moulton and Haldimand, 12 A. R. 503, and contra, see judgment of Osler, J.A., in the same case.

Cases under s. 468.—Section 468 does not apply to disputes as to a township boundary which is also a county boundary, see s. 468 (7) but is confined to other boundary lines between townships where there is joint jurisdiction, s. 468 (1). See also, s. 469.

466.—(1) Where an allowance for road was not reserved in the original survey on a township boundary or part of it, the councils of the townships may establish and lay out a highway on such boundary or part of it.

(2) The councils of any or either of the municipalities may pass a by-law for establishing and laying out such a highway and for acquiring the land requisite for the one-half of it which lies within the limits of its municipality.

(3) The clerk shall within four days after the passing of the by-law transmit by registered post to the clerk of each of the other townships a copy of the by-law certified under his hand and the seal of the corporation to be a true copy.

(4) If the other council or councils do not within six months after such notice pass a by-law or by-laws in similar terms, the council by which the by-law was passed may require the question of establishing and laying out the proposed highway to be determined by arbitration.

(5) The arbitrators shall determine whether or not the proposed highway shall be established and laid out, and if they determine that it shall be established and

laid out they shall also determine in what proportions the cost of the site of it shall be borne by each of the corporations.

(6) If it is determined by the arbitrators that the proposed highway shall be established and laid out, the other councils shall forthwith after notice of the award pass the necessary by-laws for establishing and laying out the proposed highway and for acquiring the land requisite for the one-half of it which will lie within the limits of their respective municipalities, and for otherwise carrying out the provisions of the award, and shall proceed with reasonable despatch to carry into effect the provisions of the by-law.

(7) If it is determined by the arbitrators that the proposed highway shall not be established and laid out, no further proceedings shall be taken under this section within two years from the date of the award or within such time not exceeding in all four years, as the arbitrators may by their award determine. 3 Edw. VII. c. 19, s. 620 (2-5), *redrafted;* 3 & 4 Geo. V. c. 43, s. 466 (1-7).

Establishing Township Boundary Lines where None Reserved.—As joint action is necessary to establish and lay out such a boundary line this section is necessary to provide the machinery. As to requisites of by-law, see s. 472.

Shall Forthwith Pass the Necessary By-laws.—After the award is made and notice given all, there is no further discretion left to the other councils. An imperative duty is cast on them to act, and a mandamus will be granted to compel them so to do. Re Peek and Peterborough, 1873, 34 U. C. R. 129; Re Williams and Brampton, 1908, 17 O. L. R. 398, D.C.; R. ex rel. Sovereen v. Edwards, 1912, 22 M. R. 790, and see title Mandamus *supra.*

467.—(1) Where a highway or bridge is under the joint jurisdiction of the councils of two or more municipalities and they are unable to agree as to any action which one or more of them desire to be taken in the exercise of such joint jurisdiction, any of them may require that the matter in dispute shall be determined by arbitration, and in that case shall prepare a draft by-law for carrying into effect what it is desired shall be done, and serve a copy of it on the clerk of the other municipalities with a notice that it is its desire that such a by-law shall be passed.

(2) If it is determined by the arbitrators that what is proposed ought to be done, they shall by their award so direct, and in that case each council shall forthwith after notice of the award pass a by-law in accordance with the draft by-law and shall, without unnecessary delay, do all things which on its part are necessary for carrying into effect the objects of the by-law. *New.* 3 & 4 Geo. V. c. 43, s. 467 (1-2).

Deviations of County Lines.—Where the dispute is as to a deviation of a county boundary line, see s. 469.

Enforcing Award.—See s. 466.

468.—(1) Where the councils of the townships having joint jurisdiction over a township boundary line fail to agree as to the character of the work to be done in opening, maintaining or repairing it, or as to the proportions in which the cost of the work is to be borne by the corporations of the townships respectively, any or either of such councils may apply to the council of the county to determine the matters in dispute. 3 Edw. VII. c. 19, s. 648, *amended.*

(2) Where the township councils having the joint jurisdiction over it neglect or refuse to open up and make, maintain and keep in repair any such boundary line, a majority of the ratepayers resident on land abutting on it may apply to the council of the county to enforce the opening up and the making, maintaining and keeping in repair of such boundary line. 3 Edw. VII. c. 19, s. 649, *amended.*

(3) The application shall be by petition and the council of the county after notice to all the corporations interested and after hearing them and the petitioning ratepayers, if the petition is by ratepayers, or such of them as desire to be heard, shall determine in the case provided for by sub-section 1, what work shall be done and the proportions in which the cost of it shall be borne by the corporations of the townships respectively, and in the case provided for by sub-section 2 whether the boundary line shall be opened up and the propor-

tions in which the corporations of the townships shall respectively bear the cost of opening up, making, maintaining and keeping in repair the boundary line, and in either case may direct that the statute labour or part of it shall be applied by each of the corporations for such purposes. 3 Edw. VII. c. 19, ss. 650, 651, *redrafted.*

(4) The determination and direction of the council of the county shall be embodied in an order or resolution, and the council shall appoint one or more commissioners to execute and enforce any direction so made. 3 Edw. VII. c. 19, s. 652, *first part amended.*

(5) If the councils of the townships intimate to the council of the county or to the commissioners their intention to proceed with the work directed to be done and to conform to the direction of the council of the county, the commissioners shall delay proceeding to carry out the work directed to be done for a reasonable time to enable the township councils to do it, but if the work is not proceeded with with such despatch as the commissioners deem necessary they shall themselves complete the work. 3 Edw. VII. c. 19, s. 652, *last part amended.*

(6) The cost of any work done by the commissioners shall be by them apportioned between the corporations of the townships in accordance with the order or resolution of the council of the county, and the commissioners shall certify to the treasurer of the county, the amount payable by each of such corporations, and the treasurer shall retain the same out of any money in his hands belonging to the corporation, but if there is not in the hands of the treasurer any such money or not sufficient to pay the amount payable by the corporation, the amount payable or the amount of the deficiency, as the case may be, shall be added to the county rate payable by the corporation in default. 3 Edw. VII. c. 19, s. 653, *redrafted.*

(7) This section shall not apply to a township boundary line which is also a county boundary line. *New.* 3 & 4 Geo. V. c. 43, s. 468 (1-7).

In Wentworth v. West Flamborough, 1911, 23 O. L. R. 583, D.C., a deviation road was held to be a deviation of the boundary line unopened allowance for road for the repair of which both East and West Flamborough were liable. After so finding, Boyd, C., giving the judgment of the D. C., said as folows—

"The county, acting in good faith, after notification to the defendants, and their making objection to being at all liable, proceeded, perhaps with not the greatest regularity, to expend money, some $1,200, in making the repairs, of which one-half was paid by Flamborough East. The other half the defendants refuse to pay and hence this action.

East Flamborough made application, under s. 648 of the Municipal Act, to the county council . . . to adjust the dispute and this was passed on by the council, in the presence of representatives of both, . . . and, after inspection of the road in dispute, it was resolved that, as before this time the township of East Flamborough had done the repairs without consulting West Flamborough, that would not be disturbed, but for the future the road in dispute should be deemed the town line between the townships, and that both should bear a like sum in keeping the road in repair.

(Later) . . . the council of the county resolved under s. 652 of the Act, that it was expedient and necessary to appoint a commissioner to see that the road should be placed and maintained in fit repair, and that all expenses incurred should be . . . collectable . . . in equal proportions . . . but no steps were taken beforehand to fix how much that was to be . . . the work was done by the commissioner and the moiety of that outlay has been paid by one of the interested townships, but not by the defendants.

The *modus operandi* provided by the statute is not very clear. I can find only one reference to the sections in a case reported, O'Connor v. Townships of Otonabee and Douro, 35 U. C. R. 73, 86, where the county made five yearly grants for the entire line, amounting in all to $875, which was expended by commissioners appointed for the purpose; and it is said that this is the course directed by ss. 434, 435 and 436 when the county is doing the work for the townships, because the townships are not willing to do the work themselves.

The proper reading of ss. 648-653 is to be considered. As pointed out by Mr. Harrison in his Municipal Manual, the original of s. 648, supposes that one of the townships is disposed to do what is required; but s. 649 is where all neglect or refuse to act; and that case of joint inaction or refusal is provided for by s. 650 referring to petitions provided for in terms of s. 649. I read ss. 650 and 651 as closely connected together and as conferring a permissive power to act under s. 649. That is indicated by the amendment made in 1869 changing what was then s. 341, s.-s. 4, from compulsory to permissive provisions: 33 Vict. c. 26, s. 16. So that, in effect, ss. 649, 650, and 651 are to be read as bracketed together and as of permissive character; 648 and 652 may be read together as of compulsory character, i.e., when once the county has directed joint action or declared joint liability on the part of the townships it shall be the duty of the county to appoint a commissioner to execute and enforce these orders as to the joint road; and if the representatives of the townships do not intimate their intention to execute the work themselves (the initiative as to the intention so to intervene rests on the township), then it is open for the county council to proceed "during the favourable season" and finish the work. If the county has not predetermined the exact amount to be spent, that does not, as I read the Act, disqualify that body from doing the work and recovering the outlay from the township in default.

Section 651, as to a prior determination of the amount, whether by statute labour or money expenditure or both, is not a necessary step in the proceeding; it is a permissive provision only. It may be, on a strict construction of s. 653, that when there has been such prior determination of the portion to be paid by the township, the method of recovering that outlay is provided for by retention of any township money in the control of the county or by levy of an additional rate on the township sufficient to cover such advances. But, even so, that would not preclude an action to recover the statutory debt, whether arising out of a strict adherence to the permissive terms of the Act or by the actual doing of the work by the county, when the

township elected not to do it. This is the result of the early decisions—Huron D. Council v. London D. Council, 1848, 4 U. C. R. 302, and County of Wellington v. Township of Wilmot, 1859, 17 U. C. R. 82. . . . judgment will go for the payment claimed."

Note, this case was appealed but only on the question whether the road was a deviation of a town line, 26 O. L. R. 199.

The amendment of 1913 given above changes the permissive provisions of s. 650 and 651, now s.-s. (3), back to compulsory provisions, so that the county council can be compelled to act as in the case of any specific duty.

See Mandamus, supra. The provisions of s.-s. (3) as to action under s.-s. 1 are compulsory now as are the provisions of ss. 4 and 5. Sec. 651, before amended, read "May determine the amount which such township . . . shall be required to pay."

469. Where the council of the townships having joint jurisdiction over a county boundary line are unable to agree as to—

(*a*) The necessity for a deviation of the road from the boundary line, or

(*b*) The location of the deviation, or

(*c*) The use of an existing highway in lieu of a deviation, or

(*d*) The proportions in which the cost of opening, making and maintaining the deviation or the existing highway to be used in lieu of a deviation, is to be borne,

any of the councils may apply to the Municipal Board to determine the matter in dispute, and the Board or any member of it, after notice to the corporations interested and hearing such of them as desire to be heard, shall determine the matter in dispute and may make such order as may be deemed just, and such order shall be final and not subject to appeal. 3 Edw. VII. c. 19, s. 654, *amended;* 3 & 4 Geo. V. c. 43, s. 469.

The Municipal Board.—Under 654 the application was to be made to the wardens of the bordering counties and the county judge of the county in which the township first making the application was situate was in all cases to be the third arbitrator.

May Make Such Order as May be Just.—See notes to s. 460.

Deviations of County Boundary Lines.—See notes to s. 458 *supra.*

470.—(1) The Ontario Motor League may at its own expense and subject to such regulations as the council of the municipality may prescribe, erect and maintain guide posts at road intersections and mile posts on the

highways to indicate distances and danger signals at hills which may be deemed to be dangerous or unsafe for travellers.

(2) Every such guide post, mile post and danger signal shall be so placed as not to obstruct the highway or to endanger the safety of travellers, and nothing shall appear on or be affixed or attached to it, but a notice indicating the purpose which the guide post, mile post or danger signal is designed to serve.

(3) Every person who contravenes any of the provisions of sub-section 2 shall incur a penalty of $5 for every such contravention. 3 Edw. VII. c. 19, s. 636; 1 Geo. V. c. 57, s. 14, *redrafted*.

(4) No person shall cut or throw down or injure or deface any such guide post, mile post or danger signal, and for every contravention of this sub-section the person offending shall incur a penalty not exceeding $50. *New*. 3 & 4 Geo. V. c. 43, s. 470 (1-4).

471. The Canadian Wheelman's Association of the Dominion of Canada shall have the like power as is by the next preceding section conferred on the Ontario Motor League, and all the provisions of that section shall apply to guide posts, mile posts and danger signals erected or maintained by the Association; but where either the League or the Association has exercised the powers conferred upon it upon any part of a highway the other shall not have the right to exercise its powers thereon. *New*. 3 & 4 Geo. V. c. 43, s. 471.

Regulations.—See *supra*, p. 790, as to the power to make regulations.

Shall Incur a Penalty.—For procedure see s. 498 and the notes there.

472.—(1) The council of every municipality may pass by-laws,

(*a*) For establishing and laying out highways;

(*b*) For widening, altering or diverting any highway or part of a highway;

(*c*) For stopping up any highway or part of a highway and for leasing or selling the soil and freehold of a stopped up highway or part of a highway.

(*d*) For setting apart and laying out such parts as may be deemed expedient of any highway for the purpose of carriage ways, boulevards and sidewalks, and for beautifying the same, and making regulations for their protection;

(*e*) For permitting subways for cattle under and bridges for cattle over any highway. 3 Edw. VII. c. 19, ss. 637, 658, pars. 1-2; 660, par. 2, *part redrafted;* 3 & 4 Geo. V. c. 43, s. 472 (1).

The powers given by s.-s. (1) were formerly given by 637 (1), (3) and (5), of which s.-s. (1) read, as follows:—

"For opening, making, preserving, improving, repairing, widening, altering, diverting, leasing, selling or stopping-up" highways; as to repairs which may be made without a by-law see title Making Repairs, p. 946.

Joint Jurisdiction.—Where highways are under joint jurisdiction all corporations having jurisdiction must pass by-laws for the purposes of this section and in event of disagreements the provisions of ss. 465 to 469 must be invoked.

May Pass By-laws.—The council has a discretion as to whether it will act or not and cannot be compelled to act by mandamus even when it has passed a by-law: Re Wilson v. Wainfleet, 1883, 10 P. R. 147; Hislop v. McGillivray, 1888, 15 A. R. 687; 17 S. C. R. 479; Julius v. Oxford, 1880, 5 App. Cas. 214; 49 L. J. Q. B. 577.

In Liverpool v. Liverpool, 1903, 33 S. C. R. 180, it was held that the power to pass by-laws making regulations *impliedly excluded the power to make such regulations other than by by-law.* This rule would apply here so that the various powers enumerated in s.-s. 1 must be exercised by by-law.

Under 637, when "preserving, improving, repairing" was included with the powers now given by s.-s. 1, there was conflict of judicial opinion as to whether or not a by-law was necessary. See Croft v. Peterborough, 1856, 5 C. P. 35, 141; Pratt v. Stratford, 1887, 14 O. R. 260, 16 A. R. 55; Ayers v. Windsor, 1887, 14 O. R. 682, and Taylor v. Gage, 1913, 30 O. L. R. at 86. App. Div. and see title Repairs, supra, p. 946.

By-laws under which any Highway is Opened upon Private Property must be Registered in Order to Become "Effectual in Law."—This result follows from the provisions of section 70 of the Registry Act, R. S. O. 1914, ch. 124. "Effectual in law" means effectual for any purpose and is not to be limited as meaning "effectual in law as notice within the registry laws:" Re Henderson and Toronto, 1898, 29 O. R. 669. Beveridge v. Creelman, 1877, 42 U. C. R. 29, is not an authority for the contrary view. Such a by-law may be moved against and set aside before registration, although it has no force, effect or validity whatever: Harding v. Cardiff, 1882, 2 O. R. 329.

Establishing and Laying Out Highways.—It is essential to the validity of a by-law to establish and lay out a highway that the course, boundary and width of such highway, should be capable of being ascertained

either from the by-law itself or from some document or description referred to by it, which may be treated as incorporated therewith. Failing this the by-law is necessarily inoperative and void. St. Vincent v. Greenfield, 1887, 15 A. R. 567, see also re Chambers and Burford, 1894, 25 O. R. 276.

Opening Original Allowance.—If adjoining owners have become entitled to the original allowance under ss. 493 or 494 a by-law to open it up as of right will be quashed: Beemer v. Grimsby, 1886, 13 A. R. 225. The argument that because the road might be opened up in any event, therefore the by-law should not be quashed, was rejected. See part XV., s.-s. 321 *et seq.* for procedure necessary in such a case. But a person merely in possession of the original road allowance without title cannot prevent the council from opening it and the by-law may contain a provision that possession shall be given up on a certain date, which operates as a notice of intention to open: Re McMichael and Townsend, 1872, 33 U. C. R. 158.

New Roads Through Crown Lands.—It has been held that a municipality cannot expropriate provincial Crown lands for the purpose of opening a highway. Rae v. Trim, 1880, 27 Gr. 374.

Stopping-up Through Highways.—The words "wholly within the jurisdiction of the council" used to follow at the end of s. 637 (1). It was held that wholly had reference to the jurisdiction of the council, not to the locality of the road. Re Taylor and Belle River, 1909, 18 O. L. R. 330. The ss. now clearly empowers a council to close a highway or part of a highway even if it is a part of a continuous highway passing into, across and out of the municipality, *ibid.* This was a decision of Meredith, C.J. For a contrary view see remarks of Rose, J., in Hewison v. Pembroke, 1884, 6 O. R. 170, Meredith, C.J., followed Re Falle and Tilsonburg, 1873, 23 C. P. 167.

Opening Road Alongside a Toll Road.—When a toll road is established and the right given to collect tolls, with the obligation to keep in repair, it would be unfair, unjust and illegal to establish a road running alongside and affording the public equal facilities, solely for the purpose of enabling the public to avoid the payment of tolls, and any by-law passed in furtherance of such a scheme would be unsupportable, if attacked by either the proprietor of the toll road, or any person whose property it was intended to expropriate for the purpose of constructing the new road. Per Rose, J., in Re Carpenter and Barton, 1887, 15 O. R. 55. A similar state of facts to those above mentioned was considered in East Gwillimbury v. King, 1909, 20 O. L. R. 510 C.A., although the latter case was decided on the absence of a by-law and corporate seal.

Subways and Bridges for Cattle, Overhanging Signs, etc.—The right to permit erection of structures over or under a highway such as overhanging signs, wires, cables, bridges, subways, tunnels, conduits, waterpipes, etc., depends upon the ownership of the soil and the freehold of the highway. The municipal authority in some instances has vested in it only the zone of user. In other cases its owns the soil and the freehold. Where the soil and the freehold is vested in the abutting owners they may apparently string a wire above the zone of user or dig a tunnel under it. Wandsworth v. United Telephone Co., 1884, 13 Q. B. D.; 53 L. J. Q. B. 449; Finchley v. Finchley, 1903, 1 Ch. 437; 72 L. J. Ch. 297 (wires). Poplar v. Millwall Dock Co., 1904, 68 J. P. 339 (tunnel). In Ontario the soil and the freehold is in the municipal corporations which have jurisdiction, s. 433. As owners municipal corporations on general principles could authorize the erection of such structures so long as they did not interfere with the highway as such, but the right arising from the nature of their estate in the soil and the freehold of the highway is subject to restriction by the terms of the Act. For example the right is enlarged by giving power to authorize certain actual obstructions, s. 491, and it must be held to be restricted by the specific powers given in various parts of the Act as in 1 (*c*) *supra*. It would appear then that the power to authorize such structures must be found in the Act and in the absence of a special power either express or implied legislative sanction is necessary to authorize the overhead or underground structure.

Where any such structure is authorized an indemnity ought to be taken with an undertaking to remove on notice.

Carriage Ways and Boulevards.—In the absence of a special power the council would have no right to interfere with the right of the public to use every portion of the highway for the purpose of passing, repassing or delaying for a reasonable time. The jurisdiction given by the Act is the only jurisdiction the council has. It is, in Ontario at least, a transferred jurisdiction such as was discussed in the House of Lords in Cowley v. Newmarket, 1892, A. C. 345; 67 L. J. Q. B. 65. For example, a part of a highway as the Act now stands could not be set aside for the exclusive use of motor cars. At common law all persons have the right to walk in the road and drivers of vehicles must take care: Boss v. Litton, 1832, 5 C. & P. 407, but under 1 (*d*) the council may by by-law restrict this right and confine foot passengers to sidewalks.

472.—(2) Nothing in sub-section 1 shall authorize a council to interfere with any public road or bridge vested in the Crown in right of Ontario or in any public Department, Board or officer of Ontario. 3 Edw. VII. c. 19, s. 627, *part.*

(3) A by-law passed under the authority of clause (*b*) or clause (*c*) of sub-section 1 in respect of an allowance for road reserved in the original survey along or leading to the bank of any river or stream or on the shore of any lake or other water shall not take effect until it has been approved by the Lieutenant-Governor in Council. 3 Edw. VII. c. 19, s. 632 (2), *amended.*

(4) The powers conferred by sub-section 1 shall not be exercised without the consent of the Governor-General in Council in respect of,

(*a*) Any street, lane or thoroughfare made or laid out by His Majesty's Ordnance or the Principal Secretary of State in whom the Ordnance estates became vested under the Act of the late Province of Canada passed in the 19th year of the reign of Her late Majesty Queen Victoria, Chapter 45, or under Chapter 24 of the Consolidated Statutes of Canada, or made or laid out by the Government of Canada;

(*b*) Any land owned by the Crown in right of the Dominion of Canada;

(*c*) Any bridge, wharf, dock, quay or other work vested in the Crown in right of the Dominion of Canada;

or so as to interfere with any land reserved for military purposes or with the integrity of the public defences, and the consent of the Governor-General in Council shall be recited in the by-law, but the by-law shall not be quashed or open to question because of the omission to recite it if the consent has been in fact given. 3 Edw. VII. c. 19, s. 628, *amended*. 3 & 4 Geo. V. c. 43, s. 472 (2-4).

Subsequent Consent will not Validate By-law.—In re Inglis and Toronto, 1904. 8 O. L. R. 570, was a case where a by-law was passed closing part of a street within s.-s. 4 (*a*). The consent of the Governor-General in Council had not been obtained at the time but was subsequently obtained and then an amending by-law was passed inserting a recital to the effect that the necessary consent had been given. Before the by-law was amended the motion to quash was launched. McMahon, J., held that the original by-law was void and that in passing it the council had exhausted its powers and that such a void by-law could not be given life and rendered valid by the subsequent consent and the passing of the amending by-law.

The powers referred to are presumably the powers the council had gained under the by-law by reason of the due observance of the giving of notice under 475 and other formalities; undoubtedly the council having obtained the consent could proceed *de novo* to pass a by-law stopping up such a highway.

472.—(5) The powers conferred by clause (*c*) of sub-section 1 shall not be exercised by the council of a county in respect of a highway or part of a highway within the limits of a city, town or village in or adjoining the county. 3 Edw. VII. c. 19, s. 658, par. 1, *part amended*. 3 & 4 Geo. V. c. 43, s. 472 (5).

Limitation on Powers of County.—The powers given by s.-s. 1 can be exercised by every municipality which has jurisdiction in respect of any highway. In the case of a county it may assume any highway within a town, not being a separated town, village or township 446 (1), and having by this means acquired jurisdiction the county could proceed under 472 (1) to exercise the powers thereby given were it not for the limitation imposed by 472 (5).

472.—(6) A by-law of the council of a township, passed under the authority conferred by clause (*c*) of sub-section 1, in the case of a township in unorganized territory, shall not have any force unless and until approved by a Judge of the District Court of the district

in which the township is situated, and in other cases unless and until confirmed by a by-law of the council of the county in which the township is situate passed at an ordinary meeting of the council held not sooner than three months or later than one year after the passing of the by-law of the council of the township. R. S. O. 1897, c. 225, s. 36. 3 Edw. VII. c. 19, s. 660, par. 2, *part.* 3 & 4 Geo. V. c. 43, s. 472 (6).

Limitation on Powers of Townships.—By-laws under 472 (1 c) when passed by townships "shall not have any force," unless and until approved or confirmed. They spring into life on the happening of a condition subsequent. They may be quashed for illegality or irregularity whether or not they have been approved or confirmed. Such subsequent acts cannot give life to a nullity or legality to an illegality. Prior to consent or confirmation such by-laws may be compared with by-laws passed to take effect on the happening of some condition subsequent; such a by-law was considered in Re Carpenter and Barton, 1887, 15 O. R. 55, *supra.* Also in Re Denison and Wright, 1909, 19 O. L. R. 5 D.C., where a by-law provided that it was not to "come into operation and be in full force and effect" until a subsequent date. Meredith, C.J., said such a by-law was certainly an existing by-law from the time of its final passage. Also see Brock v. Muttlebury, 1911, 45 S. C. R. 271. As to giving life to a nullity see Whelan v. Ryan, 1891, 20 S. C. R. 65. Irregularities may be cured, see title By-laws, *supra.*

Not Sooner than Three Months or Later than One Year.—If not confirmed within the time mentioned the township by-law lapses and a new by-law is necessary, which in turn must be confirmed within the time limited. See In re Ingles and Toronto, *supra,* s.-s. 4.

The day of the date of passing is to be excluded: Goldsmiths v. West Metropolitan R. Coy., 1904, 1 K. B. 1; 72 L. J. K. B. 931.

472.—(7) The council may, in any by-law closing a highway, provide that the same shall only be closed for vehicular traffic and not for pedestrian or *vice versa,* and may provide for the erection of barricades to enforce the due observance thereof. 9 Geo. V. c. 46, s. 21.

473.—(1) A by-law shall not be passed for stopping up, altering or diverting any highway or part of a highway if the effect of the by-law will be to deprive any person of the means of ingress and egress to and from his land or place of residence over such highway or part of it, unless in addition to making compensation to such person, as provided by this Act, another convenient road or way of access to his land or place of residence is provided.

(2) The by-law shall not take effect until the sufficiency of such road or way of access has been agreed upon or unless and until, if not agreed upon, its sufficiency has been determined by arbitration as hereinafter mentioned.

(3) If such person disputes the sufficiency of the road or way of access provided, the sufficiency of it shall be determined by arbitration under this Act, and if the amount of compensation is also not agreed upon both matters shall be determined by one and the same arbitration. 3 Edw. VII. c. 10, s. 629, *redrafted*.

(4) If the arbitrators determine that the road or way of access provided is insufficient they may by their award determine what road or way of access should be provided, and in that case, unless such last mentioned road or way of access is provided, the by-law shall be void and the corporation shall pay the costs of the arbitration and award. *New*. 3 & 4 Geo. V. c. 43, s. 473 (1-4).

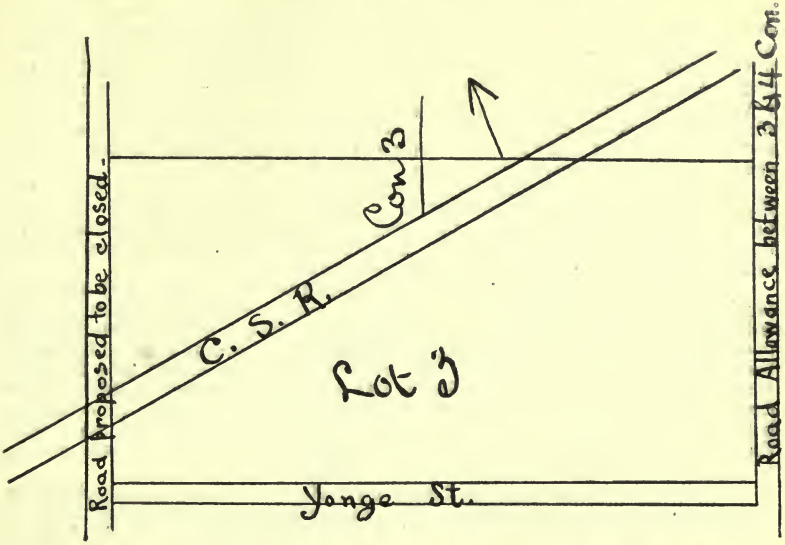
Unless Another Convenient Road or Way of Access is Provided.—This provision was considered by the C. A. in Re McArthur and Southwold, 1878, 3 A. R. 295. Burton, J.A., said: "In the present case the owner of the land is not excluded from ingress and egress to his land, and the test suggested . . . is one that has always struck me as a reasonable one. 'If there is an existing road adjoining the owner's land, which would have satisfied the requirements of the law, if furnished or provided for the use of such owner in lieu of the highway closed, then the case is not within the . . . section.' As regards the case suggested . . . of a council closing a street in a city upon which an expensive dwelling house had been erected, claiming that the owners had access to it from a stable yard and street in the rear, it is sufficient perhaps to say that if a council so misconducted themselves, the Courts would be found strong enough to prevent any such unjust proceedings: but applying the tests to which I have referred, they would have no power to pass such a by-law, the closed street being the only convenient means of access to the dwelling."

Patterson, J.A., said:—"There can be no doubt as to the applicant having another convenient way of access. It is not required that it shall be as convenient to the road which the by-law closes, otherwise there would be no question of compensation."

In Adams and East Whitby, 1882, 2 O. R. 473, Osler, J., held that the onus of proving that there is an existing convenient road rests on the corporation and that the power given by the section is a conditional one only, and if the conditions necessary to its exercise do not exist, the by-law may be quashed. He suggested that another road if not in existence ought to be opened by another by-law passed before the time fixed for closing the road.

In re Martin and Moulton, 1900, 1 O. L. R. 645, D. C., under s. 629 in its original form. Martin, the appellant, owned lot 3 which was crossed by a railway over which there was an ordinary farm crossing. The council of

Moulton proposed to close the only road by which access could be had to the portion of the lot north of the railway. The following sketch will illustrate the situation.



Martin brought an application to quash the by-law, one objection raised being that as a condition precedent to the closing of the highway in question the corporation had to provide another convenient road or means of access for the part of the farm north of the railway. Boyd, C., upheld the by-law following McArthur and Southwold, supra, and Adams and East Whitby, 1882, 2 O. R. 473, a ruling which was reversed by the D. C. Meredith, C.J., giving the judgment of the Court, quoted with approval the remarks of Burton and Patterson, JJ.A., given *supra*, but added:—

"The appellant's land is used as one farm, consisting. . . . and in view of this, had it not been for the severance by the railway lands of the north part of the farm from the remainder of it, I should have come to the same conclusion . . . as that which was reached by the Chancellor.

The fact that the farm of the appellants is divided into two parts separated from each other by the intervening lands of another, however, raises an important question as to the application of the section, and the meaning of the word "lands" as used in it. In applying the section to the case of lands occupied as a farm, what is the meaning to be given to the word "lands." Does it mean and include the whole of a farm, whether composed of one or more original lots or parts of lots contiguous to one another, or is each lot or part of a lot to be treated as a separate parcel for the purposes of the section? . . . I take it to be quite clear . . . that had there been no statutory right to a farm crossing over the railway, the two parcels of which appellants' farm is composed, must, for the purpose of the applying the provisions of the section, be treated as separate and distinct "lands."

Are then the two parts of their farm any the less to be treated as separate and distinct "lands" because of the existence of the right of crossing conferred by the Railway Act? I think not. The shortness of the distance to be travelled in getting from one part of the farm to the other by means of the crossing is of no importance, for the same principle must apply whether the length be as it probably is in this case between 60 and 100 feet or as many hundred feet.

"All that at most the appellants have in the farm crossing is an easement over the lands of the railway company; but so far as the ownership

of the soil is concerned, the part of the lot north of the railway is completely severed from the remainder of it. If the road in question be closed and the appellants were to sell the part of their farm lying north of the railway the purchaser would have no means of access to any highway, and none could be provided unless it were obtained by purchase from adjoining land owners. How, then, can it be said that the convenient road or means of access to the appellants' lands which the statute requires that they shall have or shall be provided for them is afforded by Yonge Street and the road between the 3rd and 4th concessions? It is not the case of a less convenient road or means of access being provided, but in my opinion it is an attempt to force on the appellants a road which as respects the part of their farm north of the railway, at least one-third of their farm, is not in any sense a convenient road or means of access."

This section was again considered in Jones v. Tuckersmith, 33 O. L. R., p. 634, where it was sought to set aside a by-law closing a street on the ground among others that there was no jurisdiction to pass the by-law without first providing the plaintiffs and certain others with some other convenient road or way of access to their lots.

Meredith, C.J., again delivered the judgment of the court and after referring to McArthur and Southwold, *supra*, said:—"Having regard to the fact that the Centre Street lots and the Mill Street lots are occupied as one property, and, as I have said, the only means of access to it which these respondents have ever used has been by way of Centre Street, and the fact that although some of the Mill Street lots were sold as many as thirty years ago, no one has ever attempted to use Mill Street as a means of access to his property, it must, I think, be held, following the McArthur case, that the effect of the by-law, so far as these persons are concerned, will not be to contravene the provisions of s.-s. 1 of s. 629.

"The lot of the respondent Jones is lot 40, and its only means of access is by Mill Street, but he acquired his lot from persons who owned the lot behind it, which fronts on Centre Street, after the passing of the by-law. It was said that there had been a verbal arrangement for the sale of the lot to Jones before the by-law was passed; but if there was, it was made after notice of the intention to pass the by-law was given, and the fact of its having been given had come to the knowledge of Jones, and I strongly suspect his purchase was made for the purpose of making it impossible to pass the by-law, or to pass it without providing some other means of access to the lot. In these circumstances . . . the case must be dealt with as if his lot at the time of the passing of the by-law had been still owned by the persons who sold to him."

Summary.—"Land" will include several contiguous lots owned by one person who will not be entitled to another convenient road for each lot owned by him. In other words the user of the whole tract made up of adjoining lots will be considered and the separate parcels as indicated by lines on a plan or on the ground will not each be entitled to another convenient road unless separately owned. On the other hand a parcel owned by one person consisting of a lot or a part of a lot as shewn on a plan or by lines on the ground will be considered as two separate parcels if separated by a right of way or otherwise. This question also arises in settling compensation for lands taken or injuriously affected; see part XV. *supra* p. 538.

In Addition to Making Compensation.—The payment of compensation is not a condition precedent to the right to pass the by-law although the providing of another convenient road is: Harding v. Cardiff, 1882, 2 O. R. 329; Re McArthur and Southwold, *supra;* Jones v. Tuckersmith, *supra.*

Other Cases.—Vandecar v. E. Oxford, 1878, 3 A. R. 131 (perpetual injunction against closing roads refused), Re Laplante and Peterborough, 1884, 5 O. R. 634 (quashing by-law where no convenient road supplied): White v. Louise, 1891, 8 M. R. 231 (no notice fatal).

If a by-law is passed which is invalid because of failure to comply with the provisions of the section, it cannot be quashed after the time mentioned by s. has elapsed because not invalid on its face, and it cannot be declared invalid in an action.

474.—(1) A person in possession of and having enclosed with a lawful fence that part of an original allowance for road upon which his land abuts which has not been opened for public use by reason of another road being used in lieu of it or of another road parallel or near to it having been established by law in lieu of it, shall as against every person except the corporation the council of which has jurisdiction over the allowance for road be deemed to be legally possessed of such part until a by-law has been passed by such council for opening it.

(2) No such by-law shall be passed until notice in writing of the intention to pass it has been given to the person in possession, at least eight days before the meeting of the council at which the by-law is to be taken into consideration. 3 Edw. VII. c. 19, ss. 642, 643, *redrafted*. 3 & 4 Geo. V. c. 43, s. 474 (1-2).

At Least Eight Days.—The day on which the notice is given should not be counted. Count eight days after it and then the ninth will be the first day on which the by-law may be passed.

Adjoining.—See 482 (1).

Shall . . . be Deemed to be Legally Possessed of Such.—See ss. 493-494.

Notice in Writing of the Intention.—See s. 475.

See Hanley v. Brantford, 1910, 16 O. W. R. 812.

In McLean v. Howland, 1909, 14 O. W. R. 509, a by-law was passed without complying with s. 474. It was never quashed. Plaintiff got no compensation and sued for same or damages for trespass. The action was dismissed.

By-law was good on its face and compliance with section need not be stated by recital or otherwise. Fisher v. Vaughan, 10 U. C. 492, also Connor v. Middagh, applied. See Lister v. Clinton, 18 O. L. R. 197.

475.—(1) Before passing a by-law for stopping up, altering, widening, diverting, selling or leasing a highway or for establishing or laying out a highway,

(*a*) Notice of the proposed by-law shall be published at least once a week for four successive weeks, and in the case of a village or township shall be posted up for at least one month in six of the most public places in the immediate neighbourhood of the highway or proposed highway.

(*b*) The council shall hear in person or by his counsel, solicitor or agent any person who claims that his land will be prejudicially affected by the by-law and who applies to be heard.

(2) The clerk shall give the notices upon payment, by the applicant, if any, for the by-law, of the reasonable expenses to be incurred in so doing. 3 Edw. VII. c. 19, s. 632 (1, 3), *redrafted;* 3 & 4 Geo. V. c. 43, s. 475 (1-2).

Before Passing a By-law . . . Notice shall be Published. —Section 632 formerly read, "no council shall pass a by-law . . . until notices have been previously posted up." The change makes the imperative nature of the provisions more apparent.

In re Ostrom and Sidney, 1888, 15 A. R. 372, a by-law for opening a road was passed on the 29th August. Notices were put up and published on the 29th July of the intention of the council to pass the by-law on the 29th of August. The section then provided that such a by-law should not be passed until notices had been posted up one month previously. The road as opened up did not cross the lots mentioned in the published notices. A motion was made to quash the by-law on the grounds of absence of statutory notice and variance between the by-law and the notice as to location, Street, J., held the variance not fatal, following Baker v. Saltfleet, [1871] 31 C. P. 386, and refused to quash it on the ground of insufficient notice. The C. A. reversed this judgment, quashing the by-law. Osler, J.A., said: "It is essential to the validity of a by-law establishing or stopping up a road, by which the property of private persons may be compulsorily taken or the rights of the public extinguished, that the provisions of the statute under which it is passed shall be strictly observed." He then considered Cubitt v. Maxse, 1873, L. R. 8 C. P. 704; 42 L. J. C. P. 278, where the same rule was applied, also Lafferty v. Wentworth, 8 C. P. 232 (faulty notice); Birdsall v. Asphodel, 45 C. P. 149 (notice omitted date on which council were to consider); Laplante v. Peterborough, 5 O. R. 634 (notice on 28th March for 28th April); Wannamaker v. Green, 10 O. R. 457 (publication and posting of notices held conditions precedent to validity of by-law), and distinguished cases like Ianson v. Reach, 13 C. P. 561; Stanley v. Roper, 17 C. P. 69, in which courts refused to quash the by-law because it had not been made to appear clearly that the requisite notice had not been given and they would assume nothing against its validity.

Re Rickey and Marlborough, 1907, 14 O. L. R. 587, was an application to quash a local option by-law. The Act required publication in at least one number of a paper each week for three successive weeks. Notice was published on Friday, the 14th: Tuesday, the 18th, and Tuesday, the 25th, of a certain month. Mabee, J., held that the notice had appeared in one number each week. Considering that week meant in the section a seven day period beginning with Sunday, Teetzel, J., in giving the judgment of the D. C. said: "I think the intention is that the period of publication 'for three successive weeks' should embrace three successive periods of seven days each, beginning on the first day of actual publication, and not on the first day of the biblical week in which the first publication appears, and that there should be at least one publication in a newspaper in each of the seven day periods.

"If the word 'week' is construed otherwise, it would be possible to have the publications appear in a period having only eight clear days between the first and last publication. . . ."

Hall v. South Norfolk, 1892, 8 M. R. 436; In re Coe and Pickering, 1865, 24 C. P. 439; Raunn v. Leach, 1893, 53 Minn. 84; Early v. Doe, 1853, 16 Howard U.S. 610; and Leach v. Burr, 1903, 188 U. S. 510, were referred to and the by-law was quashed on the ground that there was a substantial

omission of a positive requirement. (Cartwright v. Napanee, 1905, 11 O. L. R. 69, was followed; it was a case in which the court refused to quash a by-law on the ground of insufficient publication because the case was plainly one for allowing the curative provisions of the Act to operate: s. 296 et seq.).

By-laws opening and closing roads are to be distinguished from by-laws which can be validated under s. 296 et seq. Re Mace and Frontenac, 1877, 42 U. C. R. 70.

Contents of Notice.—"The statute does not in terms say that the notice shall mention the time when the council will pass or consider the by-law. But the legislature meant that a time should be named at which those interested could attend and be heard. There should be some reasonable compliance with the statutable intention that the published notice should apprise those interested as to when they could be heard before the council." Boyd, C., in Re Martin and Moulton, 1901, 1 O. L. R. at 646, following Re Birdsall and Asphodel, 1879, 45 U. C. R. 149, and he refused to quash a by-law which did not state the day when the council would consider the by-law considering the following intimation sufficient, "Any person whose land may be prejudicially affected by the carrying out of the intended by-law and who petitions within one month from the date hereof to be heard will be heard in person or by counsel or solicitor by the council before the by-law is passed." This provision was also held to be a literal compliance with the requirements of 1 (*b*).

The notice ought to contain a copy of the proposed by-law or at least a full statement of the effect of it. Even where the statute requires a copy of a by-law to be published an omission of immaterial words will not be fatal. In re Duncan and Midland, 1907, 16 O. L. R. at 143 C. A.

Six of the Most Public Places.—Re Robinson v. Beamsville, 1906, 8 O. W. R. 689, 9 O. W. R. 273.

The Clerk shall Give the Notices upon Payment by the Applicant.—The effect of s.-s. 2 is to cast an imperative duty on the clerk to give notices when any applicant for a by-law within the section pays the expenses. This involves action by the council either to reject or to pass the proposed by-law.

General Notes.—A sale of gravel from a highway was held invalid because not authorized under this section. Taylor v. Gage, 1913, 30 O. L. R. 75.

Published.—See s. 2 (*o*).

Once a Week for Four Successive Weeks.—The omission of the notice even by error during one week will be a ground for quashing the by-law. Where there has been such an omission the publication before the omission may be treated as a nullity and a fresh start made: Vandyke and Grimsby, 1906, 12 O. L. R. 211 D. C.

The failure to publish the notice does not make the by-law a nullity; it merely is a ground for quashing it.

(Little v. McCartney, 1908, 18 M. R. at 326).

Cases as to Publication for Four Successive Weeks.—Re Coe and Pickering, 1865, 24 U. C. R. 439; Re Miles and Richmond, 1869, 28 U. C. R. 333; Re Brophy and Gananoque, 1876, 26 C. P. 290; Re Mace and Frontenac, 1877, 42 U. C. R. 70; Re Armstrong and Toronto, 1889, 17 O. R. 766; Re Armour and Onondaga, 1907, 14 O. L. R. 606, are discussed by Riddell, J., in Re Duncan and Midland, 1907, 16 O. L. R. at 143 C.A.

Week includes Sundays and holidays, *ibid.*

For at Least a Month.—Month means calendar month. The Interpretation Act, R. S. O. 1914, c. 1, s. 29, u.

If the notice is first posted up on the 5th of the month the month will be upon the 5th of the following month, so that the 6th of the following month will be the first day on which the by-law could be considered.

Re Railway Sleepers Supply Co., 1885, 29 C. D. 204; 54 L. J. Ch. 720.

If the notice is posted up on the 31st January the month will be up on the last day of February and the first day for acting will be 1st March.

The affidavit of a person that he had no recollection of having seen notices is insufficient to shew want of notice. Notice as required by statute will be assumed till its absence is proven. Fisher v. Vaughan, 1852, 10 U. C. R. 492.

Corporations should, however, preserve proof of the posting of notices by the affidavits of the persons putting them up. Re Lafferty and Wentworth, 1849, 8 U. C. R. 232.

Notice of intention to sell, not to close, irregular and insufficient. Re Seguin & Hawkesbury, 1912, 23 O. W. R. 857; 4 O. W. N. 521.

Municipality cannot set up irregularity. Bloomfield v. Starland, 1915, 31 W. L. R. 573.

The closed road need not pass in front of the "land" and actually form a boundary of it in order to bring it within this section. It is sufficient if the road is closed right up to the land so as to deprive the owner of ingress and egress and the owner will then be entitled to compensation and another road; In re Brown and Owen Sound, 1907, 14 O. L. R. 627.

Only persons who have lands abutting on the stopped up portion are within the protection of the section. Moore v. Esquesing, 1870, 21 C. P. 277, applied; Falle v. Tilsonburg, 1873, 23 C. P. 167.

Compensation need not be provided for by the by-law. Re Vashon & E. Hawkesbury, 1879, 30 C. P. 194, following McArthur v. Southwold.

See Wanamaker v. Green, 1885, 10 O. R. 467.

476. Where the owners of and other persons interested in the land required to be taken for the highway consent in writing to the passing of the by-law for establishing and laying it out, or where such land has been acquired by the corporation, section 475 shall not apply to the by-law. 3 Edw. VII. c. 19, s. 632 (4); *amended*, 3 & 4 Geo. V. c. 43, s. 476.

477.—(1) Where an allowance for a sideline road between lots in a double front concession in a township was so run in the original survey that the line in the front half of the concession does not meet the line in the rear half, the council of the township may open and lay out a road to connect the ends of such lines where they do not so meet.

(2) The by-law shall provide that the road shall be opened and laid out in accordance with a survey to be made by an Ontario Land Surveyor named in the by-law.

(3) A Judge of the County or District Court of the county or district in which the township is situate, on the application of any person over whose land the con-

necting road will pass who objects to the surveyor appointed by the by-law may appoint another Ontario Land Surveyor in the place of the one so appointed.

(4) The application shall be made within one month after the service of the copy of the by-law on the applicant and at least five days' notice of the time when and the place where it will be heard by the Judge shall be served upon every other person over whose land the connecting road will pass and upon the clerk of the municipality.

(5) The surveyor appointed by the by-law or, if another is appointed by the Judge in his place, the surveyor so appointed shall determine the compensation to be paid to the persons whose lands are taken for the connecting road, and the amount so determined shall be paid to them by the corporation of the township.

(6) The determination of the surveyor as to the compensation shall be final. 3 Edw. VII. c. 19, s. 663, *redrafted.* 3 & 4 Geo. V. c. 43, s. 477 (1-6).

S. 663 (4) provided as follows:—
A copy of the by-law shall be served upon all persons over whose lands the proposed road will pass. . . . For some reason not apparent this has been omitted. The section is workable in its present form. A copy of the by-law should be served and after it is, application can be made as provided.

478.—(1) Where the council of a municipality desiring to open an original allowance for road has by mistake opened a road which was intended to be, but is not wholly or partly, upon such allowance, the land occupied by the road as so opened shall be deemed to have been expropriated under a by-law of the corporation, and no person on whose land such road or any part of it was opened shall be entitled to bring or maintain an action for or in respect of what was done or to recover possession of his land, but he shall be entitled to compensation under and in accordance with the provisions of this Act as for land expropriated under the powers conferred by this Act.

(2) The right to compensation shall be forever barred if the compensation is not claimed within one year

after the land was first taken possession of by the corporation. 3 Edw. VII. c. 19, s. 635, *redrafted;* 3 & 4 Geo. V. c. 43, s. 478 (1-2).

Mistake in Opening Original Allowance.—S. 635 read—"open that which they take and believe to be the true site and in case the municipality, their officers and servants, act in good faith, and take all reasonable means to inform themselves of the correctness of their line and work and in case it appears that the road being opened, although not or not altogether upon the true line of the original road, or allowance for road, is nevertheless, from any difficulty in discovering correctly the true line, as near to or as nearly upon the true line as under the circumstances could then be ascertained."

The redrafted section simply says "where by mistake." Mistake is an ignorance of fact, the presence of mistake will not make an Act effectual which is otherwise ineffectual: Pollock, Contracts, 8th ed., p. 474. A by-law which by mistake took private property for a road could be quashed or declared illegal, see *supra.* This section prevents any such result. It is essential that the mistake be made in good faith. In re Beemer and Grimsby, 1884, 8 O. R. at 103.

Compensation.—This should be claimed under Part XV.

479.—(1) No highway shall be laid out in any municipality without the sanction of the council of the municipality.

(2) No highway less than 66 feet in width or except in a city or town more than 100 feet in width shall be laid out by the council of the municipality without the approval of the Municipal Board or by any owner of land without the approval of the council of the municipality and of the Municipal Board.

(3) Nothing in this section shall affect the provisions of *The City and Suburbs Plans Act.*

(4) Sub-section 2 shall not apply to a township in unorganized territory, and a highway less than 66 feet in width may be laid out by the council of any such township subject to and in accordance with the regulations of the Department of Lands, Forests and Mines. 4 Geo. V. c. 33, s. 20.

See Pigott v. Bell, 25 O. W. R. 265, and Ostrom v. Sidney, 15 A. R. 372.

S. 81 (14) of the Registry Act, R. S. O. 1914, c. 124, reads:—

The registrar shall not register a plan which does not comply with the provisions of this Act; nor shall he register a plan on which a road or street less than sixty-six feet wide is laid out unless the assent of the proper municipal council is registered therewith.

S. 109 of the Land Titles Act, R. S. O. 1914, c. 126, reads:—

(1) No plan upon which a road, street, or highway less than 66 feet wide is laid out shall be registered unless and until the assent of the proper municipal council is registered therewith where such assent is by law necessary, and no plan upon which a street, road or lane is laid out, shall be filed in any such office unless there is filed therewith the approval of the proper municipal council or unless such plan is approved by a judge of the county or District Court of the county or district in which the land lies, where the same is not in the County of York or City of Toronto, or by the Master of Titles where the land is in the County of York or City of Toronto, after notice in each case to the proper municipal authorities, 1 Geo. V. c. 28, s. 109.

(2) The approval of the proper Municipal Council, referred to in this section, may be on terms and conditions embodied in an agreement signed by the owner of the lands laid out by such plan, and by the municipality, and may be registered upon the lands so laid out. 2 Geo. V. c. 24, s. 2.

Refusal of Consent in Bad Faith.—In case of bad faith such as was exhibited by the council in Bell Telephone v. Owen Sound, 1904, 8 O. L. R. 74, and in other cases (see title Bad Faith, *supra*), the owner is confined to the remedy of application to a judge. The sanction of one or the other must be obtained; each is a *persona designata* to perform a certain act and the performance can only be reviewed on the same principles as apply to the review of ministerial Acts by Courts.

Approval or sanction by council may be on terms and conditions where laying out is by plan to be registered under the Land Titles Act, *supra*. In other cases the council may stipulate for changes as a condition of giving sanction.

480. The council of an urban municipality may pass by-laws for regulating the erection or occupation of dwelling houses on narrow streets, lanes or alleys or in crowded or unsanitary districts. 3 Edw. VII. c. 19, s. 353, *part*. 3 & 4 Geo. V. c. 43, s. 480.

Buildings on Narrow Streets.—Powers have already been given to urban municipal councils to regulate size and strength of walls of buildings, to require production of plans for approval, s. 400 (4), and to regulate the construction, alteration and repairs of buildings and the fixing of fire districts and building restrictions therein for purposes of fire prevention, s. 400 (16-35); cities and towns may fix a building line, s. 406 (10).

This section gives a special power to regulate erection and occupation on narrow streets, etc.; this would enable special provisions to be made respecting the plans of houses to be erected in such places, the building line, the materials and strength of construction, the area of land to be used with any such building, the height, the minimum cubic feet of air space, the minimum window area per room, occupation of basements for living or sleeping, etc. All with reference, however, to the abatement or prevention of abnormal or unsatisfactory conditions resulting from narrow streets or crowded or unsanitary districts.

Regulating. — Regulating involves the continued existence of the thing to be regulated: Virgo v. Toronto, [1896] A. C. 88; 65 L. J. P. C. 4, and therefore regulations which totally prohibit the thing to be regulated or prohibited in certain areas will be *ultra vires* if made under a power to regulate. A by-law under this power would have to apply equally to all districts within the section.

Urban Municipality.—*I.e.*, a city, a town and a village, s. 2 (*a*).

481.—(1) The council of a city having a population of not less than 50,000 may pass by-laws for

(*a*) Prohibiting the erection or occupation of dwelling houses on highways, lanes or alleys of less width than that prescribed by the by-law;

(*b*) Prescribing the minimum area of vacant land which shall be attached to and used with any dwelling house thereafter erected, as the court-yard or curtilage of it;

(*c*) Regulating the manner in which buildings intended to be occupied as dwelling houses are to be constructed within the municipality or within any defined area of it. 3 Edw. VII. c. 19, s. 631 (1), *amended.*

(*d*) Prohibiting the erection of dwelling houses or the alteration of other buildings for the purpose of adapting them for use as dwelling houses, if the same front on a highway less than 40 feet in width, unless the street has been established as a highway by by-law of the council or otherwise assumed for public use by the corporation. 9 Edw. VII. c. 73, s. 20, *redrafted.*

Sub-section (2) repealed by 4 Geo. V. c. 33, s. 21, provided that: "A by-law for any of the purposes mentioned in sub-section 1, before the final passing of it, shall be published in full twice in each week for four consecutive weeks in two newspapers published in the city, with a notice appended thereto, stating the date on which the proposed by-law will be taken into consideration by the council."

4 Geo. V. c. 21, provided:

21. Sub-section 2 of s. 481 of the said Act is hereby repealed, and it is hereby declared that no by-law passed under the said s. 481 shall be deemed to be invalid by reason of any omission to comply with the provisions of the said sub-section.

Prohibiting Erection and Occupation of Dwellings.—See s. 480 for a summary of powers of urban councils respecting the erection and occupation of buildings. Sub-section 1 (*a*) extends the power given by s. 480 by including a power of prohibition not given by 480 and by enabling the city to prescribe the width of the highways within the by-law. The by-law could not prohibit in the case of certain highways and permit on similar highways. See title By-laws, *supra*, p. 349.

Prescribing Minimum Area of Vacant Land to be Used with Dwellings.—This power is apparently involved in that given by s. 480, so far as places within 480 are concerned, but 1 (*b*) gives the power to prescribe throughout the whole municipality and must be exercised by by-law applying equally throughout the municipality. Contrast 1 (*c*).

Vacant Land, that is, unoccupied by buildings.

Regulating Mode of Construction of Dwelling Houses within the Municipality or any Defined Area of it.—Read with s. 400 (4) and s. 406 (10) this section enables a city of over 50,000 to impose building restrictions so far as dwelling houses are concerned, varying in different areas according to circumstances. By-laws under 400 (4) and 406 (10) must be general in application, while a by-law under 1 (*c*) may specify different restrictions for different defined areas.

This far-reaching power gives control of building restrictions to the corporations and enables approved restrictions in connection with any building scheme to be enforced by the sanction of a by-law. Building schemes can ordinarily be enforced only by means of restrictive agreements which apply only to negative covenants. Under the sanction of a by-law passed under 1 (*c*) positive requirements may be enforced.

Prohibiting Erection of Dwelling Houses or Alteration of Buildings for Use as Dwelling Houses.—1 (*d*) so far as prohibiting erection is concerned enables a special by-law to be passed in the case of highways less than 40 feet in width which have not been established or assumed by the corporation. It thus adds to the general power given by 1 (*a*).

So far as prohibiting alteration is concerned, under 1 (*a*) all that could be done would be to prohibit occupation of the altered building as a dwelling house under a general by-law; 1 (*d*) enables the alteration itself to be prohibited where the building proposed to be altered is within the sub-section. A by-law under 1 (*d*) must apply generally to all buildings within the sub-section.

Established by By-law or Assumed.—See notes to 460 (6) where the same phrase is used.

Notice.—See notes to s. 475, *supra.*

482. By-laws may be passed—

(1) By the council of every municipality for granting aid to the corporation of any immediately adjoining municipality towards opening, widening, maintaining or improving any highway within such municipality or constructing, maintaining or improving any bridge therein. 3 Edw. VII. c. 19, s. 644, *amended;* 3 & 4 Geo. V. c. 43, s. 482 (1).

Immediately Adjoining.—This sub-section formerly read "adjoining." While adjoining is sometimes used in the sense of near or in the neighbourhood of, there can be no doubt that "immediately adjoining" means in touch in some part. See Words and Phrases, title Adjoining. Where four towns met at a point, the diagonally opposite towns were held to be adjoining towns: Holmes v. Carley, 31 N. Y. 289. The phrase, adjoining municipality, was held to mean primarily a contiguity of territory:

Rehill v. East Newark, 63 Atl. at 83. It was argued that the phrase referred not to the territory of the municipality, but to its property, by a park or waterworks owned by, but outside of the territorial limits of the municipality, but this view was rejected.

Sub-section (1) authorizes the giving of aid in the case of a highway within the municipality aided.

482.—(2) By the council of every local municipality for granting aid to the corporation of the county in which the municipality is situate towards opening, and making any new road on the boundary of the municipality or constructing any new bridge on such boundary. 3 Edw. VII. c. 19, s. 647, par. 1, *amended.* 3 & 4 Geo. V. c. 43, s. 482 (2).

This authorizes the giving of aid to the county in the case of a new road on the boundary of the municipality getting the aid.

What is a *new road* or *new highway* or a *new bridge.*

This would exclude the granting of aid by a township to an adjoining county or to a township in an adjoining county.

482.—(3) By the councils of cities and towns for granting aid to the corporation of a township in the county in which the city or town is territorially situate or in an adjoining county towards opening, widening, maintaining or improving any highway in such township which constitutes or is to constitute or forms or is to form part of a highway leading to such city or town, or towards constructing, maintaining or improving any bridge forming or which is to form part of such highway. 3 Edw. VII. c. 19, s. 663*a*, *amended;* 3 & 4 Geo. V. c. 43, s. 482 (3).

Is Territorially Situate.—That is when the geographical situation of a town or city is such that it is surrounded by the territory of a county. As to adjoining county, see notes to s.-s. 1.

City and town may aid township in surrounding or adjoining county in case of highway leading to city or town.

482.—(4) By the councils of counties for granting aid towards making, improving or maintaining any county or township boundary line. 3 Edw. VII. c. 19, s. 614, *part.* 3 & 4 Geo. V. c. 43, s. 482 (4).

Taking this sub-section with the others, it seems clear that its application is confined to the boundary lines of the county passing the by-law, or boundary lines of townships within it. See s.-s. (1).

Aid under s.-s. 4 can only be granted to local municipalities within the county. Or can it be granted to an adjoining county, or to a local municipality in an adjoining county?

482.—(5) By the councils of counties for granting aid to the corporation of any town, village or township towards,

(*a*) Opening any new highway or constructing any new bridge in the municipality;

(*b*) Opening, widening, maintaining or otherwise improving any highway leading from or passing through the municipality into a county road, or constructing, maintaining or improving any bridge forming, or which is to form, part of such highway. 3 Edw. VII. c. 19, s. 658, pars. 5, 6, *amended.* 3 & 4 Geo. V. c. 43, s. 482 (5).

By-law for grant by county to townships quashed: In re Strachan & Frontenac, 1876, 41 U. C. R. 175, because it gave aid to maintain old roads, when Act only authorized aid to new roads.

In the Municipality. — That is in the town, village or township, under s. 5 (a), such aid can only be granted to a corporation within the county. (a) Refers to new roads within the local municipality. (b) Refers to both new and old roads, passing through the local municipality or leading from it into a county road.

482.—(6) By the councils of townships

(*a*) For granting aid to the corporation of a county adjoining that in which the township is situate towards opening, widening, maintaining or improving any highway lying between the township and another municipality in the adjoining county, or towards constructing, maintaining or improving any bridge on such highway;

(*b*) For granting aid for the like purposes to the corporation of the county in which the township is situate in respect of any highway or bridge within the township assumed as a county road or bridge or agreed to be so assumed on condition that such aid shall be granted. 3 Edw. VII. c. 19, s. 660, par. 1, *amended.*

(7) By the council of a township in unorganized territory for opening, widening, maintaining or improving any highway or constructing, maintaining or improving any bridge in an adjoining municipality or in a municipality situate in such adjoining municipality or in an adjoining unorganized township or in adjoining unsurveyed territory or for granting aid to any adjoining municipality or to any municipality situate in such adjoining municipality for any of such purposes. *New.* 3 & 4 Geo. V. c. 43, s. 482 (6-7).

Unorganized territory means that part of Ontario without county organization, see s. 2 (t).

Unorganized township means a township not incorporated as a township municipality, see s. 24 (1).

This s.-s. 7 differs from the preceding sub-section, in that it authorizes the opening, construction, etc., to be done directly, as well as indirectly, by granting aid.

482.—(8) The aid may be granted by way of loan or otherwise. *New.* 3 & 4 Geo. V. c. 43, s. 482 (8).

As to contributions by cities toward improvement of county roads, see The Highway Improvement Act, R. S. O. 1914, c. 40, s. 25, which is as follows:—

25. When any highway leading or adjacent to any city or town separated from the county is widened, strengthened, reconstructed or otherwise improved or requires the expenditure of a greater amount for maintenance and repair to meet the requirements of increased, heavy, constant or other extraordinary traffic to or from such city or town, beyond the requirements which, but for the existence of such city or town, would be deemed those of a standard highway for the locality, the corporation of such city or town by by-law passed with the assent of at least two-thirds of the members of the council thereof may agree with the corporation of the county to contribute such additional cost, or a proper portion of the cost, or that the amount of the contribution of such city or town shall be determined by arbitration under The Municipal Act, and may, without the assent of the electors, provide by by-law for the issue of debentures payable in not more than twenty years from the date of the issue thereof to raise the amount agreed upon or awarded, or may agree with the corporation of the county for the payment of such amounts in annual instalments to be raised by annual special rate upon the rateable property in the city or town. 2 Geo. V. c. 11, s. 12.

See The Colonization Roads Act, R. S. O. 1914, c. 41.

Many sections from different parts of 3 Edw. VII., c. 19, are brought together here and amended, and with additions, consolidated into a code of powers as to the giving of aid by one municipality to another. The aid given can be by way of loan or otherwise, that is in any other way, as by guaranteeing or by a cash advance. For the phrase "or otherwise," see Order XXXII., rule 6, Rules Supreme Court (E), and Ellis v. Allen, [1914] 1 Ch. 904; 83 L. J. Ch. 590.

The general object of an Act sometimes requires that a general word shall not be restricted to preceding specific words: Kennedy v. Toronto, 1887, 12 O. R. at 226.

483. By-laws may be passed by the council of every municipality

BOULEVARDS.

1. For setting apart portions of the highways at or near the sides of them for the purpose of boulevards, and for permitting the owners of land abutting on a highway to construct, make and maintain at their own expense boulevards on that part of the highway which may be set apart for that purpose, but not so as unreasonably to confine, impede or incommode public traffic.

2. For regulating the construction, maintenance and protection of such boulevards. 3 Edw. VII. c. 19, s. 638, *amended.* 3 & 4 Geo. V. c. 43, s. 483 (1-2).

For power to establish, see also The Public Parks Act, R. S. O. 1913, c. 203, also s. 472 (1d) and s. 398 (32).

Sub-sections 1 and 2 duplicate in part the provisions of s. 472 (1d), but evidently deal wtih cases where it is intended that the boulevards are to be maintained by abutting owners. By-laws under s.-s. 2 can impose penalties for failing to maintain such boulevards up to a required standard, and may protect, among other ways, by forbidding the crossing of such boulevards or otherwise. Breach of such a by-law may be contributory negligence; see notes to s. 460.

The limitation, not so as unreasonably to confine, impede or incommode public traffic, is in marked contrast with the absence of limitation in other sections, e.g., s. 487 (2). Compare with the limitation in s. 43 of The Public Health Acts Amendment Act 1890 (I), supra.

A by-law which infringes this limitation can be quashed on the ground of ultra vires, supra.

By-laws passed under s.-s. 1 and 2 may be repealed without providing for compensation to the owners who have maintained boulevards thereunder. The power to pass implies the power to repeal.

Altering Character of Highway.—A council cannot under the powers contained in s. 483, 1 and 4, divert a highway dedicated for a special highway purpose to other highway purposes. There is no power to alter dedication: Wandsworth v. Golds, [1911] 1 K. B. 60; 80 L. J. K. B. 126.

The same rule would apply if lands were acquired under statutory powers for a special drive or boulevard. Such a drive or boulevard could not subsequently be turned into another kind of highway under powers given by s.-s. 1 and 4, see Atty.-Gen. v. Hanwell, U. C., [1900] 1 Ch. 51; 69 L. J. Ch. 626.

Limitation on Powers.—Where an enabling section contains a restriction such restriction relates solely to acts done under the enabling part of the section and has no reference to acts done by virtue of powers otherwise conferred or possessed. It would be a most dangerous principle to interpret a section purporting to give new powers which are only to be exercised, subject to a condition, as interfering with or restricting powers already existing: Corsellis v. London County Council, 1908, 1 Ch. 13: 77 L. J. Ch. 120.

AREAS.

483.—3. For permitting the owners of land to make, maintain and use areas under and openings to them in

the highways and sidewalks, and for permitting the owners of land abutting on one side of a highway to construct, maintain and use a bridge or other structure across the highway for the purpose of access to land owned by such owners on the other side of the highway, for prescribing the terms and conditions upon which the same shall be made, constructed, maintained and used, and for making such annual or other charge for the privilege conferred by the by-law as the council may deem reasonable.

(*a*) Such annual or other charge shall be payable and payment of it may be enforced in like manner as taxes are payable and payment of them may be enforced.

(*b*) The corporation shall be liable for any want of repair of the highway which may result from the construction, maintenance and use of any such area or opening, bridge or structure, but shall be entitled to the remedy over provided for by section 464 against the person by whose act or omission the want of repair is caused. 3 Edw. VII. c. 19, s. 639 (1, 3), *redrafted*. 3 & 4 Geo. V. c. 43, s. 483 (3); 7 Geo. V. c. 42, s. 27.

Section 639 as passed by 60 V., c. 45, s. 21, cancelled all agreements respecting areas entered into prior to July 1st, 1897, and substituted provisions similar to s.-s. 3. The effect of this sub-section is discussed in the notes to s. 460, supra, where the cases are collected.

A license must be read as containing a recital of Act under which issued, and any condition inserted in the license repugnant to the Act will be void: Taylor v. Winsford U. C., 76 L. J. K. B. 897.

In Like Manner as Taxes.—The by-law can provide for the charge to be a tax on the property of the owner, and payable as other taxes, and may be entered in the collector's roll; see s. 99 of The Assessment Act, R. S. O. 1914, c. 195.

483.—4. For setting apart so much of any highway as the council may deem necessary for the purposes of a bicycle path or of a foot path.

(*a*) Any person who rides or drives a horse or other beast of burden or a motor vehicle, wagon, carriage or cart over or along any such path shall

incur a penalty of not less than $1 or more than $20. 3 Edw. VII. c. 19, ss. 640, par. 1, 660, par. 4, *amended;* 3 & 4 Geo. V. c. 43, s. 483 (4).

Express powers are necessary to enable a municipality to set apart any part of a highway for any special kind of traffic. The public right to use every part of a highway cannot be limited without such express power.

The penalties imposed are the same as those imposed by s. 11 of The Highway Travel Act, R. S. O. 1914, c. 206, for breaches of that Act. As to mode of enforcement see title Penalties, infra.

A by-law cannot impose a greater penalty than is provided by statute for the same offence: Calder v. Pilling, 14 M. & W. 76.

TOLL ROADS.

483.—5. For raising money by toll on any highway, bridge or other work to defray the expense of making, maintaining or repairing it. 3 Edw. VII. c. 19, s. 640, par. 4.

6. For granting to any person in consideration or part consideration of planking, gravelling or macadamizing a highway, or of building a bridge, the tolls fixed by by-law to be levied on the work for a period of not more than twenty-one years after the work has been completed, and after such completion has been declared by a by-law of the council;

(*a*) The grantee of the tolls shall, during such period, maintain and keep in repair the highway or bridge. 3 Edw. VII. c. 19, s. 640, par. 5; 3 & 4 Geo. V. c. 43, s. 483 (5-6).

Tolls and Exemptions.—By s. 73 of The Toll Roads Act, R. S. O. 1914, c. 210, certain provisions of that Act and all the provisions of The Toll Roads Exemption Act, R. S. O. 1914, c. 209, are made applicable to all toll roads whereon tolls are levied or collected, including "all toll roads owned, leased, held or in the possession of any person or persons." Toll roads created by by-law under s.-s. 5 and 6, are subject to these provisions, as "person" includes a "municipal corporation." The Interpretation Act, R. S. O. 1914, c. 1, s. 29 (x), and Smith v. Wentworth, 1894, 26 O. R. 209.

A by-law passed under similar powers, was held to be subject to exemptions, notwithstanding its general terms, and the plaintiff was held entitled to replevy goods seized for tolls, as to which there was an exemption, although the by-law had not been quashed, and notwithstanding statutory provisions similar to those found in s. 349: Wilson v. Middlesex, 1859, 18 U. C. R. 348.

All tolls payable under by-laws passed under s.-s. 5 and 6, are subject to the limitations set out in The Toll Roads Act, but the by-law may fix a lower toll or grant greater exemptions.

Repairs.—The grantee would apparently be under a statutory duty to keep the toll road in repair by reason of s. 42 of The Toll Roads Act, which is made applicable by s. 73, supra. S. 6 (a), however, imposes the duty definitely for the period fixed by by-law. Under s. 66 of The Toll Roads Act, also made applicable, no action shall be brought for anything done in pursuance of the Act, unless such action is brought within six months next after the act committed.

The municipal corporation still remains liable for non-repair, as the grantee acts under the authority of by-law s. 460 (7).

The grantee will apparently be liable for non-feasance; see misfeasance and non-feasance, supra.

If the grantee fails to repair, see proceedings for forfeiture in s. 52 of The Tolls Road Act. The by-law may provide additional provisions as to forfeiture. For a case of forfeiture, see South Dumfries v. Clark, 1909, 14 O. W. R. 158.

Repeal.—A by-law passed under s.-s. 6, granting tolls for a consideration, is in the nature of an agreement, and cannot be repealed by the municipality, although it may be quashed or declared illegal. See title Contracts Authorized by By-law, supra.

A municipal corporation has no power apart from statute to collect tolls.

483.—7. Subject to the rights of a Crown timber licensee under *The Crown Timber Act,* for preserving or selling the timber or trees on any original allowance for road. 3 Edw. VII. c. 19, s. 640, par. 7, *amended;* 3 & 4 Geo. V. c. 43, s. 483 (7).

The power given by s.-s. 7, enables a municipality without passing a by-law, to bring an action of trespass for removing timber from original road allowances: Burleigh v. Hales, 1864, 27 U. C. R. 72. But licensees of the Crown could not be sued for so doing, when no by-law had been passed: Burleigh v. Campbell, 18 C. P. 457. Licensees of the Crown who had notice of a by-law, were held not entitled to remove timber although the licenses were prior in date to the by-law: Barrie v. Gillies, 21 C. P. 213. See also Louise v. C. P. R., 14 M. R. 6.

This sub-section formerly included stone, sand or gravel: Brock v. Toronto & N. Ry. Co., 1873, 37 U. C. R. 372, and Louise v. C. P. R., supra, were gravel cases.

As to trees on highways not original road allowances and gravel, see notes to s. 433, supra.

An original allowance for a road, means the land set apart for a highway in the original survey of a township; see s. 11, The Public Lands Act, R. S. O. 1914, c. 28.

The Crown Timber Act, R. S. O. 1914, c. 29, provides as follows:

11.—(1) Every Government road allowance included in a timber license, granted under section 3, shall be deemed to be ungranted public lands, within the meaning of that section.

(2) The licensee shall have all the rights in respect of every such road allowance, and the trees, timber and lumber thereon, or cut thereon . . . except that he shall not be entitled to take or keep exclusive possession of such road allowance.

(3) No by-law of a municipal corporation for preserving, selling, or otherwise appropriating or disposing of the timber or trees, or any part thereof on a Government road allowance, included in any license, shall have any force or effect against such licensee.

12.—(1) Where a by-law of the council of a township, organized as a separate municipality, or of any united townships, for preserving or selling the timber or trees on the Government Road allowances within such township, or united townships, included in any license, is in force, the corporation of such township or united townships shall be entitled to be paid out of the consolidated Revenue Fund, a sum equal to two per

centum of the dues received for or in respect of the timber or saw-logs cut within the township, or united townships, under the authority of the license, while the by-law was in force.

(2) Unless the Minister otherwise directs, no corporation shall be entitled to such payment unless a certified copy of the by-law, accompanied by an affidavit of the Reeve or Clerk, verifying the copy, and the date of the passing of the by-law, is filed in the Department within six months from the passing of the by-law.

(3) The affidvait may be taken before any person or officer who, under The Public Lands Act, is authorized to take affidavits.

(4) All money so paid to a corporation shall be expended in the improvement of the highways situate within the township, or within that one of the united townships in respect of which such money was paid.

483.—8. For making regulations as to pits, precipices and deep waters and other places dangerous to travellers. 3 Edw. VII. c. 19, s. 640, par. 6; 3 & 4 Geo. c. 43, s. 483 (8).

Other Places.—The *ejusdem generis* rule would not apply, see notes to s. 491, therefore other places might include dangerous buildings, walls, steps, excavations, etc.

To Travellers.—The dangerous places must be sufficiently near to the highway to cause danger to travellers thereon.

Regulations.—There is no power to prevent. Regulation implies the continued existence of the subject of regulation, see Regulation, supra, p. 790. The utmost the municipality can do is to require safeguards, such as fences, rails, etc. There is no power to erect safeguards, or to abate or remove given by this sub-section. The owners of the lands on which such dangerous places are situated may be subject to indictment for nuisance to the highway, see supra, p. 962, and as to the municipal power to abate, see supra, p. 760.

Liability.—As to the duty and liability of a municipality with regard to places dangerous to travellers, see notes to s. 460, supra, and Boswell v. Yarmouth, 1879, 4 A. R. 353.

Similar Legislation.—The Public Health Acts Amendment Act, 1907 (I), s. 30, gives power to local authorities to require the owner by notice to repair, remove, protect, or enclose such dangerous places, and if he neglects, may do the work themselves and collect the expenses thereof as a civil debt. The most a by-law passed under s.-s. 8 could provide would be a penalty for not complying with regulations enacted by the by-law.

Section 30, above mentioned, deals with excavations "in any situation fronting, adjoining or abutting on any street . . . dangerous to the persons lawfully using the street." Sub-section 8 is clearly wider.

In Carshalton U. Council v. Burrage, [1911] 2 Ch. 133; 80 L. J. Ch. 500, there was a deep chalk pit at the further side of a narrow strip of land, belonging to the defendant, and adjoining a road. Neville, J., thought that the mere fact that the children of the locality chose the edge of the pit as a playground would not bring it within the section. That would not be using the street at all, but he held that the existence of the pit was with regard to the legitimate users of the road, an undoubted danger, and he added: "The highway is for use at all hours of the day and night, and I can well conceive a serious, if not fatal, accident happening there from passengers on the road unintentionally getting off it, and not recovering it, but finding themselves on the edge and over into the pit." It was held that the local authority were justified in issuing their notice, and they recovered the expense of erecting a fence.

PURCHASING GRAVEL PITS.

483.—9. For acquiring either alone or jointly with the corporation of another municipality such land in either municipality as may be deemed necessary for procuring therefrom stone or gravel for use in making, maintaining or repairing the highways under the jurisdiction of the council or councils. 3 Edw. VII. c. 19, s. 640, par. 9, *amended*. 3 & 4 Geo. V. c. 43, s. 483 (9).

Jointly.—In the case of joint stock companies, express powers are necessary to authorize joint action with other companies: Ex parte British Nation Life Assce. Assn., 8 Ch. D. 679; 48 L. J. Ch. 118 at 127. The same rule would appear to apply to municipal corporations. The power to acquire lands jointly with another corporation must be expressly given. The power is apparently confined to joint action with only one other municipality, and is limited strictly to getting stone or gravel for highway purposes.

Land in Either Municipality.—The jurisdiction of a municipal corporation must be exercised within its own boundaries by s. 249 (1), except where otherwise provided.

The sub-section formerly read "land within its own or any adjoining municipality," and contained a power to sell when no longer needed. The power to acquire alone in an adjoining municipality is apparently given. The power to sell is now given in s. 323, supra.

483.—10. For entering upon and searching for and taking from land within the municipality, or with the consent of the council of an adjacent municipality expressed by by-law or resolution from land in such municipality, such timber, gravel, stone or other material as may be necessary for constructing, maintaining and keeping in repair the highways and bridges;

(*a*) The compensation to be paid to the owners of and other persons interested in the land for the timber, gravel, stone or other material shall be agreed upon or determined by arbitration before the power to take it is exercised. 8 Edw. VII. c. 48, s. 22, *amended*.

(*b*) The compensation may be a lump sum for the privilege of taking as much timber, stone, gravel or other material as may be required, or a sum determined by the quantity taken, or a price by the cubic yard or otherwise for what may be taken, as may be agreed on or be determined by the arbitrators.

(*c*) Where it is necessary in the exercise of any of the powers conferred by the by-law to pass through or over the land of another person, the corporation may do so as occasion may require, doing no unnecessary damage, but before doing so the compensation to be paid for the exercise of such power shall be agreed upon or determined by arbitration. *New.* 3 & 4 Geo. V. c. 43, s. 483 (10).

Under R. S. O. 1887, c. 184, s. 550, a by-law was passed authorizing pathmasters to enter upon any land within the municipality when necessary to do so excepting orchards, etc., and to search for materials for making and repairing roads, and providing that the right to enter, as well as the compensation to be paid, if not agreed upon, should be settled by arbitration.

This by-law followed closely the language of the section, which did not contain the provisions now found in (a), (b) and (c).

While the by-law was in force and being acted on an action was brought for an injunction to restrain the corporation from removing gravel from the plaintiff's land. The injunction was granted, notwithstanding the provisions of R. S. O. 1887, s. 184, s. 338, now s. 349, supra: Rose v. W. Wawanosh, 1870, 19 O. R. 294.

Street, J., thought that if so general a power had been intended it would have been easier for the legislature to say at once that every pathmaster should have the power given by the statute. He held the by-law on its face illegal, because it purported to confer upon officers powers much wider and more extensive than the statute authorized.

A by-law under this sub-section should not only specify the lands from which the materials are to be taken, but the quantity to be taken, and the time when to be taken, or if the by-law be general, the notice should give these particulars. If this is not done arbitrators cannot make an award in respect of either the right of entry or the value of the materials: In re Ingersoll and Caroll, 1882, 1 O. R. 488, where an award was set aside. But now the provisions of (b) dispense with this rule, and the by-law or notice may specify as much as required.

No valid arbitration can be held until after a by-law has been passed defining the material to be taken, and the lands from which they are to be taken: Waterloo v. Berlin, 1904, 8 O. L. R. at 339.

Consent Necessary. — Under s. 249, the jurisdiction of a municipality is confined to its geographical limits unless otherwise provided. Where power is given to acquire lands outside of the municipality such power is subject to special limitations which differ in different cases. See Parks and Drainage, infra, and for a general discussion: Barton v. Hamilton, 1890, 27 A. R. 346; 20 S. C. R. 173. Under this section the required consent must be obtained or the by-law will be bad. Presumably the consent is necessary because the adjoining municipality might need the gravel, but such consent connot be withheld in bad faith: see Bell Telephone v. Owen Sound, 1904, 8 O. L. R. 74; 4 O. W. R. 69, following London & N. W. R. W. Co. v. Westminster, [1904] 1 Ch. 759.

483.—11. For purchasing conditionally, or otherwise, or for renting for a term of years or otherwise, road-making machinery and appliances for the purposes of the corporation, and for borrowing money for the purpose

of paying the purchase price for any period not exceeding five years and for issuing debentures for the money so borrowed, or for issuing to the vendor debentures payable within that period in payment of the purchase money.

(*a*) The debentures issued under this paragraph shall be on the instalment plan. 3 Edw. VII. c. 19, s. 640, pars. 10*a*, 10*b*, *amended;* 3 & 4 Geo. V. c. 43, s. 483 (11).

Purchasing Conditionally.—There is no power given by the Municipal Act to mortgage corporate property. By this sub-section road making appliances can be purchased under what are commonly known as lien notes, by which the title is retained by the seller until the price is fully paid. Such appliances may also be hired under the hire purchase system.

Instalment Plan.—See s. 288 (4) and ss. 314 to 318.

Issuing to the Vendors.—Debentures could be issued to the vendors without this express power; see title Debentures, s. 314, supra.

484. The council of every municipality may pass by-laws for subscribing for any number of shares in the capital stock of or for lending money to or guaranteeing the payment of any money borrowed by a bridge company incorporated for the purpose of erecting and maintaining any bridge within, or partly within, the municipality or between it and another municipality. 3 Edw. VII. c. 19, s. 645, *redrafted;* 3 & 4 Geo. V. c. 43, s. 484.

If money is available in the treasury it can be lent under this section without submitting the by-law to the electors. If, however, it is proposed to subscribe for shares or guarantee payment, the provisions of s. 289 (1) apply.

485. The council of every municipality through or adjoining which any toll road passes may enter into an agreement with the owner of the road to expend on it for a limited number of years, such statute labour or sum of money as may be agreed upon and that at the end of the term of years agreed upon such road shall be toll free and shall become the property of the corporation of the municipality in which it is situate. 3 Edw. VII. c. 19, s. 646, *amended;* 3 & 4 Geo. V. c. 43, s. 485.

Although it is not stated that the power given by this section must be exercised by by-law, still a by-law is necessary, see s. 249 (1).

Statute Labour.—Every resident has the right to perform his whole statute labour in the statute labour division in which he resides, unless the council otherwise orders, s. 9 (4): The Statute Labour Act, R. S. O. 1914, c. 196. This section enables a council to direct that statute labour be done on a private toll road, in or adjoining a municipality, which would not otherwise be lawful. See The Statute Labour Act, infra.

486. The council of a local municipality may pass by-laws for entering into and performing any agreement with any other council in the same county for executing, at their joint expense and for their joint benefit, any work within the jurisdiction of the council. 3 Edw. VII. c. 19, s. 647, par. 2; 3 & 4 Geo. V. c. 43, s. 486.

See s. 483 (9), supra.

Any Work.—This means any work in connection with highways. The title of this part has a governing effect upon the language of the section, see s. 489.

Any by-law under this section will be subject to s. 289 (1), if it involves a deal or liability not provided for in the estimates of the current year.

Local municipality means city, town, village or township, s. 2 (g).

A local municipality cannot enter into such an agreement with a local municipality in another county; see s. 444 for the method to be followed in such a case. See Joint Undertakings, s. 483 (9). Power must be clearly given to authorize joint action, see infra.

Joint Work.—In re Nichol & Alnwick, 1877, 41 U. C. R. 577.

487. The council of every municipality may pass by-laws

1. For causing any tree, planted or growing on any highway, square, lane or other public communication, to be removed if and when deemed necessary for any purpose of public improvement; but

(*a*) The owner of the adjacent land shall be entitled to ten days' notice of the intention of the council to remove such tree, and to be recompensed for his trouble in planting and protecting it, but neither he nor the occupant of the land shall be entitled to any further or other compensation.

(*b*) Neither the owner of the adjacent land nor any pathmaster or other public officer, nor any other person, shall remove or cut down or injure any such tree without the express permission of the council.

2. For planting and preserving shade and ornamental trees upon any highway, and for granting to any person or association of persons money to be expended for such purposes. 3 Edw. VII. c. 19, s. 574, par. 2, *redrafted.*

3. For prohibiting the injuring or destroying of trees or shrubs on the highways, planted or preserved for shade or ornament. 3 Edw. VII. c. 19, s. 547, pr. 3, *redrafted.*

4. For authorizing the Park Commissioner or any officer appointed for that purpose or a Committee of the Council to

(*a*) Plant or cause to be planted trees in the highways of the municipality;

(*b*) Trim or cause to be trimmed all trees on private property the branches of which extend over a highway;

(*c*) Cut down or remove or cause to be cut down or removed all decayed trees;

(*d*) Remove or transplant or cause to be removed or transplanted any tree planted or growing in any highway, square, lane or other public communication after 48 hours' notice in writing to the occupant of the land opposite to which the tree is planted or growing, but no live tree, unless within 30 feet of another tree, shall be removed without the consent of such occupant.

(1*a*) The notice mentioned in clause (*d*) may be given by leaving it with a grown-up person resident upon the land, or if the land is unoccupied by posting it in a conspicuous place on the land.

(1*b*) Neither the corporation nor any person acting under the authority of a by-law for the purposes mentioned in this paragraph shall incur any liability by reason of anything done under the authority of the by-law if reasonable care, skill and judgment are exercised in the doing of it, nor shall the corporation be liable to make compen-

sation to the owner or occupant of the land further than as provided by this section.

(1*c*) Nothing in this paragraph shall limit the powers conferred by paragraphs 1, 2 and 3. 3 Edw. VII. c. 19, s. 574, pars. 4-6; s. 575; 4 Edw. VII. c. 22, s. 23; 6 Edw. VII. c. 34, s. 22, *redrafted;* 3 & 4 Geo. V. c. 43, s. 487 (1-4).

(*See also for power to grant bonuses for planting of trees and regulating the planting of trees on highways. R. S. O. c. 243, ss. 3 and 8.*)

488.—(1) The council of a county or a township may pass by-laws for requiring that on each or on either side of a highway or part of a highway which passes through a wood the trees, except such as are reserved by the owner for ornament or shelter, shall for a space not exceeding 25 feet from the limits of the highway or part of it be cut down and removed by the owner or occupant of the land within a time to be appointed by the by-law, and if he fails to do so, authorizing such person as may be named in the by-law to cut down and remove them.

(2) Where the owner or occupant fails to cut down and remove such trees in accordance with the requirement of the by-law the person named in the by-law for that purpose may cut down and remove them, and the trees may be used for the construction, improvement or repair of any highway or bridge in the road division in which the land is situate or may be sold by him to defray the expenses incurred in carrying out the provisions of the by-law. 3 Edw. VII. c. 19, ss. 658 (3) and 660 (3), *redrafted.* 3 & 4 Geo. V. c. 43, s. 488.

The Tree Planting Act.—Councils also have powers under The Tree Planting Act, R. S. O. 1914, c. 213, which is as follows:—

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as The Tree Planting Act, 3-4 Geo. V. c. 53, s. 1.

2.—(1) The owner of land adjacent to a highway, lane, alley, place or square may plant trees on the portion thereof contiguous to his land; but no tree shall be so planted that the same is or may become a nuisance or obstruct the reasonable use of a highway or other public thoroughfare.

(2) Every tree so planted shall be the property of the owner of the land adjacent to such highway, lane, alley, place or square and nearest to such tree.

(3) An owner of land may, with the consent of the owner of the adjoining land, plant trees on the boundary between such lands, and every such tree so planted shall be the common property of such owners.

(4) Every growing tree, shrub or sapling planted or left standing on either side of a highway for the purposes of shade or ornament shall be the property of the owner of the land adjacent to the highway and nearest to such tree, shrub or sapling. 3-4 Geo. V. c. 53, s. 2.

3.—(1) The council of any municipality may pass a by-law for paying a bonus not exceeding twenty-five cents for every ash, basswood, beech, birch, butternut, cedar, cherry, chestnut, elm, hickory, maple, oak, pine, sassafras, spruce, walnut or whitewood tree, planted, under the provisions of this Act, within such municipality on any highway or on any boundary line or within six feet of such boundary line.

(2) The by-law shall provide for the appointment of an Inspector of trees so planted, for their due protection against injury or removal by any person, including the owner, without the authority of a resolution of the council, and for the conditions on which the bonus may be paid. 3-4 Geo. V. c. 53, s. 3.

4.—(1) Not less than thirty municipal electors in a police village may petition the council of the township praying for the passing of a by-law under section 3 to have effect within the limits of the police village, and on receipt of such petition the council may pass a by-law giving effect to it.

(2) The trustees of such police village shall appoint the Inspector of trees provided for by the by-law, and the amount required for the payment of the bonuses for tree planting under the by-law, and the remuneration of the Inspector shall be raised by a rate upon the assessment for real property, income and business and other assessments in such police village in the manner provided by The Municipal Act. 3-4 Geo. V. c. 53, s. 4.

5.—(1) The Inspector shall make to the council one report for each year, if required so to do, giving the names of all persons entitled to any bonus under the by-law, the number of trees of each species planted and the amount of bonus to which each person is entitled, and certifying that the trees have been planted for a period of three years and that they are alive, healthy and of good form; and upon the adoption of such report the bonus shall be paid.

(2) The corporation shall not be liable to pay a larger sum in respect of trees planted under this Act than would be payable if the same had been planted at a distance of thirty feet apart, and in no case shall a bonus be granted where the trees are less than fifteen feet apart. 3-4 Geo. V. c. 53, s. 5.

6.—(1) Any person who ties or fastens any animal to or injures or destroys a tree planted and growing upon a highway, lane, alley, place or square, or, if a bonus has been paid therefor, upon any boundary line between lands, or who suffers or permits any animal in his charge to injure or destroy or who cuts down or removes any such tree without having first obtained permission so to do by resolution of the council of the municipality shall incur a penalty not exceeding $25, recoverable under The Ontario Summary Convictions Act.

(2) One-half of such penalty shall go to the person laying the information and the other half to the corporation of the municipality within which such tree was growing.

(3) Any person who ties or fastens any animal to or injures or destroys any tree growing for the purposes of shade or ornament upon a boundary line between lands or who suffers or permits any animal in his charge to injure or destroy or who cuts down or removes any such tree without the consent of the owners thereof, shall incur the like penalty. 3-4 Geo. V. c. 53, s. 6.

7. The council of every municipality may pass by-laws to

(*a*) regulate the planting of trees upon highways;

(*b*) prohibit the planting upon the highways of any species of trees which they may deem unsuited for that purpose;

(*c*) provide for the removal of trees planted on a highway contrary to the provisions of any such by-law. 3-4 Geo. V. c. 53, s. 7.

The purpose of this Act is to encourage tree planting by private persons. The power conferred by s. 2 is subject to such limitations as may be imposed by by-laws passed under the powers given in s. 7: Per Osler, J.A., in Hodgins v. Toronto, 1892, 19 A. R. at 545.

The council can by by-law under the provisions of s. 3 (2), provide for the protection of trees on which a bonus has been paid, and prevent their removal without the authority of a resolution.

As for the Inspector of trees, such a statutory officer is not a municipal servant, but is a public officer. The Inspector's duty is apparently confined to investigating and reporting on the matters mentioned in s. 3.

The powers given by s. 7 are subject to the condition imposed by s. 2 (1), that no tree shall be so planted as to become a nuisance or obstruction to the highway.

The property of an adjoining owner in trees growing on the highway, which accrues to him by virtue of s. 2, gives the owner such special right and interest in the trees as will enable him to maintain an action for damages against a person who destroys them without authority: Douglas v. Fox, 31 U. C. C. P. 140, followed; Bannatyne v. Suburban, 1904, 15 M. R. at 16. In the latter case a street railway company with statutory powers to construct along highways, having the general consent of the municipal corporation to construct, were restrained from cutting down trees without first performing the statutory conditions precedent of setting in motion the procedure for compensating the plaintiff and obtaining lawful possession.

The Tree Planting Act gives the power to plant trees to the owner of lands subject to the condition that no such tree shall be a nuisance or obstruct the highway; s. 487 gives councils the power (1) under s.-s. 1 to remove tree for purposes of public improvement; (2) under s.-s. 2 to plant and to authorize the planting of trees; (3) under s.-s. 3 to protect such trees. The penalties provided by by-laws passed under s.-s. 3 may be recovered in lieu of the penalty provided by s 6 of The Tree Planting Act. A charge may be laid under either the by-law or s. 6.

Under The Tree Planting Act trees planted by a municipality become the property of the nearest adjoining owner. But this property does not authorize him to remove them or cut them down (see s. 2), without the express permission of the council, and he can be fined for injuring them. His property, which is purely statutory, only entitles him to be recompensed for his trouble in planting and protecting such trees. It is, however, sufficient to enable him to maintain an action for an injunction to restrain persons from injuring such trees; see Bannatyne v. Suburban, supra, and to recover damages resulting to his property in consequence of the destruction thereof.

Sub-section 4 without limiting the powers given by the preceding sub-sections, authorizes the appointment of officers with special powers as to trees, some of which might have been conferred under the preceding sub-sections; others confer new powers, *e.g.*: (1) The power to trim trees growing on private property, which extend over highways. This power was denied in Hodgins v. Toronto, supra; (2) The power to cut down and remove decayed trees; (3) The power to transplant when trees are less than 30 feet apart, and in other cases with consent of the owner. As to the 30 feet between trees, see s. 5 of the Tree Planting Act, supra, p. 1040.

Trimming is to be distinguished from topping, see Unwin v. Fisher, 1891, 2 Q. B. 115. There is no authority under s. 487 to top trees on private property. See title Nuisance to Highways.

If reasonable care, skill and judgment are not exercised, the corporation and its officers are guilty of negligence in the exercise of statutory

powers, and liable for the damage resulting therefrom. The officers are not protected as in the case of an invalid by-law, see s. 349, supra.

There is no jurisdiction to act if the notice mentioned in s. s. 4 (d) is not given, and the corporation and its officers would in that event be liable to the owner of the trees; see Bannatyne v. Suburban, supra, p. 1041, and generally as to cases where notice is a condition precedent to the right to exercise powers, see notes to s. 475.

In the absence of s.-s. 4 (c), deceased trees could be removed under the general power to keep highways in repair, see s. 460.

The Tree Planting Act, s. 6, makes permission by resolution of the council necessary to authorize the removal or cutting down of trees. A resolution is a sufficient mode of municipal action, where power is conferred by any Act other than the Municipal Act; see Toronto v. Toronto Rw. Co.,1906, 12 O. L. R. 534, 8 O. W. R. 179.

On the other hand power to act by by-law impliedly excludes power to act by resolution or otherwise; see Liverpool v. Liverpool, 33 S. C. R. 180. The express permission referred to in s.-s. 1 (s). should apparently be given by by-law.

The Public Health Acts Amendment Act, 1890 (I), 53 & 54 Vict., c. 59, s. 43, provides:—

Any urban authority may, if they see fit, cause trees to be planted in any highway . . . provided that this power shall not be exercised, nor shall any trees so planted be continued so as to hinder the reasonable use of the highway by the public or any person entitled to use the same, or so as to become a nuisance or injurious to any adjacent owner or occupier. This Act only applies where it has been adopted. The Lewes Corporation, before the Act was passed, was indicted and convicted for a nuisance to a highway by planting trees. See the Times, March 9th, 1886, cited by Arnold, p. 20, note (g).

Section 487, s.-s. 2 and 4 (a), do not contain any such restriction on planting as is to be found in s. 43 above mentioned, and in s. 2 (1) of The Tree Planting Act, and it would seem to follow that a municipality can by by-law authorize the planting of trees, which would at common law be a nuisance to the highway, see notes to s. 491. Compare the erection of a statue on a street without authority: Squire v. Campbell, 1836, 6 L. J. Ch. 41, and note the limitation on the power given by s. 483 (1).

Overhanging Branches.—A landowner is not bound to permit a neighbour's tree to overhang his land, and if he can get rid of the encroachment without entering upon the land of his neighbour or without committing a trespass, he may do so whenever he pleases without notice: Lemmon v. Webb, [1891] A. C. 1; 64 L. J. Ch. 205, or he may maintain an action for an injunction: Smith v. Giddy, 1904, 2 K. B. 448; 73 L. J. K. B. 894; following Crowhurst v. Amersham, 4 Ex. D. 5; 48 L. J. Ex. 109.

The foregoing rule will not apply to trees planted on boundary lines under The Tree Planting Act, nor will it now apply to trees on highways.

The authority to trim must be given by by-law, not by resolution: Re Allen v. Napanee, 1902, 4 O. L. R. 582.

The Tree Planting Act gives no power to remove trees where they do not obstruct or become a nuisance to the highway; s. 487, s.-s. (1) gives this power.

Trees and herbage on a highway belong to the owner of the soil of the highway.

Trees: Turner v. Ringwood Highway Bd., 1870, L. R. 9 Eq. 418; Nicol v. Beaumont, 1884, 53 L. J. Ch. 853.

Herbage: Curtis v. Kesteven, 1890, 45 Ch. D. 504; Haigh v. West, 1893, 2 Q. B. 19; Neaveison v. Peterborough, 1901, 1 Ch. 22; Atty.-Gen. v. Garner, 1907, 2 K. B. 480; Ross v. East Nissouri, 1 O. L. R. 353.

In Hodgins v. Toronto, 1892, 19 A. R. 537, The Tree Planting Act was not in force. The road in question had been laid out by the Government surveyor in the original survey, and as the statute then provided the soil and the freehold were in the Crown. A telephone company acting under statutory powers, whose charter expressly provided that they were not to mutilate tress, cut off branches from trees growing on the plaintiff's

land, and from trees growing in the street in front of the plaintiff's land. It was held that the plaintiff had no interest in the tree growing in the street sufficient to enable him to complain, and that the overhanging branches of the trees growing on the plaintiff's land were not a nuisance to the highway, and that the defendant telephone company had no right to cut them.

For leading cases as to trees growing on boundary lines, see "Cases on Property," by Gray, vol. 1, p. 543.

489.—(1) The councils of united counties may pass by-laws for raising or borrowing money to be expended exclusively in any one of the counties forming the union.

(2) None of the members of the council but those representing local municipalities in the county in which the expenditure is to be made shall vote upon the by-law except in the case of an equality of votes, when the warden shall have the casting vote.

(3) The sums to be raised by taxation for the purpose of making any such expenditure and the sums required to be raised to pay the principal and interest of any money borrowed for that purpose shall be assessed and levied only upon the rateable property in the county in which the expenditure is to be made.

(4) Every debenture issued under the authority of the by-law shall be issued as the debenture of the corporation of the united counties, but it shall be stated in the body of it that the payment of the principal and interest is to be provided for by a special rate upon the rateable property in the county in which the expenditure is to be made and upon that property only. 3 Edw. VII. c. 19, s. 659 (1-4), *redrafted;* 3 & 4 Geo. V. c. 43, s. 489.

490. The council of a township may pass by-laws for granting a prize not exceeding $10 for the best kept roadside, farm front and farm house surroundings, in each public school section in the township, and for prescribing the conditions upon which such prizes may be competed for and awarded. 9 Edw. VII. c. 73, s. 30. 3 & 4 Geo. V. c. 43, s. 490.

A municipal corporation has no powers at common law. Its powers are only such as are expressly given by, or arise by necessary implication from the words of the Act. See notes to s. 8.

491. The councils of all municipalities may pass by-laws:—

1. For prohibiting or regulating the obstructing, encumbering, injuring or fouling of highways or bridges;

2. For requiring doorsteps, porches or other erections or things projecting into or over any highway to be removed by the owner or occupant of the land in connection with which they exist.

3. For prohibiting the building or maintaining of fences on any highway or the placing or depositing of firewood or any other thing calculated to obstruct it, or to obstruct or interfere with public travel on it, on any highway or bridge, and for requiring the removal of them by the person by whom the same are or were so built, maintained, placed or deposited.

   (*a*) Unless the by-law otherwise provides, a by-law passed under the authority of paragraph 3 shall not extend or apply to a worm fence which is not for more than half its width upon the highway, or to materials to be used for the construction or repair of a highway or bridge, if they do not interfere with the use of it for public travel.

4. For prohibiting the throwing, placing or depositing on any highway or bridge of dirt, filth, glass, handbills, paper, or other rubbish or refuse, or the carcass of any animal. 3 Edw. VII. c. 19. ss. 557, 637, par. 4, *redrafted;* 3 & 4 Geo. V. c. 43, s. 491 (1-4).

5. To provide for placing, regulating and maintaining upon the public highways traffic signs for the purpose of guiding and directing traffic; provided that no by-law shall authorize the placing of such signs upon that portion of any highway

which lies between the double tracks of a street railway constructed upon such highway known as the devil strip. 8 Geo. V. c. 32, s. 14.

It has already been pointed out that any Act which interferes with the convenient and lawful use of a highway constitutes a nuisance for which the person responsible may be indicted. An action will also lie at the suit of the Att.-Gen. either alone or on the relation of a person willing to be responsible for costs for an injunction to restrain the persons causing such a nuisance. In addition, a person suffering special damage may sue therefor.

S. 491 empowers councils to deal with these matters by by-law, which may prohibit absolutely obstructions or acts of the kind enumerated or which may authorize and regulate some such acts.

Such by-laws provide a summary method of dealing with nuisances to highways of the kinds enumerated in this section, for the offender may be taken before a magistrate by summons and fined for a breach of any such by-law. The wide language of the section enables a council to declare many acts in relation to a highway unlawful which would be lawful at common law. Thus a by-law might limit the time during which vehicles should be allowed to stand beside the curb, although the obstruction caused by such a stopping might be at common law reasonable and therefore lawful. In this way the particular standard of highway user and maintenance which each corporation desires may be enforced.

The principles applied by the common law are well expounded in the following remarks of Vaughan Williams, L.J., in Atty.-Gen. v. Brighton, 1900, 1 Ch. 276, 69 L. J. Ch. 204, which was cited with approval by MacLennan, J.A., in Rex v. Maher, 1905, 10 O. L. R. 102, and which indicates where the line is to be drawn between lawful user of a highway and excessive user. The Brighton Supply Association did a very large business in a very narrow street, only twenty feet wide, loading and unloading as many as six vans at a time. The Atty.-Gen. on the relation of one Pack brought an action to restrain the supply association from causing a nuisance to the public and to James Pack by putting the street to an unreasonable and excessive user. The vans blocked up one half of the street during a great part of the day. They were packed close together with the tail-end towards the curb and projecting into the road. The horses were turned around as far as possible. The loading and unloading obstructed the foot passage, and the roadway was so far obstructed that only one vehicle could pass while the vans were drawn up. The road was cleared for an hour and blocked for an hour alternately from 8 a.m. to 5 p.m. Vaughan Williams, L.J., said . . . "It must be shewn to support this action not only that there was such a physical displacement or physical reduction in the temporarily available use of the highway by the public, but it must be shewn that such displacement or reduction was not consistent with the full user of the highway. Now a highway is primarily, no doubt, for the purpose of the passage of Her Majesty's subjects, but it is also for the purpose that those who pass along the highway shall be able to stop at such houses as abut on the highway, and either call for goods or persons there or discharge goods and persons there. The fact that you temporarily reduce the width of the roadway does not make that act unlawful and does not make your obstruction an unlawful obstruction. . . . it is no more unlawful to call at a house in a narrow street than it is unlawful to call at a house in a wide street . . . if the cases are looked at I do not think that there will be found any case of an indictment at all events in which there has been a conviction upon evidence which merely shews excessive user—a very large user—of a lawful right as distinguished from an improper user of a highway. . . .

"On the other hand, it cannot possibly be said that no amount of user could possibly amount to a nuisance if that user consisted of an aggregate of lawful acts. I do not agree with that proposition at all. The truth of the matter is that you have always got in these cases before you can answer the question—was that particular user necessary or reasonable?—to take

into consideration all the facts of the case. . . . . Under those circumstances I . . . come to the conclusion that the user of the highway by the defendants was unreasonable and unnecessary." The injunction was granted as applied for.

Other examples of excessive user constituting a nuisance are: Robinson v. London General Omnibus, 1910, 74 J. P. 161, 26 T. L. R. 233 (turning and shunting omnibusses), and Atty.-Gen. v. Smith, 1910, 103 L. T. 96, 74 J. P. 313 (loading and unloading).

Rex v. Maher, 1905, 10 O. L. R. 102 (cab standing in front of hotel by agreement held lawful user).

As to the powers of councils to authorize certain obstructions such as cab-stands, see s. 400 (5). In the absence of an authorization by by-law under the latter section, if vehicles obstruct the highway unreasonably the persons responsible may be indicted for nuisance or restrained by injunction. Benjamin v. Storr, 1874, L. R. 9 C. P. 400, 43 L. J. C. P. 162, was a case of unreasonable user by vans and fouling by horses where the plaintiff suffered special damage for which he recovered. For a full discussion of reasonable user of a highway, see remarks of Jessel, M.R., in Original Hartlepool Collieries Co. v. Gibb, 1877, 5 Ch. D. 713, 46 L. J. Ch. 311.

By-laws passed under s. 491 must like all other by-laws be general in their nature and of equal operation throughout the municipality. Thus they cannot authorize obstructions at special places or on special roads or lanes or in particular wards or districts. See Virgo v. Toronto.

When the council has by by-law authorized and regulated a use of the highway otherwise illegal the common law is abrogated in so far as the special authority goes. Examples of the power are found in by-laws which authorize owners engaged in constructing buildings to fence in a part of the highway during the period of construction, or which authorize the closing of streets temporarily while construction work is going on. Excepting under the authority of some such by-law a municipality no more than a private person can unlawfully obstruct, injure, foul, etc., highways or authorize such acts, and it will be subject to the same actions as a private person if it does so.

When an obstruction exists in a street at the time of dedication there may be a dedication subject to the obstruction, that is a limited dedication. See Dedication, supra, p. 907. If an obstruction is made after the dedication of the highway a municipal corporation may by by-law require its removal if of the classes enumerated and no length of time will avail to legalize the obstruction.

Where a verandah had encroached on a highway for many years and the corporation passed a by-law directing its removal and applied for a mandatory injunction against the owner for its removal, the C. A. found that there was no particular reason for ordering the verandah to be taken down and refused to grant the injunction. Osler, J.A., said that the appropriate remedy to compel its abolition was in his opinion by indictment. And Moss, J.A., said: "The power of the court to enforce by injunction, mandatory or otherwise, the provisions of a municipal by-law except at the instance and upon the information of the Attorney-General, has been questioned. In any case it is one which the court will be chary of exercising. Caldwell v. Galt, 1900, 27 A. R. 162.

Unquestionably a breach of a by-law may be restrained by injunction where action is brought by the Atty.-Gen. (on the relation of the corporation if the Atty-Gen. so desires), even though the defendant has been fined for a breach of the by-law.

See Atty.-Gen. v. Wimbledon House Co., [1904] 2 Ch. 34, 73 L. J. Ch. 593, following Atty.-Gen. v. Ashbourne, [1903] 1 Ch. 101, 72 L. J. Ch. 67, approved of in the Court of Appeal in Devonport v. Tozer, [1903] 1 Ch. 759, 72 L. J. Ch. 411. In the latter case the defendant acted in contravention of a by-law passed by the corporation which provided a penalty for breach. The corporation without taking proceedings for penalties brought an action for an injunction to restrain the defendants from acting in breach of the by-law, to which action the Atty.-Gen. was not a party: the C. A. held that the corporation could not without the Atty.-Gen. being a party, maintain the action.

The C. A. in Devonport v. Tozer pointed out that a local authority must have special statutory authority giving it special rights to sue in its

own name in respect of a public wrong, and in the absence of such special rights they must proceed in the recognized way, namely, at the suit of the Atty.-Gen. See also Tottenham v. Williamson, 1896, 2 Q. B. 358, 63 L. J. Q. B. 591; Wallasey v. Gracey, 1887, 36 Ch. Div. 593.

In such an action laches can be imputed to the public through the medium of the Atty.-Gen. Atty.-Gen. v. Bradford, L. R. 2 Eq. 71, 35 L. J. Ch. 619, at p. 621, where Wood, V.C., said: "There may be cases of large expenditure incurred in erecting buildings which are of course seen by the public, who should complain of their going on and the whole expenditure having been made without any complaint by any one might afford good ground for saying the public, like individuals, should not allow the expenditure to be made and afterwards come forward to complain of the infringement of rights they might earlier have asserted."

In Ontario municipal corporations by virtue of their ownership of the fee of highways have been held entitled to maintain actions in respect of encroachments on or other nuisances to the highway in the nature of actions of trespass, and it has been held that a municipality by acquiescence in the placing a railway track on the highway could not subsequently maintain an action for the removal of the railway from the street: Pembroke v. Canada Central, 1882, 3 O. R. 503; but the court expressed a doubt as to whether such acquiescence would have availed as a legal justification on an indictment for nuisance. And it has been said in the C. A. in Cartwright Pub. School v. Cartwright Township, 1903, 5 O. L. R. 699, at p. 702, that there can be no estoppel or waiver of a public right.

In the State of Illinois the doctrine of estoppel in pais has been applied in cases where a person has been permitted to occupy a portion of a public street and has erected expensive buildings thereon with the acquiescence of the municipal authorities to justify the continued occupation by such persons notwithstanding a subsequent effort on the part of the corporation to put an end to such private user of the highway. This doctrine has not been generally recognized in other States.

See People v. Rock Island, 215, Ill. 488.

Title in a highway by long continued adverse possession cannot be acquired in Ontario.

See Gooderham v. Toronto, 1885, 21 O. R. 120, 19 A. R. 641, 25 S. C. R. 246, where the plaintiff had for thirty years enclosed and used with other lands a parcel claimed by the city to be a highway. The plaintiff succeeded but on the ground that the land in question never had been a highway and so never was vested in the corporation.

General Scope of 491.—Sub-section 1 gives a general power of prohibiting and regulating with respect to (1) obstructing; (2) encumbering which is not the same, e.g., handbills might encumber; (3) injuring or (4) fouling highways.

This general power is wide enough to include the special powers of prohibiting mentioned in ss. 3 and 4 as the items mentioned in s.-s. 3 are certainly included in the general term obstructing used in s.-s. 1, and the items in s.-s. 4 are included in encumbering or fouling in s.-s. 1 (but what about interfering?). It is difficult to understand the necessity for s.-s. 4. It cannot have the effect of restricting the generality of s.-s. 1, or can it? The enumeration of certain items in s.-s. 4 which the council can prohibit without a power to regulate being given would seem to indicate that the general power to regulate the matters enumerated which would otherwise exist under s.-s. 1 does not exist with respect to items included in s.-s. 4. Thus the council cannot by by-law regulate the throwing of handbills or the placing of refuse such as ashes; it can merely prohibit these things under s.-s. 4.

On the other hand, ss. 2 and 3 give the special power of requiring the removal of the items enumerated by the persons mentioned in the Act. There is no power to require removal by municipal officers. The power of the corporation to remove is discussed below.

Removing Obstructions Summarily.—The duty of keeping a highway in repair under Ontario, s. 460, involves and includes the duty of removing obstructions. In Reynolds v. Presteign Urban D. C., 1896, 1 Q. B.

604, 65 L. J. Q. B. 400, Presteign U. D. C. were under a statutory duty to repair highways which were vested in them by the Public Health Act, 1875, (Eng.), s. 149. They gave notice to remove encroachments and obstructions consisting of a hedge and railings under the Highways Act, 1835, s. 65, but the time within which they could proceed to obtain a summary conviction under this Act had expired (compare time limit for offences against by-laws passed under powers as to obstructions in Ontario, s. 491), and it was doubtful whether the obstructions were such as could have been made the subject of indictment (presumably because the interference with the highway was trifling.

They accordingly proceeded summarily to remove the hedge and railings and the plaintiff then brought action for trespass and claimed damages. The defendants justified their acts, but Lord Russell of Killowen, C.J., said:

> "I do not mean to say that considerable weight should not be attached to the observation of plaintiff's counsel as to the propriety and desirability that questions of this kind ought not to be decided either by public bodies or private individuals with a high hand, or by taking the law into their own hands without adequate reason; and I agree that where there is any doubt as to the rights in question, local authorities should act with circumspection, and should prefer to act through judicial proceedings. But where they do choose to act on their own responsibility they take it upon themselves to run the risk. If they proceed to remove encroachments on what they believe to be highways vested in them, the burden of justification is thrown upon them, and they must take the consequences of any proceedings taken against them. But if upon the hearing of such proceedings it is shewn in point of fact, that there were encroachments on property vested in them by statute, they must be held to have the same right to take steps to protect such property as any private owner would have to protect his own land. I need not point out that if there be a construction or obstruction encroaching upon the property of a private owner he has a right to remove it. Indeed, the House of Lords has recently held in Lemmon v. Webb, [1895] A. C. 1, 64 L. J. Ch. 205, that in the case of overhanging trees, notice by the owner of the property overhung is unnecessary to justify him in cutting the branches projecting over his property. Here, no doubt, there was a provision under section 149 of the Public Health Act, 1875, providing a particular mode of procedure which a local authority might have pursued, but that does not deprive them of a right of summarily removing the encroachment which follows from the property being vested in them. The provision is not necessarily to be followed, but is supplementary. I consider, therefore, that in point of law the defendants were justified in acting as they did."

In addition to the remedy by indictment a municipal corporation may maintain an action for an injunction restraining the defendant from continuing to obstruct a highway though proceeding by indictment is the more usual course. The onus of proving the existence of the highway is on the corporation, see St. Vincent v. Greenfield, 1887, 15 A. R. 567, and Fenelon Falls v. Victoria R. W. Co., 1881, 29 Gr. 4, where the cases are collected. Referring to the latter case, Gwynne, J., said it was "a case of wrongful acts committed by a railway company upon the soil of a street vested in the corporation, in short the common case of trespass upon the soil of the street of which the corporation were seized: Vancouver v. C. P. R., 1894 23 S. C. R. 1. See discussion supra as to when such an action must be brought by the Attorney-General. Fenelon Falls v. Victoria R. W. Co., supra, was followed in Toronto v. Lorsch, 1893, 24 O. R. 227, and in Gloucester v. Canada Atlantic, 1902, 3 O. L. R. at 91, affirmed by the C. A. 4 O. L. R. 262. The decision was again based on the highway being vested in the municipality. The Canada Atlantic had fenced across an unopened highway which they were compelled to remove. In Toronto v. Lorsch supra, the city was allowed to maintain an action for a declaration that certain land was a highway and the city was held to have the same right as a private person to have such a declaration; the latter right was

affirmed in Gooderham v. Toronto, 1890, 21 O. R. 20, 19 A. R. 641; see also Liverpool v. Liverpool, 35 N. S. R. 241, as to absence of the Attorney-General as plaintiff in such a suit.

See also, s. 501 and notes there.

Fences and Firewood.—As s.-s. 3 deals specially with these two classes of obstructions they cannot be deemed to be included in the general language of s.-s. 1. There is no power under this sub-section to authorize such obstructions directly or indirectly. The by-law may require the removal of such obstructions after notice or without notice and may impose a fine or imprisonment (s. 497), for failure to comply with its provisions.

Proceedings under any such by-law must be commenced within six months after the offence is committed, except where the by-law provides the maintaining of a fence. Ontario Summary Convictions Act, R. S. O. 1914, c. 90, s. 4, which applies to s. 1142 of the Criminal Code.

The offence of building a fence or placing or depositing firewood is not a continuing offence. S. 51 of the Highway Act, 1864 (Imp.), provides among other things that "If any person shall encroach by making any . . . fence or by placing any . . . materials on the side . . . of any carriageway . . . he shall be subject on conviction . . . to any sum not exceeding forty shillings . . . and it shall be lawful for the justices . . . to levy the expenses of taking down such . . . fence and removing such . . . materials . . . upon the person offending." Lord Coleridge, C.J., said in Coggins v. Bennett, 1877, 2 C. P. D. 568: "What the legislature contemplated was some definite act which should be the subject of a remedy in this summary way . . . the object of the legislature evidently was that if the board chose to resort to this summary mode of proceeding they must come within six months; but if they allow that time to go by they must proceed in the ordinary way by indictment."

In the absence of statutory authority a by-law under ss. 2 and 3 could not provide for levying the cost of removal on the offended.

Any Other Thing, s.-s. 3.—The ejusdem generis rule only applies when the specific words are all of the same genus. If they are of different genera the meaning of the general word remains unaffected by them. Thus in R. v. Payne, 35 L. J. M. C. 170, the words were "any mask, dress or disguise or any letter or any other article or thing." The court held, "any other article or thing" to mean any other article or thing of any other kind, sort or description whatever, such for example as a crowbar.

It is plain that the words "any other thing" in s.-s. 3 mean any other thing of any other kind, sort or description whatsoever calculated to obstruct, etc., and this view is borne out by the fact that s.-s. 3 (a) indicates that materials for construction or repair are included.

Rubbish or Refuse.—The Highways Act, 1835, s. 72 imposes a fine if any person "shall lay any lumber, stone, hay, straw, dung, manure, lime, soil, ashes, rubbish or other matter or thing whatsoever "upon a highway to its injury or the injury of travellers." and the immediately following sub-section imposes a like fine if any person "shall suffer any filth, dirt, lime or other offensive matter or thing whatsoever to run or flow into or upon any highway" from any house or lands adjacent thereto.

Under s. 491, s.-s. 4, there is no jurisdiction to pass by-laws dealing with filth flowing or running on to the highway. This could be dealt with under the general powers in s.-s. 1.

The ejusdem generis rule does not apply to the expression other rubbish or refuse so that any rubbish whatever is included.

Encroachments.—As jurisdiction over highways rests entirely with the legislature or those bodies to whom the legislature has delegated such jurisdiction in cases where the soil of a highway belongs to an abutting owner subject to the rights of the public over it as a highway, and much more in cases where the soil is vested in the Crown or a municipal authority as trustee for highway purposes, a person proposing to build has no right in the absence of authority derived from statute to build upon a public highway so as to deprive the public of that free and convenient passage to which by law they are entitled. Vestry of St. Mary v. Goodman, 1889, 23 Q. B. D.

154, 58 L. J. M. C. 122, was a case where the pilasters forming part of a shop front projected six inches into a public footway, the width of the street being over thirty feet. Hawkins, J., after stating the law as given above, traced the course of legislation in England to ascertain if the legislature had conferred such a right or had legalized what otherwise would be an indictable nuisance. In the report of Edmonton v. Brown, Brown v. Edmonton, 1894, 23 S. C. R. 308, it is held that the right of the public to the free and unobstructed use of a street could not be taken away even by the existence of an obstruction at the time when the street was dedicated, but the full judgment of the Court which is to be found in 27 S. C. R. 510 note, is not explicit on the point in question.

S. 491, s.-s. 1, does not refer to encroachments by the wall or foundation of a building, but only to projections such as porches, steps and others of like nature.

A council apparently cannot by by-law deal with encroachments by walls, etc. Such an encroachment if slight is probably not indictable; see Vestry of St. Mary v. Goodman, supra.

Obstructing or Injuring Highways.—The power given by s.-s. 1 enables a municipal council to sanction what would otherwise be an indictable nuisance. Regulation implies the continued existence of the thing to be regulated. Obstructing, encumbering, etc., as enumerated are the inevitable consequences of the lawful user of the highway. The council can single out particular modes of highway user which would otherwise be legal and forbid them imposing a penalty for breach of the by-law, or it may expressly authorize acts which would otherwise be indictable so long as they are acts which come within the four classes enumerated in the sub-section.

The Highway Act, 1835, 5 & 6 Will. 4, c. 50, ss. 69 and 72, enumerates and forbids many specific acts comprised in the categories in question, e.g., tethering animals, injuring by heavy traffic, the destroying or obliterating direction signs, setting off fireworks, permitting filth to run upon the highway from any house, playing games and many others.

In prosecutions under by-laws passed under s.-s. 1 the following cases under s. 72 above mentioned, may be found helpful: R. v. Bartholomew, 1908, 1 K. B. 554, 77 L. J. K. B. 275 (local authority permitting a church coffee stall on highway, charge dismissed because no appreciable obstruction resulted); Dunn v. Holt, 1904, 73 L. J. K. B. 341 (operating on street a machine for removing dust from houses, held lawful, neither time nor space occupied being excessive): Horner v. Cadman, 1886, 55 L. J. M. C. 110 (collecting a crowd on highway and addressing it, convicted though there was a passage around). St. Mary, Newington v. Jacobs, 1871, L. R. 7 Q. B. 47, 41 L. J. M. C. 72 (moving heavy machinery in wagons across and crushing and obstructing the roadway, held, that had the acts been done by an ordinary passenger they would have been illegal, but being done in carrying on the defendant's ordinary business in premises situated on each side of a highway, the defendant being owner of the soil of the roadway, the defendant was not guilty of infringing s. 72).

Query—Can the council under this sub-section license or otherwise authorize a private use of a special portion of a highway and the closing of it up temporarily? See discussion, infra.

492.—(1) Where a highway for the site of which compensation was paid has heretofore or shall hereafter be established and laid out in place of the whole or any part of an original allowance for road, or where the whole or any part of a highway has heretofore been or shall hereafter be legally stopped up, if the council determines to sell such original allowance or such stopped up highway, the price at which it is to be sold shall be

fixed by the council, and the owner of the land which abuts on it shall have the right to purchase the soil and freehold of it at that price.

(2) Where there are more owners than one, each shall have the right to purchase that part of it upon which his land abuts, to the middle line of the stopped up highway.

(3) If the owner does not exercise his right to purchase within such period as may be fixed by the by-law or by a subsequent by-law, the council may sell the part which he has the right to purchase to any other person at the same or a greater price. 3 Edw. VII. c. 19, s. 640, par. 11, *redrafted.* 3 & 4 Geo. V. c. 43, s. 492 (1-3).

493.—(1) Where a highway for the site of which compensation was not paid has been laid out and opened in the place of the whole or any part of an original allowance for road, the owner of the land appropriated for the highway or his successor in title if he owns the land which abuts on such allowance, shall be entitled to the soil and freehold of it, and if it has not already been conveyed to him or his predecessor in title, to a conveyance of it.

(2) Where the land which so abuts is owned by more persons than one each shall be entitled to and to a conveyance of the soil and freehold of that part of the allowance upon which his land abuts to the middle line of the allowance.

(3) If the owner of the land appropriated for the highway or his successor in title does not own any land abutting on the allowance and the allowance is sold by the council, he shall be entitled to a part of the purchase money which bears the same proportion to the whole purchase money as the value of the part of the site of the new highway which belonged to him bears to the value of the whole site. 3 Edw. VII. c. 19, s. 641, *part redrafted.* 3 & 4 Geo. V. c. 43, s. 493 (1-3).

494.—(1) A person in possession of the whole or any part of an original allowance for road in place of which he or any of his predecessors in title has laid out and opened a new road or street without receiving compensation for the site of it, shall be entitled to the soil and freehold of such allowance or part of it, and if it has not already been conveyed to him or to his predecessor in title to a conveyance of it.

(2) Where there are more persons than one in such possession each shall be entitled to and to a conveyance of the soil and freehold of that part of the allowance upon which his land abuts to the middle line of the allowance.

(3) If the road has not been adopted by by-law of the council or otherwise assumed for public use by the corporation, this section shall not apply until the new road or street is adopted by by-law of the council, and the council by by-law declares that the original allowance is in its opinion useless to the public.

(4) This section shall apply to roads and to streets hereafter laid out and opened and to such as have been heretofore laid out and opened. 3 Edw. VII. c. 19, s. 641, *part redrafted.* 3 & 4 Geo. V. c. 43, s. 494 (1-4).

The power to sell is given by s.-s. 472 et seq. S. 492 applies after the procedure prescribed by the former group of sections has been followed and a by-law has been passed authorizing the selling of the closed highway.

As to the essential contents of such a by-law see notes to s. 472, supra. The by-law should fix the price at which the closed highway is to be sold and the time within which the owner of abutting lands must exercise his right to purchase.

The price set in the original by-law can only be changed by a by-law passed with the same formalities as an original by-law, for it is in effect authorizing a different contract of sale, that is different sale from the abortive sale authorized by the first by-law.

The right to purchase given by s. 492 is a personal right like an option and cannot be assigned.

The Owner of the Land which Abuts.—This means a mortgagee who has no legal estate. "The mortgagee's interest in the land is not unfrequently the only valuable interest belonging to any one. Even where the equity of redemption of the mortgagee is a valuable one he might seriously impair the security of the mortgage if allowed to become the owner as against him of a highway upon which the property originally had a front and to close this front as against him. On the other hand any such accretion acquired by the mortgagee would necessarily be redeemable by the mortgagor as part of the mortgaged premises." Street, J., in Brown v. Bushey, 1894, 25 O. R. at 616.

Brown v. Bushey was decided under s.-s. 9 of s. 550 Consolidated Municipal Act, 1892, which provided for selling . . . to the owners of any adjoining land any road legally stopped up. The Act at that time contained no section corresponding to s. 5, which provides that a person in actual occupation of land under an agreement shall be deemed to be the owner and the unpaid purchase money shall be deemed to be an incumbrance on the land. In such a case the incumbrancee would not be entitled to buy as against the purchaser under agreement. Yet the reasoning of Brown v. Bushey would seem to apply.

S. 493.—In order to come within s. 493 and compel a conveyance there must be evidence to shew that the road was laid out in the place of an original road allowance. Such a road must serve the purpose and accommodate the traffic of the public that the original road allowance was intended to do. The fact that it runs in the same direction and is in the same vicinity is material. See Cameron v. Wait, 1878, 3 A. R. 75; Lister v. Clinton, 1909, 18 O. L. R. 197. In the latter case the plaintiff was in possession of and had fenced the original road allowance, and the public used a road known as the shore road, the site of which had been appropriated from the plaintiff by long user and which latter road the plaintiff claimed was opened "in lieu of the original road allowance" as the language of the statute then was. The corporation under a power in effect the same as that in s. 474, supra, gave sufficient notice of intention to pass a by-law to open the original road allowance. The by-law which contained a recital that the shore road had existed from time immemorial but not in lieu of the original allowance was duly passed. On the grounds given above Latchford, J., held that the recital was incorrect and added: "They (the plaintiffs) are entitled to the parts of the road original allowance across their farms and although they have not received conveyances from the township, the township could not in my opinion pass a by-law to open up the road allowance without providing for compensation to those so entitled." The by-law was accordingly quashed.

S. 493 refers to a case where a site for a road is taken or appropriated by consent on which a highway has been laid out and opened as in Lester v. Clinton, where the shore road was simply appropriated and statute labour and the moneys of the township were applied in maintaining the road. There was no conveyance of the site. The shore road had evidently been dedicated by consent or possibly at the request of the corporation as the plaintiff had moved his fences back at the request of the corporation on several occasions. See title Dedication, supra.

S. 493 also applies to cases where the allowance for which the new road was substituted was not in possession of the man whose land was "appropriated"—which may mean "dedicated by consent" or "expropriated"—for the new road. In such a case the man who had no possession might require the conveyance which the council is empowered to give.

The municipal council in making a conveyance under ss. 493 and 494 is only exercising a power and not acting by virtue of its ownership.

The declaration that the abutting owner is entitled to the land coupled with the exception in s. 433, supra, is a statutory conveyance. This conclusion is not displaced by the fact that power to convey is given in express terms.

The conveyance will be a monument of title capable of registration and of being preserved as evidence although unnecessary for the mere purpose of vesting the fee.

(The power to convey under s. 494 is only exercisable after the statutory condition precedent of passing a by-law is complied with. After the by-law is passed however the section itself vests the original allowance in the person in possession and the conveyance is only of value as a monument of title as in the case under s. 493; see remarks of Patterson, J.A., supra.

According to Patterson, J.A., in Beemer v. Grimsby, 1886, 13 A. R. at 226, the purpose of sections like 493 and 494 is to state questions which from the unavoidably informal character of the transactions of the early settlers and the passing away of the whole generation could not be brought into litigation without creating confusion and doing injustice.

The difference between ss. 493 and 494 is that in cases under 493 possession of the original road allowance is not made essential to the right to it.

S. 493 includes cases of substituted roads laid out by the municipal council, though not confined to those roads, and covers the case of the substitution of a new road for an actually travelled allowance and not merely for allowances that were never opened.

Without Receiving Compensation.—In Beemer v. Grimsby, 1886, 13 A. R. 225, s. 551 of the Mun. Act of 1883, corresponding in part to ss. 493 and 494.

During eighty years the public had access to the lake over a substituted road which gave the accommodation which the original allowance had been designed to afford. The substituted road was used in lieu of the original allowance which had been enclosed and used by the abutting owners from whose lands the substituted road was taken. There was no foundation for inferring that compensation was made for the site of the substituted road beyond such occupation. The corporation passed a by-law opening the original allowance which was quashed as invalid.

S. 493 refers to cases where the site for the substituted road has been appropriated without compensation as was done in Lester v. Clinton, infra, It does not matter in cases under this section whether or not the abutting owner is in possession of the original road allowance. S. 494 refers to cases of dedication without compensation by an owner who takes possession of the original road allowance. In the latter case the owner cannot acquire title in the absence of (1), adoption or assumption of the substituted road, (2) a by-law declaring the original allowance useless to the public. The provisions of s. 495 would apply to such a by-law.

By the provisions of s.-s. 4, s. 494 is made retroactive. As to the difficulty which would otherwise arise see Cameron v. Wait, 3 A. R. 183, supra.

Appropriated.—In Pirie v. Parry Sound, 11 O. W. R. 11, the appropriation was by by-law.

In Wentworth v. W. Flamborough, 1910, 23 O. L. R. 583, there was a dispute between county and township about the liability to repair a substituted road, the original allowance (a boundary road) having been conveyed to the abutting owner. Middleton, J., seemed to doubt the validity of the conveyance which was made without a by-law, while Boyd, C., in the D. C., considered that the original allowance had become permanently closed by proper municipal action. It would be the better practice to authorize the making of the conveyance under ss. 493 and 494 by by-law.

Cases on Sections 492 to 494.—Cameron v. Wait, 1877, 3 A. R. 175; Fonseca v. Shultz, 1891, 7 M. R. 464; Beemer v. Grimsby, 1885, 13 A. R. 225; Lister v. Clinton, 1909, 18 O. L. R. 197; Wannamaker v. Green, 1884, 10 O. R. 457; Herriman v. Pulling, 1906, 8 O. W. R. 149; Pirie v. Parry Sound, 1907, 11 O. W. R. 11; Mills v. Freel, 1912, 23 O. W. R. 45, 3 O. W. N. 1240.

Addition of Territory.—Bell v. Burlington, 1915, 34 O. L. R. 410.

495. Stone, gravel or other material shall not be put on any highway for the purpose of rebuilding or repairing it during the winter months so as to interfere with the use of sleighs, unless another convenient highway is provided while the rebuilding or repairing is being done. 3 Edw. VII. c. 19, s. 558, *redrafted;* 3 & 4 Geo. V. c. 43, s. 495.

This section imposes an imperative statutory duty and failure to obey it will render the corporation responsible in damages to a person injured in consequence of such failure. Apart entirely from the provisions of the section the placing of gravel on a highway so as to interfere with the use

of sleighs may amount to misfeasance and consequent liability at common law.

The word rebuilding was inserted in the revision of 1913. The word build is not ordinarily applied to road-making. It might refer to a bridge but the latter is included in the term highway.

The word repair includes growth from " a blazed line to a paved street according to the needs of the traffic having regard to the means available for the purpose." Weston v. Middlesex, 1913, 30 O. L. R. at 31, affirmed, 31 O. L. R. 148. Rebuilding is not repair. In the latter case the plaintiff was compelled to leave the metalled roadway because of the heaps of gravel placed there by the corporation and eventually his sleigh was upset and he was injured seriously. He recovered damages.

The liability resulting from neglect to observe statutory duty was discussed at length in the judgment of the P. C. in Jones v. C. P. R. (1913), 30 O. L. R. 347 and 83 L. J. P. C. 13.

When another convenient highway is provided it is the duty of the corporation at the point of junction or a reasonable distance before it is reached to place a clear warning sufficient by day and by night to turn travellers off the portion of the highway being rebuilt or repaired, and if this is not done the corporation will be liable for negligence in not giving due warning.

496.—(1) The Lieutenant-Governor in Council may stop up, alter, widen or divert any highway or part of a highway in a Provisional Judicial District not being within an organized municipality, and may sell or lease the soil and freehold of any such highway or part of a highway which he has stopped up or which in consequence of an alteration or diversion of it no longer forms part of the highway as altered or diverted. 5 Edw. VII. c. 22, s. 30, *redrafted.*

(2) The council of a township in unorganized territory surveyed without road allowance, but in which 5 per cent. of the area is reserved for highways, may pass by-laws for opening and making highways where necessary and the provisions of this Act as to compensation for lands taken or injuriously affected by the exercise of the powers conferred by this section shall not apply. 61 Vict. c. 26, s. 2; 3 & 4 Geo. V. c. 43, s. 496 (1-2).

(3) In cases of deviations from road allowances and of roads laid out where there are no road allowances as provided in sub-section 2 the corporation shall cause a plan thereof, so far as the same affects ungranted lands of the Crown, to be made by an Ontario land surveyor and shall file the same in the Department of Lands, Forests and Mines. 61 V. c. 26, s. 3.

The following are the provisions of s. 57 of the Public Lands Act, R. S. O. 1914, c. 58.

57.—(1) In all sales, free grant locations, leases, licenses of occupation, mining claims and other dispositions of Public Lands or mining lands or mining rights, there shall be reserved to the Crown the right to construct on the land any colonization or other road or any road in lieu of or partly deviating from an allowance for road without making compensation therefor, and such right whether or not it is expressly reserved from the sale, location, lease, license or occupation, mining claim or other disposition of the land or by the letters patent when issued shall be deemed to be so reserved.

(2) Sub-section 1 shall not apply where the land or the mining claim has been patented before the passing of this Act.

(3) In all sales, free grant locations, leases, licenses of occupation, mining claims and other dispositions of Public Lands or mining lands or mining rights, where the letters patent have been issued containing a reservation of 5 per cent. of the area for roads, wood, gravel and other materials required for the construction or improvement of any colonization or other road or of any road in lieu of or partly deviating from an allowance for road, may be taken from the land without making compensation therefor or for the injury thereby done to the land from which they are taken, and where the letters patent have been issued without a reservation being made of 5 per cent. of the area for roads, wood, gravel and other materials required for the purposes hereinbefore mentioned may be taken from the land, but compensation shall be paid as provided by The Ontario Public Works Act.

(4) The rights mentioned in the preceding sub-sections may be exercised by the Minister or by any person authorized by him to exercise them, on behalf of the Crown. 3-4 Geo. V. c. 6, s. 57.

As to lands taken or injuriously affected by proceedings under s.-s. 1, compensation where payable would be payable under the terms of the Ontario Public Works Act as provided in s. 57, supra.

PENALTIES AND ENFORCEMENT OF BY-LAWS.

497.—(1) By-laws may be passed by the councils of all municipalities and by Boards of Commissioners of Police for imposing penalties not exceeding $50, exclusive of costs, upon every person who contravenes any by-law of the council or of the board passed under the authority of this Act.

(2) Every such penalty shall be recoverable under *The Ontario Summary Convictions Act*, all the provisions of which shall apply, except that the imprisonment may be for any term not exceeding six months for the breach of a by-law,

(*a*) of the council or the Board of Commissioners of Police of a city,

(*b*) of the council or board of any other municipality for the suppression of houses of ill-fame,

and in all other cases for any term not exceeding twenty-one days. 3 Edw. VII. c. 19, s. 702, *redrafted.* 3 & 4 Geo. V. c. 43, s. 497 (1-2).

498.—(1) Except where otherwise expressly provided, the penalties imposed by or under the authority of this Act or under the authority of a by-law of a municipal council or of a Board of Commissioners of Police, passed under the authority of this Act, shall be recoverable and may be enforced under *The Ontario Summary Convictions Act.* 3 Edw. VII. c. 19, s. 704, *amended.*

(2) Prosecutions for offences against sections 138, 142, 187 or 189 shall be heard and determined by a police magistrate or two justices of the peace, and in other respects the provisions of *The Ontario Summary Convictions Act* shall apply. *New.*

(3) Where the prosecution is brought by a peace officer or employee of the corporation or of the local Board of Health, the whole of the penalty shall belong to the corporation, and in other cases shall belong one-half to the corporation and the other one-half to the prosecutor. 3 Edw. VII. c. 19, s. 708, *amended.* 3 & 4 Geo. V. c. 43, s. 498 (1-3).

499.—(1) A conviction for a contravention of any such by-law shall not be quashed for want of proof of the by-law before the convicting Justice, but the Court, or a Judge hearing the motion to quash, may dispense with such proof or may permit the by-law to be proved by affidavit, or in such other manner as may be deemed proper.

(2) Nothing in this section shall relieve a prosecutor from the duty of proving the by-law or entitle the Justice to dispense with such proof. 3 Edw. VII. c. 19, s. 710, *redrafted;* 3 & 4 Geo. V. c. 43, s. 499 (1-2).

Section 499.—(2) If the by-law is not proved the Justice has no alternative but to dismiss the charge. Judicial notice cannot be taken

of by-laws. A by-law cannot be proved by affidavit: R. v. Banks, 1894, 1 Can. Crim. Cases 370.

Section 499—Proof of By-laws.—Section 258, *supra*, provides a simple mode of proving a by-law: In R. v. Dowslay, 1890, 19 O. R. 622, in a prosecution for an offence against a by-law the by-law was not proved as provided by the Municipal Act, but the original by-law was in Court, and portions of it were read to the defendant in the presence and hearing of the Justice who convicted the defendant. Galt, C.J., quashed the conviction, saying:—

> "It is manifest from the foregoing, that no copy of the said by-law authenticated in the manner provided by the Act was produced: and I fail to see how the Justices of the Peace could act on the production of a paper not by any officer of the municipality, but by the solicitor of the complainant, and alleged by him to be the original by-law, and it is not shewn that this paper was under the seal of the corporation.
>
> "This conviction will be quashed, with the usual order for the protection of the magistrate and of the informant; but as the latter had a pecuniary interest in the penalty, he must pay the costs of the defendant."

There was apparently no provision corresponding to s. 499 (1) at the time R. v. Dowslay was decided.

While proof of the by-law may be given on a motion to quash a conviction, there is apparently no provision enacting it to be given on appeal from a conviction such as was provided in former s. 710.

Imprisonment May be Ordered Forthwith on Non-payment.—The Ontario Summary Convictions Act, R. S. O. 1914, c. 90, s. 4, provides that except where otherwise provided Part XV. of the Criminal Code shall apply *mutatis mutandis* as if enacted in and forming a part of the Act. Section 739 of the Criminal Code which thus applies is as follows:—

> "Whenever a conviction adjudges a pecuniary penalty or compensation to be paid, or an order requires the payment of a sum of money, whether the Act or law authorizing such conviction or order does or does not provide a mode of raising or levying the penalty, compensation or sum of money, or of enforcing the payment thereof, the justice by his conviction or order after adjudging payment of such penalty, compensation or sum of money, with or without costs, may order and adjudge:—
>
> "(a) That in default of payment thereof forthwith, or within a limited time, such penalty, compensation or sum of money and costs, if the conviction or order is made with costs, shall be levied by distress and sale of the goods and chattels of the defendant, and, if sufficient distress cannot be found, that the defendant be imprisoned in the manner and for the time directed by the Act or law authorizing such conviction or order by this Act, or for any period not exceeding three months, if the Act or law authorizing the conviction or order does not specify imprisonment, or does not specify any term of imprisonment, unless such penalty, compensation or sum of money and costs, if the conviction or order is made with costs, and the costs and charge of distress and of the commitment and of the conveying of the defendant to gaol are sooner paid; or
>
> "(b) That in default of payment of the said penalty, compensation or sum of money, and costs, if any, forthwith or within a limited time, the defendant be imprisoned in the manner and for the time mentioned in the said Act or law, or for any period not exceeding three months, if the Act or law authorizing the conviction or order does not specify imprisonment, or does not specify any term of imprisonment, unless the same and the costs and charges of the distress and of the commitment and of the conveying of the defendant to gaol are sooner paid.

"2. Whenever under such Act or law, imprisonment with hard labour may be ordered or adjudged in the first instance as part of the punishment for the offence of the defendant, the imprisonment in default of distress or of payment may be with hard labour. 55-56 Vict., c. 29, s. 872; 57-58 Vict., c. 57, s. 1; 63-64 Vict., c. 46, s. 3."

The validity of the part of the by-law imposing a penalty will depend on the validity of the substantive part of the by-law: R. v. Chisholm, 1907. 14 O. L. R. 178, at 183.

In R. v. Van Norman a by-law provided for the payment of $10 by the municipal treasurer to a person securing a conviction in case there was not sufficient distress out of which the costs of prosecution could be secured. This was attacked on a motion to quash a conviction as being in effect an offer of a reward to the party securing the conviction. Riddell, J., thus dealt with the objection:—

"In some instances this would or might be so: and it may be that this section is *ultra vires* of the county council: Cornwall v. Corporation of West Nissouri (1875), 25 C. P. 9, decides that the municipality cannot legally pay a reward for the apprehension of criminals—unless indeed that be authorized by statute. Certain bounties and rewards are authorized by the Act, ss. 592 and 595, but the Legislature has not yet given power to municipalities to put peddlers who sell without a license upon the same footing as wolves or horse thieves, however obnoxious such vendors may be in the view of the members of a municipal council. But that, again, does not affect this defendant; the section now under consideration may be elided from the by-law, and nothing in the present proceedings would be in the least affected."

By-laws may impose a minimum and a maximum fine and may fix larger penalties for second and subsequent offences, but the maximum fixed by s. 497 cannot be exceeded: Piper v. Chappell, 1845, 14 M. & W. 624.

In re Snell v. Belleville, 1870, 30 U. C. R. 81, a by-law providing for a fine of not less than $1 or more than $20 for a breach, thus leaving a discretion to the magistrate, was held good.

No Arrest for Breach of Municipal By-law.—Kelly v. Barton. 1895, 26 O. R. 608, 22 A. R. 522, was an action against a constable for illegal arrest in stopping the plaintiff and taking her to the police office and there detaining her fifteen minutes for a breach of a municipal by-law.

Claim Against Municipal Corporations for Malicious Prosecution.—In Gall v. Ellice, 1902, 3 O. L. R. 438. D.C., an action was brought against the corporation for maliciously enforcing an invalid conviction. The action was dismissed and the D.C. upheld this disposition of it. The facts and the law were stated by Boyd, C., as follows:—

"The magistrate had proceeded *ex parte* to convict, after the parties had been summoned and had made default. The legal difficulty was then raised, that the proceedings were nugatory, because the summons served had no seal.

"The magistrate took the advice of the county attorney on this, and upon that advice he issued the warrant. He says: 'If I had been advised that the summons was not legal, I would not have issued the warrant' (*i.e.*, to arrest).

"It was stated to the council that the magistrate would not hand the warrant to the constable till a resolution was passed as to costs, and as soon as the resolution was passed, the warrant was handed by the magistrate to the constable.

"The resolution is in these words: 'It was unanimously resolved by the council of Ellice that the corporation of the township will stand and be responsible for any costs that may be caused by the suit of Mr. Murr v. Chas. Gall (and others), re enforcing the judgment of Robert Armstrong, magistrate, in the matter of said suit.'

"There is no proof that the conviction or warrant was brought before the council, or that there was any knowledge of its illegality on

the ground of joint fine, and no proof that the council was acting other than bona fide for the protection of the spring on the highway. There is no evidence of malice.

"But presume that imputed knowledge of the invalid conviction and warrant is to be attributed to the corporation, then their resolution to put it in force, or to pay any costs of putting it in force, was *ultra vires*. It transcends the statutory powers of any municipal corporation to award funds for illegal purposes. The element of public character in this municipality forbids the council passing such a resolution so as to bind the corporation, *i.e.*, all the inhabitants.

"Neither is the corporation, as such, bound to make good such costs, nor is the corporation, as such, liable in damages for any action taken by the magistrate in consequence of such unwarrantable resolution.

"This act of the council does not bind the corporation, and the legal consequence of any illegal conduct arising from it are to be visited, not on the municipality, but upon the offending members who passed the resolution: Cornell v. The Town of Guilford, 1845, 1 Denio N. Y. 510; Pocock v. The Corporation of the City of Toronto, 1896, 27 O. R. 635, at p. 639; and the Mayor, etc., of the Municipal Borough of Tynemouth v. The Attorney-General, 1899, A. C. 293."

Torts of Officers or Committees Within the Scope of Their Employment.—The general principle that a master is liable for the acts of a servant acting within the scope of his employment when in so acting he has done something wrongful, even though the act done be the very reverse of that which was actually authorized: Neville v. Ross, 1872, 22 U. C. C. P. 487; Gilchrist v. Carden, 1876, 26 U. C. C. P. 1; Stalker v. Dunwich, 1888, 15 O. R. 342; Biggar v. Crowland, 1906, 13 O. L. R. 164. In Wilson v. Winnipeg, 1887, 4 M. R. 193, the full Court of the Queen's Bench for Manitoba held the City of Winnipeg responsible in damages for malicious prosecution.

No Action Lies to Compel Municipality to Enforce a By-law.—In Brown v. Hamilton, 1902, 4 O. L. R. 249, there was a by-law forbidding the setting off of fireworks in the public streets. Fireworks were set off in breach of the by-law and the plaintiff was injured and sought to recover damages from the city. Boyd, C., considered that there was no duty cast on the municipality to see to the enforcement of the by-law, and that the corporation might remain quiescent in the face of periodical violations.

Court Cannot Review Reasonableness of Penalties.—Section 702 provided: (1) For inflicting *reasonable* fines and penalties; (2) for collecting the same and costs; (3) for inflicting *reasonable* punishment by imprisonment for non-payment in case no distress was found. The omission of the word *reasonable* from s. 497, is in harmony with the views expressed in Kruse v. Johnson, 1898, 2 Q. B. 91, 67 L. J. Q. B. 782, and now adopted by the Legislature. See s. 249 (2).

In Peters v. London, 1846, 2 U. C. R. 543, a by-law was held bad which did not specify the amount of the penalty for infraction, but left it to the magistrate, not even limiting him to the amount, which the statute declared should be the limit in regard to all penalties.

It is a fatal objection to a conviction that the conviction is for two several and distinct offences, while only one penalty is inflicted. For if the defendant were prosecuted again on either of the charges separately, could he plead the conviction in answer? Would it not be replied that the conviction was ambiguous, uncertain, and invaluable for his purpose? See R. v. Bennett, 1882, 1 O. R. 445, such a conviction would be quashed without costs. See R. v. Johnston, 38 U. C. R. 549.

Section 498.—(1) This section appears, in part at least, to cover the same ground as s. 497 (2). The Ontario Summary Convictions Act now applies subject to the qualifications contained in this Part XXII. The Consolidated Municipal Act of 1903 provided a code of procedure with forms of informations, summonses and convictions providing for

distress and imprisonment in default of distress. It does not seem advisable to discuss matters of procedure in prosecutions under the Municipal Act in the present work.

Section 498.—(2) Section 138 deals with offences connected with ballot papers providing a maximum penalty of two years in case of election officer. Section 142 with violations of secrecy at elections maximum penalty six months. Section 187, bribery and corrupt practices, maximum penalty $200 and six months and disqualification from voting for two years. Section 189, undue influence, penalty the same as under 188.

500. Where a council has authority to direct or require by by-law or otherwise that any matter or thing be done, the council may by the same or by another by-law direct that in default of its being done by the person directed or required to do it, such matter or thing shall be done at his expense, and the corporation may recover the expense incurred in doing it by action, or the same may be recovered in like manner as municipal taxes, or the council may provide that the expense incurred by it, with interest, shall be payable by such person in annual instalments not exceeding ten years and may, without obtaining the assent of the electors, borrow money to cover such expense by the issue of debentures of the corporation payable in not more than ten years. 3 Edw. VII. c. 19, s. 703, *amended.* 3 & 4 Geo. V. c. 43, s. 500, *amended;* 5 Geo. V. c. 34, s. 36.

501. Where a building is erected or used or land is used in contravention of a by-law passed under the authority of this Act, in addition to any other remedy provided by this Act, and to any penalty imposed by the by-law, such contravention may be restrained by action at the instance of the corporation. 4 Edw. VII. c. 22, s. 19, *part redrafted;* 3 & 4 Geo. V. c. 43, s. 501.

Section 500.—This refers to cases where the council may by by-law order persons not servants of the corporation to do an act. The following are some of the cases in which the section may apply:—

Projecting Porches, Etc.—Under s. 491 (2), a council may by by-law require doorsteps, porches, etc., projecting into or over any highway, to be removed by the owner or occupant of the land from which they project. In case of failure to comply with any such by-law the corporation could by another or the same by-law under s. 500, provide for the removal by officers and the assessment of the expense against the land in question, or could bring an action to recover the expense. Under s. 501 the corporation could bring an action to restrain a breach of the by-law.

Buildings Erected in Contravention of Building Restrictions Imposed by By-law.—Under s. 482, a council may by by-law prohibit the erection of buildings in certain cases. There is no power to order the removal of buildings erected in contravention of such by-laws, but by s. 501, the corporation may maintain an action to prevent the infringement of the by-law.

Section 501.—For discussion of procedure to enforce by-law by action, see s. 491 and Atty.-Gen. v. Wimbledon, 1904, 2 Ch. 34, 73 L. J. Ch. 593; Atty.-Gen. v. Ashbourne, 1903, 1 Ch. 101, 72 L. J. Ch. 67; Devonport v. Tozer, 1903, 1 Ch. 759, 72 L. J. Ch. 411.

In Caldwell v. Galt, 1900, 27 A. R. 162, the plaintiff brought an action to restrain the corporation from enforcing a by-law requiring the removal of a porch, and the corporation counterclaimed for its removal. Moss, J.A., said:—

> "The power of the Court to enforce by injunction, mandatory or otherwise, the provisions of a municipal by-law, except at the instance and upon the information of the Attorney-General, has been questioned: see the subject alluded to in Attorney-General v. Campbell (1872), 19 Gr. 299. In any case it is one which the Court will be chary of exercising, and the circumstances here do not call for the active intervention of the Court.
>
> "In the circumstances of the case, I think the defendants should be left to the ordinary methods of enforcing obedience to their by-law."

There was apparently no provision corresponding to s. 501 in force at the time.

Orders for removal of fences under the Snow Fences Act. See s. 399 (28 to 32).

PART XXIII.

POLICE VILLAGES.

Introduction.—Smith v. Township of Bertie, 1913, 28 O. L. R. 330, was an action against a township to recover damages caused by the lack of repair of a sidewalk in the police village of Crystal Beach. Middleton, J., said that neither counsel had been able to refer him to a case on the question involved and that he himself had been unable to find any discussion of the exact nature of a police village and the effect of its incorporation upon the liability of the parent municipality.

Crystal Beach had been erected into a police village in 1898 under the provisions of the then Act, and the county which erected it assumed in the enacting by-law to declare that the village should be an incorporated police village and that the inhabitants should be and become a body corporate free from the township and should have perpetual succession under the name of the Corporation of the Village of Crystal Beach. This, Middleton, J., pointed out, was entirely *ultra vires* and void, and he added that the position of a police village must be found in the Municipal Act, and after analyzing the relevant sections of the Act he concluded:—

> "From all this, I think, it is abundantly plain that under this statute a police village does not become a separate incorporation, but that the scheme is really one by which a limited territory is set apart, and the trustees are empowered to raise indirectly, through the township, by way of local assessment, sums required for certain local improvements. . . . .
>
> "This amendment (the provisions now found in ss. 529 *et seq.*), goes to fortify the view I have expressed of the true position of trustees of a police village under the earlier Act."

It does not appear from the report of Smith v. Bertie, *supra*, whether or not the trustees of Crystal Beach were parties to the action. If they were not and if the sole question was the liability of the township corporation, the observations of Middleton, J., as to whether or not the trustees of a police village erected under s. 502 are a corporation, are merely *obiter*.

Status of Police Villages.—It seems clear from a consideration of Part XXIII., that at all events, the inhabitants of a police village are not a corporation, so that s. 8, which provides that the inhabitants of every county, city, town, village and township shall be a body corporate, and s. 9, which provides that the name of such body corporate shall be *the corporation of the county, etc., of, etc.*, do not apply. A police village is not a village within the meaning of the term as used in the preceding sections of the Act. It is simply a geographical area with respect to which area and the inhabitants thereof the trustees or the board of trustees have certain jurisdiction and in which certain rules of law found in Part XXIII. of the Act are in force.

Status of Board of Trustees under s. 529.—A Board of Trustees under ss. 529 *et seq.*, is clearly a corporation. In this respect such Boards are analogous to such English local government authorities, as the London County Council or the various urban councils under the Local Government Acts where the councils themselves are corporations, and in this respect they represent a radical departure from the scheme of the Act, which is that the councils of municipal corporations are merely the agents by which the powers of the corporations are exercised and are not themselves corporations. See ss. 10 and 249 *et seq.* For a further discussion, see s. 529.

Status of Trustees of Police Villages not Incorporated under 529 et seq. — While the express provisions of ss. 529 *et seq.* regarding the incorporation of Boards of Trustees, may, as pointed out by Middleton, J., in Smith v. Bertie, *supra*, give weight to the view that no police village is a corporation, and possibly also to the view that the trustees of police villages, erected under ss. 502 *et seq.*, are not a corporation, the question, it is submitted, must be settled by ascertaining the true construction and effect of ss. 502 *et seq.*, and if the latter sections do in effect create the trustees a corporation by implication there is, it is submitted, nothing in ss. 529 *et seq.* inconsistent with the implication. The question must be discussed on general principles as there is apparently no decision on the point unless Smith v. Bertie, *supra*, is one. The material sections are: 505, which declares that there shall be three trustees and that they may contract and may sue and be sued and may pass by-laws by and in the name of the *Trustees of the Police Village* of . . . . .; s. 513, which enables the trustees to do all things necessary for the purpose of constructing sidewalks and repairing highways and for the purpose of securing a supply of light, heat or power by contract, and this would appear by necessary implication to involve the ownership of personal property of certain limited kinds; s. 514 would appear to involve the power to receive and hold money to be paid out later for purposes authorized by the Act. While ss. 516 and 517 seem to indicate that money borrowed by the issue of township debentures shall not be paid to the trustees and that they only shall have control and care of the appliances purchased with the money, and under 519 the trustees only have control of parks and exhibition grounds purchased under the authority of that section. This involves possession and incidental rights of possession; s. 521 authorizes the trustees to employ a constable and to agree to pay him a salary; s. 522 1 (*a*) authorizes the providing of yards and enclosures for pounds and involves the purchase or leasing of land. The trustees, under ss. 521 *et seq.*, have therefore the following incidents of a corporation: (1) a name; (2) power to contract without personal liability; (3) power to sue and be sued; (4) power to hold property. It is suggested that perpetual succession is involved in the use of a common name notwithstanding changing members, and that as the function of a seal is to indicate the corporate will notwithstanding the views of individual corporators, necessity for a seal is dispensed with by providing that acts of the trustees shall be authenticated by the signatures of two trustees or the sole signature of the inspecting trustee.

If not a corporation the trustees may be described as a *quasi* corporation. The cases as to Boards of Health are analogous. In Sellars v. Dutton, 1904, 7 O. L. R. 646, Street, J., in the Divisional Court, said:—

> "I agree in the conclusion that the local Boards of Health constituted under ss. 48 and 49 of s. 248, R. S. O. 1897, are not corporations, and that they cannot be used by any corporate name.
>
> "It is true that a corporation may be created by the language of an Act of Parliament without a direct enactment creating it; but, if the language relied on is not direct, it must at least shew by necessary implication the intention to create the corporation. In addition to a corporate name, it must appear that some powers are conferred which cannot be exercised or some duties imposed which cannot be performed in the absence of a corporate existence. If, in addition to a corporate name, an intention to give perpetual succession for any purpose appears, as for instance, the right to hold land to the body and its successors, a very strong case for the creation of a corporate body by necessary implication is made out: Tone Conservators v. Ash (1829), 10 B. & C. 349: Jefferys v. Gurr (1831), 2 B. & Add. 833.
>
> "I am unable to find in the powers conferred upon the local Boards of Health, or in the duties to which they are subjected by the Act, anything requiring a corporate existence or anything which cannot be as readily done if they are looked upon as a mere committee. The decision in the Taff Vale Case, [1901] A. C. 426, does not help the plaintiff, because the power to hold property does not exist in the local Boards of Health; and the right given them under s. 71 to recover the cost of abating nuisances does not necessarily imply corporate existence."

Falconbridge, C.J., in agreeing, referred to Re Derby and South Plantagenet Board of Health, 1890, 19 O. R. 51. The dissenting judgment of Britton, J., should be noted. Other cases are Ross v. London, 1910-11, 20 O. L. R. 578, 23 O. L. R. 74; Rich v. Melancthon Board of Health, 1912, 26 O. L. R. 48. Farwell, J., whose judgment in the celebrated case of Taff Vale R. W. Co. v. Amalgamated Society of Railway Servants, 1901, A. C. 426, 70 L. J. K. B. 905, was expressly approved in the House of Lords, said:—

> "Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The Legislature has legalized it, and it must be dealt with by the Courts according to the intention of the Legislature . . . the real question is whether on the true construction of the Trade Union Acts the Legislature has legalized an association which can own property and can act by agents by intervening in labour disputes between employers and employed, but which cannot be sued in tort in respect of such acts.
>
> "Now the Legislature in giving a trade union the capacity to own property and the capacity to act by agents has, without incorporating it, given it two of the essential qualities of a corporation—essential, I mean, in respect of liability for tort, for a corporation can only act by its agents, and can only be made to pay by means of its property. The principle on which corporations have been held liable in respect of wrongs committed by its servants or agents in the course of their service and for the benefit of the employer (see Mersey Docks and Harbour Board v. Gibbs (1866), 35 L. J. Ex. 225; L. R. 1 H. L. 93), is as applicable to the case of a trade union as to that of a corporation . . . The proper rule of construction of statutes such as these is that in the absence of express contrary intention the Legislature intends that the creature of the statute shall have the same duties and that its funds shall be subject to the same liabilities as the general law would impose on a private individual doing the same thing. It would require very clear and express words of enactment to induce me to hold that the Legislature had in fact legalized the existence of such irresponsible bodies with such wide capacity for evil. . . . If, therefore, I am right in concluding that the society are liable in tort the action must be against them in their registered name. The acts complained of are the acts of the association. . . . The cases having the nearest analogy to the present are those like Ruck v. Williams, [1858] (27 L. J. Ex. 357; 3 H. & N. 308), and Whitehouse v. Fellows, [1861] (30 L. J. C. P. 305; 10 C. B. (N.S.) 765), where unincorporated Improvement Commissioners and the trustees of a turnpike road respectively, sued under their respective Acts in the name of their clerk, were held liable in tort."

The most that can be said is that the trustees of police villages under ss. 502 *et seq.* seem to have more of the attributes of a corporation than Boards of Health have, and it may be that they are corporations *sub modo* for the many purposes within the rule laid down by Farwell, J. If this is correct the effect of proceedings under ss. 529 *et seq.*, is simply to give full incorporation with additional powers. But note the contrary view apparently based on the theory that express incorporation which may be a ground under ss. 529 *et seq.*, is a ground for assuming that no incorporation is intended in other cases.

For further discussion see title *Actions by and against Boards of Police Commissioners, Water Commissioners, Boards of Health and Similar Bodies.*

Formation of Police Villages.

502.—(1) Under and subject to the provisions and conditions hereinafter mentioned, a locality may be erected into a police village by the council of the county in which it is situate, or if it comprises parts of two or more counties by the council of the county in which the larger or largest part of the locality is situate. 3 Edw. VII. c. 19, s. 714 (1), *part amended.*

(2) Where a petition signed by a majority of the freeholders of the locality whose names are entered on the last revised assessment roll and by a sufficient number of the resident tenants of the locality whose names are entered on such roll to make up with such freeholders a majority of the whole number of freeholders and tenants whose names are so entered, praying for the erection of the locality into a police village, is presented to the council, the council, if the locality has a population of not less than 150, and an area of not more than 500 acres, may pass a by-law erecting the locality into a police village to take effect from a day to be named in the by-law declaring the name which the police village shall bear and its boundaries, fixing a time and place and naming the returning officer for holding the first election of trustees and fixing a time and place for the first meeting of trustees. 3 Edw. VII. c. 19, s. 714 (1-2), *parts;* 6 Edw. VII. c. 34, s. 41 (1); 8 Edw. VII. c. 48, s. 28, *amended.* 3 & 4 Geo. V. c. 43, s. 502 (1-2).

(3) Where a petition has been presented as provided by sub-section 2 and is sufficiently signed, and the council of the county does not at its next meeting after the presentation of the petition pass a by-law erecting the police village, application may be made to the Ontario Railway and Municipal Board for an order erecting the locality described in the petition into a police village, and the Board upon being satisfied that the petition has been duly signed and presented to the council, and that the council has neglected to act, and that the locality contains a population of not less than one hundred and fifty

and has an area of not more than five hundred acres, and that the convenience of the inhabitants of the locality requires the erection of the police village, may make an order erecting the locality into a police village, the order to take effect at a date to be named therein, declaring the name the police village shall bear and its boundaries, fixing the time and place and naming the returning officer for holding the first election of trustees and fixing the time and place for the first meeting of trustees. 5 Geo. V. c. 34, s. 36.

503.—(1) When the population of a police village exceeds 500, the council of the county by which it was established may, on petition of two-thirds of the freeholders and tenants of the village, whose names are entered upon the last revised assessment roll, and of the majority of the resident freeholders and tenants of the territory proposed to be added, whose names are entered on the last revised assessment roll of the municipality, may by by-law increase the area of the village by adding to it any adjoining land, but not exceeding 20 acres for each additional 100 of its population over 500. 3 Edw. VII. c. 19, s. 714*a;* 6 Edw. VII. c. 34, s. 41 (3), *amended.*

(1*a*) In the case of a police village having a population of less than five hundred and an area of less than five hundred acres, the council of the county, on petition as required by sub-section 1, may by by-law increase the area of such village by adding to it any adjoining land so that the total area shall not exceed five hundred acres. 4 Geo. V. c. 33, s. 22.

(2) Land in another county shall not be included in the increased area without the consent of the council of that county. *New.* 3 & 4 Geo. V. c. 43, s. 502 (1-2).

504. Subsections 2, 3, 5, 6 and 9 of section 13 shall apply to the proceedings under the next two preceding sections, and the population of the locality shall be determined in case of dispute in such manner and by such

means as the council shall determine. *New.* 3 & 4 Geo. V. c. 43, s. 504.

Sections 502 (2), 503 (2). The Council may Pass a By-law. —Contrast this with the imperative provisions of s. 13. The county council can act or not as seems best. For notes on procedure under ss. 502 and 503, and freeholder, tenant, resident, etc., see s. 13.

Trustees—Election of, etc.

505.—(1) There shall be three trustees for every police village. 3 Edw. VII. c. 19, s. 716.

(2) The trustees may contract and may sue and be sued, and may pass by-laws by and in the name of the trustees of the police village of (*naming it*), but they shall not be personally liable upon their contracts. *New.* 3 & 4 Geo. V. c. 43, s. 505 (1-2).

506.—(1) Except where other provision is made in this Part and except as provided by sub-sections 2 to 6, the provisions of Parts 2, 3 and 4, which are applicable to councillors of townships, shall apply *mutatis mutandis* to trustees of police villages. *New. See* 3 Edw. VII. c. 19, ss. 717-727 and 729-733.

(2) The trustees shall appoint the returning officer and the place within the village for holding the nomination and for the polling of every election except the first. 3 Edw. VII. c. 19, s. 721, *amended.*

(3) The clerk of every township, a part of which is comprised in the village, not later than the day before that on which the polling is to take place, shall deliver to the returning officer of the village a copy of so much of the voters' list as relates to the village, attested by his declaration in writing as a true copy thereof. 3 Edw. VII. c. 19, s. 728, *amended.*

(4) The return of the ballot box provided for by section 122 shall be made,

(*a*) Where the village lies wholly within the township to the clerk of that township;

(*b*) Where the village comprises parts of two or more townships in the same county to the clerk of that county;

(*c*) Where the village comprises parts of two or more townships in different counties to the clerk of the county in which the larger or largest part of the village is situate. 3 Edw. VII. c. 19, s. 733, *amended.*

(5) The clerk to whom the ballot box is returned shall perform the duties which, under sections 126 and 127, are to be performed by the clerk of a municipality. *New.*

(6) No person shall be qualified to be elected a trustee unless he has the prescribed qualification in respect of land situate in the village and resides in or within two miles of the village. 3 Edw. VII. c. 19, s. 717, (1), *part amended.*

(7) No person shall be qualified to vote at an election of trustees unless he has the prescribed qualification in the village. 3 Edw. VII. c. 19, s. 719, *amended.*

(8) The first meeting of the trustees after the annual election shall be held at noon on the 3rd Monday in January, or on some day thereafter at noon. 3 Edw. VII. c. 19, s. 737, *amended;* 3 & 4 Geo. V. c. 43, s. 506 (1-8).

507. If a vacancy occurs in the office of trustee the remaining trustees or trustee shall, by writing, appoint a trustee to fill the vacancy. 3 Edw. VII. c. 19, s. 734, *part amended;* 3 & 4 Geo. V. c. 43, s. 507.

508.—(1) The trustees shall, by writing, appoint one of their number to be inspecting trustee. 3 Edw. VII. c. 19, s. 735, *part amended.*

(2) Forthwith after the making of an appointment under sub-section 1 or under section 507, the writing by which the appointment is made shall be filed with the clerk to whom the ballot box is to be returned as pro-

vided by sub-section 4 of section 506; 3 & 4 Geo. V. c. 43, s. 508 (1-2).

509.—(1) The trustees may at any time before the first day of June in any year by a requisition in writing require the council of the township in which the village is situate to cause to be levied, along with the other rates upon the rateable property in the village, such sum as the trustees deem necessary to defray the expenditure of the trustees for the current year. 3 Edw. VII. c. 19, s. 738, *part amended.*

(2) Where the village comprises parts of two or more townships the requisition shall be made on the council of each township for its proportion of the whole amount to be levied as ascertained in the manner provided by section 510. 3 Edw. VII. c. 19, s. 739, *amended.*

(3) The amount which the trustees may require to be so levied shall not in any year exceed a sum which a rate of one cent in the dollar on the rateable property in the village will provide, but this shall not apply to a rate imposed or to be levied under sections 516, 517, or 519. 3 Edw. VII. c. 19, s. 738, *part amended;* 3 & 4 Geo. V. c. 43, s. 509 (1-3).

Section 506 (1).—Part II. deals with the qualification of councillors, also disqualifications and exemptions; Part III. with elections, and Part IV. proceedings to declare seats vacant.

An election of trustees is probably an election within the meaning of Part V., dealing with Bribery and Corrupt Practices.

Sections 506 (2), 507, 508, shall Appoint.—There is no provision corresponding to that in s. 241 (1) requiring the powers of the trustees to be exercised by by-law and apparently an imperative duty of the kind imposed on the trustees by s. 506 (2) could be carried out by resolution.

Section 506 (3).—Probably the list attested as required by s. 506 (3) is a "proper list" within the meaning of ss. 58 and 91 and such list would therefore have the finality and conclusive effect discussed, supra, p. 81.

Section 506 (8).—Meetings of trustees should be held within the limits of the village. See s. 198.

Section 509 (1), to defray the Expenditure.—It is suggested that the trustees are liable in tort, for example, for failure to perform statutory duties or for negligent construction of works legally undertaken by them or for damages resulting from *ultra vires* acts and for breach of contracts made by them, and all sums so payable are included in the term expenditure. The only limitation on the amount to be requisitioned being

that imposed by s.-s. (3), and a prerogative writ of mandamus will probably lie to compel them to requisition the amount as the provisions of the Act respecting executions against municipalities do not apply. See Part XVII. and s. 510.

The council of the township has the right to and should examine the requisition of the trustees with a view to ascertaining if the expenditure proposed is *ultra vires* of the trustees and may refuse to pay any amounts not authorized by law. See title *Estimates*, s. 209 (16).

510.—(1) Where a village comprises parts of two or more townships the proportion of the amount required to be levied in each township shall be determined by the assessors of the townships.

(2) Where a police village is hereafter erected, the assessors shall meet forthwith after the election for the purpose of determining and shall determine the proportion to be levied in each township.

(3) Thereafter and in the case of all other police villages the meeting shall be held in every second year.

(4) Except in the case of now existing police villages, the two years shall be reckoned from the respective times when the last determination was made by the assessors. 3 Edw. VII. c. 19, s. 739*a* (1), *amended.*

(5) If the assessors differ, notice of the fact shall be forthwith given to the inspecting trustee, who shall act with the assessors in determining the proportions, and the decision of a majority shall be final and conclusive. 3 Edw. VII. c. 19, s. 739*a* (2), *part amended.*

(6) The determination of the assessor or of the assessors and the inspecting trustee shall be forthwith communicated to the clerk of each of the townships. 3 Edw. VII. c. 19, s. 739*a* (2), *part.*

(7) The meeting of the assessors shall be called by the assessor of the township in which is situate the larger or largest part of the rateable property of the village. 3 Edw. VII. c. 19, s. 739*a* (3).

(8) The proportions as determined under this section shall govern until the next determination is to be made

as provided by sub-section 3. 3 Edw. VII. c. 19, s. 739*a* (2), *part*. 3 & 4 Geo. V. c. 43, s. 510 (1-8).

Section 510.—The assessors in acting under s. 510, are the *personæ designatæ* and are acting judicially and if they proceed on a wrong principle or act corruptly, parties interested can apply for a prerogative writ of mandamus to compel them as a public body to enter on and do their duty, and such a mandamus will lie against the trustees in like manner even if they are not technically a corporation, but only in cases where there is no other remedy. A Court cannot substitute its discretion for that of the persons appointed by statute. Rich v. Melancthon Board of Health, 1912, 26 O. L. R. 48, D. C.

Shall be Final and Conclusive.—See s.

511. The ratepayers of the village shall be entitled to such deduction from the township rate payable by them as may be agreed on between the trustees and the council of the township, or if the village comprises parts of two or more townships, by the councils of the respective townships, or if they are unable to agree as shall be determined by a judge of the county court of the county in which the village, or if it comprises more counties than one, the larger or largest part of the village is situate. 3 Edw. VII. c. 19, s. 740, *amended*. 3 & 4 Geo. V. c. 43, s. 511.

Section 511. The Ratepayers of the Village.—The term village as used in Part XXIII., means the geographical area erected into a police village. There is no village corporation. The expression, the ratepayers of the village, means the ratepayers of the township or townships as the case may be whose lands are subject to special rates by reason of the erection of the police village. These ratepayers still continue to be ratepayers of the townships being subject to the township rate, less any deduction under s. 511, and entitled to vote on township elections and township money by-laws.

512.—(1) The trustees shall be entitled to have the statute labour to be performed by the ratepayers of the village performed in the village.

(2) If the trustees request the council of a township to commute the statute labour payable by the ratepayers in that part of the village which is situate in the township, the council shall provide for such commutation at such rate not exceeding $1 per day, as may be requested by the trustees. 3 Edw. VII. c. 19, s. 740*a*, *redrafted*.

(3) The amount of the commutation money shall be collected by the collector of the township and be placed

to the credit of the trustees in the books of the treasurer of the township. *New.* 3 & 4 Geo. V. c. 43, s. 512 (1-3).

513.—(1) The trustees may

(*a*) construct sidewalks and culverts and make, improve, drain and repair the highways in the village;

(*b*) make contracts for the supply of light, heat or power by any person to the trustees for the purposes of the village or to the residents thereof;

and do all things necessary for any of such purposes. 3 Edw. VII. c. 19, s. 741, *redrafted;* 3 & 4 Geo. V. c. 43, s. 513.

Section 513 (b).—This sub-section apparently merely confers the power to contract for supply of light, heat and power and does not authorize the establishment of light, heat, power and gas works. The trustees are not authorized to supply heat, light or power to the residents of a village, but merely to make contracts for the supply of the same to the residents. Trustees will only have such powers over the supply as may be given them by the contract. Sec. 513 is not exhaustive as to the powers of the trustees, for example, 516 (1) authorizes the purchase of fire engines and the procuring of a water supply therefor, but apparently no power is given to secure a water supply except for fire purposes. Note in this respect the power of boards of trustees, s. 534.

514.—(1) The treasurer of a township shall, if he has money of the corporation in hand and not otherwise appropriated, from time to time pay any order of the inspecting trustee or of any two of the trustees to the extent of

(*a*) The sum required by section 509 to be levied by the council of the township and any sum which the council is required by the provisions of this Part to place to the credit of the trustees, although the same have not been then collected;

(*b*) Any money received for license fees under any by-law of the trustees and for penalties for breaches of any such by-law or of sections 524, 525 and 526; and

(*c*) Any money placed to the credit of the trustees under the authority of section 515.

(2) An order shall not be given under this section except for work actually performed or in payment in pursuance of an executed contract. 3 Edw. VII. c. 19, ss. 742, 743; 10 Edw. VII. c. 85, s. 20, *redrafted;* 3 & 4 Geo. V. c. 43, s. 514 (1-2).

515. The council of a township in which the whole or a part of a police village is situate may by by-law provide that the whole or any part of the money received by the corporation of the township for licenses issued under The Liquor License Act for premises situate in the village or for penalties imposed for offences against that Act committed in the village shall be placed to the credit of the trustees in the books of the treasurer of the township. 3 Edw. VII. c. 19, s. 742*a, amended;* 3 & 4 Geo. V. c. 43, s. 515.

516.—(1) Upon the application of the trustees the council of a township in which a police village is situate shall submit for the assent of the electors of the village, and if it receives such assent shall pass a by-law for borrowing money for

(*a*) The construction of sidewalks of cement, concrete, brick or other permanent material;

(*b*) The purchase of fire engines and other appliances for fire protection and the supply of water therefor;

(*c*) Lighting the highways in the village; and

(*d*) Supplying water, light, heat or power to the trustees for the purposes of the village or to the residents thereof; *amended* 7 Geo. V. c. 42, s. 23;

(*e*) Acquiring land as a site for and erecting thereon a police village hall. 5 Geo. V. c. 34, s. 38 (1);

and for the issue of debentures of the corporation of the township for the money borrowed, payable on the instalment plan, as such time within ten years and in such manner as the trustees may request. 3 Edw. VII. c. 19, s. 744 (1), *part;* 4 Edw. VII. c. 22, s. 35, *redrafted.*

(2) The special rate for the payment of the principal and interest shall be imposed upon the rateable property in the village. 3 Edw. VII. c. 19, s. 744 (1), *part.*

(3) The money borrowed shall be retained in the hands of the treasurer of the township, and he shall pay out of it the orders of the inspecting trustee or of any two trustees in payment for work actually performed or of an executed contract with respect to the work or service for undertaking which the by-law was passed.

(4) When the by-law is passed, the trustees may undertake the work or service.

(5) The trustees shall have the control, care and management of the fire engine and appliances, and of the plant and appliances for the supply of light, heat or power, and of the police village hall.

(6) The trustees shall in each year before the striking of the rate by the council of the township furnish to the clerk a statement showing in detail the amount required to be levied upon the rateable property of the village for the current year for any such work or service which has been undertaken and for the care and maintenance of any fire engine and appliances purchased and for providing water therefor and for the maintenance and operation of the plant and appliances for the supply of light, heat or power, and of the police village hall. 3 Edw. VII. c. 19, s. 744 (3-5), *redrafted;* 3 & 4 Geo. V. c. 43, s. 516 (1-6); *amended;* 5 Geo. V. c. 34, s. 38 (2).

Section 516 (1). Shall Submit.—The section imposes an imperative statutory duty on the council of the township which, when all conditions precedent have been complied with, must be performed, and a prerogative writ of mandamus will lie to compel performance. Williams v. Brampton, 1908, 17 O. L. R. 398, D. C.; 12 O. W. R. 1235. See 516 (6).

Shall Furnish a Statement.—See s. 509 (1).

517.—(1) The trustees may, with the consent of the council of the township in which the village is situate expressed by by-law or resolution, purchase fire engines and appliances for fire protection at a cost not exceeding $3,000, and pay therefor in instalments within ten years.

(2) Upon the purchase being made the council of the township shall pass a by-law for raising the amount of the purchase money by the issue of debentures of the corporation of the township on the instalment plan, payable within ten years.

(3) The special rate imposed for the payment of the debentures shall be imposed upon the rateable property in the village.

(4) The assent of the electors to the by-law shall not be necessary.

(5) Sub-sections 5 and 6 of section 516 shall apply to a fire engine and appliances purchased under the authority of this section. 6 Edw. VII. c. 34, s. 43, *part redrafted;* 3 & 4 Geo. V. c. 43, s. 517 (1-5).

518. The trustees may contract with the corporation of a township in which the whole or any part of the village is situate for the use by the corporation of a fire engine and appliances purchased under the authority of this Part upon such terms as to payment for the use of them and otherwise as may be agreed upon. 6 Edw. VII. c. 34, s. 43, *part amended;* 3 & 4 Geo. V. c. 43, s. 518.

Powers of Trustees.—The general principle of construction applicable to statutory bodies that they have only such powers as are expressly conferred by or necessarily implied by the enacting statute, applies to trustees. For full discussion see s. 10. The power to contract given by s. 505 (1), is limited to contracts which the trustees are expressly or impliedly authorized to make. See s. 518.

Agreements between local authorities involving joint use of property on terms, are expressly authorized in several cases. See s. 486.

It is submitted that the trustees could not without special authority authorize the use of property of which they have charge for any purpose inconsistent with the trusts upon which they are vested with control of the property. For example, furnishing a supply of light, power or heat to persons not resident in the village would be *ultra vires.* See Ottawa v. Ottawa 1906, 12 O. L. R. 290; 8 O. W. R. 204, C. A.

518*a*. Where the trustees of a police village have heretofore constructed, purchased or acquired or hereafter construct, purchase or acquire, electric light, or power works or works for the development of a water power or works for generating, producing, transmitting or distributing electrical power or energy under a contract with the Hydro-Electric Power Commission of Ontario at the expense of the ratepayers of the police village, by-laws may be passed in the manner provided by sections 516 and 520 for borrowing such further sums as may be necessary to extend or improve such works or to meet the cost of extension or improvements already made to such works.

(*a*) The by-law or by-laws shall not require the assent of the electors if approved by the municipal board.

(*b*) Such approval may be given if it is shown to the satisfaction of the board that the works are approved by the said Commission and that the extension is necessary, and that sufficient additional revenue will be derived therefrom to meet the annual payments in respect of the debt and the interest thereon. 5 Geo. V. c. 34, s. 39.

Establishment of Parks, Gardens, etc.

519.—(1) Upon the petition of three-fourths of the electors qualified to vote upon money by-laws the council of a township in which a police village is situate may pass a by-law for acquiring land within or without the limits of the village for a highway or for a public park, garden or place for exhibitions, and for the erection thereon of such buildings and fences as the council may deem necessary for the purposes of such highway, park, garden or place for exhibitions and may dispose of such land when no longer required for such purposes. 3 Edw. VII. c. 19, s. 746 (1); 7 Edw. VII. c. 40, s. 38 (1), *redrafted.*

(2) The trustees shall have the care, control and management of such highway, park, garden or place. 3 Edw. VII. c. 19, s. 746 (3), *part;* 7 Edw. VII. c. 40, s. 38 (3), *part.*

(3) The council of the township may provide that,

(*a*) The money required for the purpose mentioned in sub-section 1 shall be levied upon the rateable property in the village, or,

(*b*) Such money be raised by the issue of debentures of the corporation of the township on the instalment plan payable within 10 years.

(4) The by-law shall impose the special rate for the payment of the debentures upon the rateable property in the village. 3 Edw. VII. c. 19, s. 746 (2); 7 Edw. VII. c. 40, s. 38 (2), *amended.*

(5) The trustees shall annually before the striking of the rate for the year by the council of the township, furnish to the council a statement showing in detail the amount required to be levied for the current year for managing and maintaining the highway, park, garden or place of exhibitions, and the same shall be levied upon the land in the village. 3 Edw. VII. c. 19, s. 746 (3), *part;* 7 Edw. VII. c. 40, s. 38 (3), *part.*

(6) The assent of the electors to a by-law passed under this section shall not be necessary. 3 Edw. VII. c. 19, s. 746 (4); 3 & 4 Geo. V. c. 43, s. 519 (1-6).

Parks, Highways, etc.—It is to be noted that s. 519 authorized township councils to acquire parks, highways, etc., and to dispose of the land when no longer required. Such lands will be purchased by and vested in the township corporation, but under the control and management of the trustees.

Section 519 (2). Shall have the Care, Control and Management of such Highway, etc.—In Smith v. Township of Bertie, 1913, 28 O. L. R. 330, the plaintiff sued the township for damages resulting from the non-repair of a sidewalk in a police village and succeeded. The action was under former s. 606, now s. 460. Middleton, J., said:—

"The defendant municipality is responsible for the condition of all roads within its limits, under s. 606; and that the fact that the trustees of the incorporated village have authority to construct sidewalks and to repair them, within the limits of the village, does not absolve the township from its primary liability. The lack of repair resulting in an

accident imposes liability upon the entire municipality; and, while this is in one sense unfair, it is no more unfair than the situation which arises when any work constructed as a local improvement falls into disrepair. There the municipality as a whole is liable for the lack of repair in a work constructed as a local improvement. If the trustees of a police village fail to renew a decayed sidewalk, the township is not justified in leaving it as a source of danger, and may remove it altogether.

"In Faulkner v. City of Ottawa (1906), 8 O. W. R. 126, the city was held liable for damages occasioned by the inadequacy of sewers constructed under a local improvement plan, although the ratepayers by petition had prevented the construction of an enlarged sewer; and, although the case was reversed upon appeal (1907), 10 O. W. R. 807, the judgment did not turn upon this question."

Note, however, the liability imposed on an incorporated Board of Trustees by s. 533 (1). Trustees, whether incorporated or not, are probably not directly liable for non-feasance in connection with the repair of highways, Smith v. Bertie, *supra*, but it is submitted that on general principles all boards of trustees are liable for misfeasance or negligence in the performance of duties or the carrying out of authorized undertakings or for illegal acts, on the principles laid down by the House of Lords in the two cases, Mersey Dock Trustees v. Gibbs, 1866, L. R. 1 H. L. 93; 35 L. J. Ex. 225; Taff Vale v. Amalgamated, etc., 1901, A. C. 426; 70 L. J. K. B. 905.

See general discussion of title, page 1063.

520.—(1) Where the village comprises parts of two or more townships a by-law for the purposes mentioned in sections 516, 517 and 519 may be passed by the trustees, with the assent of the electors of the village qualified to vote on money by-laws; and for the purposes of such by-laws the trustees shall have all the powers of the council of a village, except the power to issue the debentures for the payment of the principal and interest.

(2) The by-law shall fix the proportion of the debt, for payment of which the special rate is to be imposed, which is to be borne by the part of the village situate in each township, and such proportion shall be the same as that in which the annual sum to be levied as provided by section 509 is to be levied according to the then last determination of the assessors or of the assessors and the inspecting trustee under section 510.

(3) If the by-law receives the assent of the electors, the trustees, after passing it, shall serve a certified copy of it upon the clerk of each of the townships.

(4) The council of each township shall forthwith thereafter pass a by-law for raising the amount which

is to be borne by that part of the village situate in the township by the issue of debentures of the corporation of the township, payable as provided by the by-law of the trustees, and it shall not be necessary that such by-law shall receive the assent of the electors or impose any rate for the payment of the debentures.

(5) The special rates imposed by the by-law of the trustees shall be levied and collected by the councils of the townships within which the property upon which they are imposed is situate. 3 Edw. VII. c. 19, s. 744*a*, *redrafted;* 3 & 4 Geo. V. c. 43, s. 520 (1-5).

521.—(1) The trustees may appoint a constable for the village who shall have the same powers and perform the same duties within the village as a constable appointed by the council of a village.

(2) The constable may be paid by salary or may keep for his own use the fees of his office as the trustees may determine.

(3) Where the constable is paid by salary the trustees may require that the fees of his office be paid to the treasurer of the township in which the village is situate or where the village comprises parts of two or more townships to the treasurer of any or either of them for the use of the village. 3 Edw. VII. c. 19, s. 746*a;* 5 Edw. VII. c. 22, s. 48, *redrafted;* 3 & 4 Geo. V. c. 43, s. 521 (1-3).

Constable of Police Village, s. 521.—The trustees will probably be liable if they do not select a proper person, and damage results from his incompetence. See McKenzie v. Chilliwack, 1912, A. C. 888; 82 L. J. P. C. 22.

The duties of a constable appointed by a village are prescribed by s. 367, and the effect of s.-s. (1), is to make this section *mutatis mutandis* applicable to a police village. See notes to Part XVIII. The trustees may assign special duties to the constable to be performed by him as the servant or agent of the trustees, such as looking after parks, repairing sidewalks, looking after fire appliances and power plant, etc. The authority to do this follows from ss. 513, 514 (5) and 519 (2) and similar sections imposing duties which, if undertaken, must be performed by the trustees through agents. The trustees may, of course, perform the duties, excepting those of the constable acting as peace officer, themselves, but there is no provision for their remuneration such as is found in ss. 424 and 425 and such payments are illegal unless specially authorized.

Special Powers.

522.—(1) The trustees shall have the like power to pass by-laws as is conferred on the council of a village with respect to the matters under the following sub-headings,—

(*a*) Driving or riding on roads and bridges. (Sec. 398, pars. 8, 9).

(*b*) Free libraries. (Sec. 398, par. 17).

(*c*) Sidewalks—Vehicles on. (Sec. 398, par. 37).

(*d*) Pounds. (Sec. 399, pars. 52-55).

(*e*) Snow and ice, removal of. (Sec. 399, pars. 61, 62).

(*f*) Sidewalks—Horses and cattle upon. (Sec. 400, par. 44).

(*g*) Spitting on sidewalks. (Sec. 400, par. 46).

(*h*) Traffic on highways, etc., driving of cattle, etc. (Sec. 400, par. 49).

(*i*) Tobacconists. (Sec. 419, par. 2).

(*j*) Bagatelle and billiard tables. (Sec. 420, par. 1).

(*k*) Exhibitions, places of amusement, etc. (Sec. 420, par. 3).

(2) Where power is conferred to license, the license fee shall be fixed by the trustees, and sub-sections 1, 3, 4, and 5 of section 253 shall apply.

(3) While a by-law passed under the authority of sub-section 1 is in force, no by-law of the council of the township applicable to the same subject matter shall apply to or be in force in the village. 3 Edw. VII. c. 19, s. 746*b* (1); 5 Edw. VII. c. 22, s. 42; 10 Edw. VII. c. 85, s. 21, *amended;* 3 & 4 Geo. V. c. 43, s. 522 (1-3).

523.—(1) Every by-law of the trustees shall be signed by at least two of them.

(2) A certified copy of every such by-law shall, within seven days after it is passed, be transmitted to the clerk of every township a part of which is comprised in the village. 3 Edw. VII. c. 19, s. 746*c*, *redrafted;* 3 & 4 Geo. V. c. 43, s. 523 (1-2).

Prevention of Fire.

524.—(1) Every proprietor of a house more than one storey high shall place and keep a ladder on the roof of such house near to or against the principal chimney thereof, and another ladder reaching from the ground to the roof of such house, under a penalty of $1 for every omission; and a further penalty of $2 for every week for which such omission continues.

(2) Every householder shall provide himself with two buckets fit for carrying water in case of accident by fire, under a penalty of $1 for each bucket not so provided.

(3) No person shall build any oven or furnace unless it adjoins and is properly connected with a chimney of stone or brick at least three feet higher than the house or building in which the oven or furnace is built, under a penalty not exceeding $2 for non-compliance.

(4) No person shall pass a stove-pipe through a wooden or lathed partition or floor, unless there is a space of four inches between the pipe and the wood-work nearest thereto; and the pipe of every stove shall be inserted into a chimney; and there shall be at least ten inches in the clear between any stove and any lathed partition or wood-work, under a penalty of $2.

(5) No person shall enter a mill, barn, outhouse or stable, with a lighted candle or lamp, unless it is well enclosed in a lantern, nor with a lighted pipe or cigar, nor with fire not properly secured, under a penalty of $1.

(6) No person shall light or have a fire in a wooden house or outhouse, unless such fire is in a brick or stone chimney, or in a stove of iron or other metal, properly secured, under a penalty of $1.

(7) No person shall carry fire or cause fire to be carried into or through any street, lane, yard, garden or other place, unless such fire is confined in a copper, iron or tin vessel, under a penalty of $1 for the first offence, and of $2 for every subsequent offence.

(8) No person shall light a fire in a street, lane or public place under a penalty of $1.

(9) No person shall place hay, straw or fodder, or cause the same to be placed, in a dwelling house, under a penalty of $1 for the first offence, and of $5 for every week the hay, straw or fodder is suffered to remain there.

(10) No person, except a manufacturer of pot or pearl ashes, shall keep or deposit ashes or cinders in any wooden vessel, box or thing not lined or doubled with sheet-iron, tin or copper, so as to prevent danger of fire from such ashes or cinders, under a penalty of $1.

(11) No person shall place or deposit any quick or unslacked lime in contact with any wood of a house, outhouse or other building, under a penalty of $1, and a further penalty of $2 a day until the lime has been removed, or is secured, so as to prevent any danger from fire, to the satisfaction of the inspecting trustee.

(12) No person shall erect a furnace for making charcoal of wood, under a penalty of $5; 3 & 4 Geo. V. c. 43, s. 524 (1-12).

Gunpowder.

525.—(1) No person shall keep or have gunpowder for sale, except in boxes of copper, tin or lead, under a penalty of $5 for the first offence, and $10 for every subsequent offence.

(2) No person shall sell gunpowder, or permit gunpowder to be sold in his house, storehouse or shop, outhouse or other building, at night, under a penalty of $10 for the first offence, and of $20 for every subsequent offence. 3 & 4 Geo. V. c. 43, s. 525 (1-2).

Nuisances.

526. No person shall throw, or cause to be thrown, any filth or rubbish into a street, lane or public place, under a penalty of $1, and a further penalty of $2 for every week for which he neglects or refuses to remove the same after being notified to do so by the inspecting trustee or by some other person authorized by him. 3 Edw. VII. c. 19, s. 747; 3 & 4 Geo. V. c. 43, s. 526.

527.—(1) It shall be the duty of the trustees to see that the provisions of the next preceding three sections are not contravened, and that offenders are prosecuted for breaches of them. 3 Edw. VII. c. 19, s. 748, *part redrafted;* 3 & 4 Geo. V. c. 43, s. 527.

(2) Any trustee who wilfully neglects or omits to prosecute an offender against any of the provisions of sections 524, 525 or 526, when requested so to do by a resident householder of the village who offers to adduce proof of the offence, and a trustee who wilfully neglects or omits to fulfil any other duty imposed on him by this Part, shall incur a penalty of $5. 3 Edw. VII. c. 19, s. 749, *redrafted;* 3 & 4 Geo. V. c. 43, s. 528 (1-2).

528. The penalties imposed by or under the authority of this Part shall be recoverable under The Ontario Summary Convictions Act, all of the provisions of which shall apply except that proceedings for the recovery of penalties for contraventions of sections 524 to 527 shall be commenced within ten days after the commission of the offence, or if it is a continuing offence, within ten days after it has ceased and not afterwards. *New. See* 3 Edw. VII. c. 19, s. 748; 3 & 4 Geo. V. c. 43, s. 528.

Sections 524, 525 and 526.—It will be noted that the penalty for each offence is prescribed by the section or sub-section creating the offence. Where a provincial statute creates an offence and a penalty is not provided in the very section or sub-section creating it, a person guilty of the offence can be prosecuted for a crime under and by virtue of s. 164 of the Criminal Code. See R. v. Meehan, 1902, 3 O. L. R. 567; R. v. Durocher, 1913, 28 O. L. R. 499.

Incorporation of Trustees.

529.—(1) Where a police village has a population of not less than 500, the trustees may be created a body corporate, and when incorporated the corporation shall be styled "The Board of Trustees of the Police Village of ———" (*naming it*).

(2) The provisions of this Part as to the erection of a police village shall apply *mutatis mutandis* to an application for the incorporation of the trustees of a police village with the exception that the petition for incorporation shall be signed by not less than 50 resident freeholders of the village whose names are entered on the last revised assessment rolls of the municipality or municipalities of parts of which the village is composed. 3 Edw. VII. c. 19, s. 751, *amended;* 3 & 4 Geo. V. c. 43, s. 529 (1-2).

530.—(1) At its first meeting in each year the Board shall appoint one of its members to be the Chairman, and shall also appoint a Secretary. 5 Edw. VII. c. 22, s. 41; 6 Edw. VII. c. 34, s. 42, *redrafted.*

(2) The chairman shall, if present, preside at all meetings of the Board and in his absence the Board shall appoint one of its members to act as Chairman during such absence. *New.* 3 & 4 Geo. V. c. 43, s. 530 (1-2).

531.—(1) The by-laws of the Board shall be signed by the Chairman or acting Chairman and shall be sealed with its seal.

(2) The provisions of this Act as to the proof of by-laws of a council shall apply to the by-laws of the Board.

5 Edw. VII. c. 22, s. 43, *part redrafted;* 3 & 4 Geo. V. c. 43, s. 531 (1-2).

532. The expenses of repairing and maintaining all works, improvements and services undertaken by the Board under the authority of this Act, shall be borne by the Board, and such expenses shall be levied and collected by the councils of the townships on the requisition in writing of the Board, in like manner as the money to be levied as provided by section 509. 3 Edw. VII. c. 19, s. 753. 3 & 4 Geo. V. c. 43, s. 532.

Section 532.—It is difficult to see the reason for this section. It covers in part the same ground as s. 509. There seems to be a possibility of doubt as to whether the limit on expenditure imposed by s. 509 (3), is imposed on incorporated boards of trustees.

533.—(1) If the Board makes default in maintaining and keeping in repair any such work, and the corporation of a township becomes liable under section 460 for damages suffered by or occasioned to any person in consequence of such default, the corporation shall be entitled to the remedy over against the Board provided for by section 464.

(2) The amount required to satisfy the liability of the Board shall be levied and collected by a special rate on the rateable property in the village, and it shall be the duty of the Board to make a requisition in writing to the council of the township to levy and collect the same.

(3) Where the village comprises parts of two or more townships the special rate shall be apportioned between the townships in the manner provided by section 509, and shall be levied and collected by the councils thereof in accordance with the requisition of the Board. *New.* 3 & 4 Geo. V. c. 43, s. 533 (1-3).

Section 533.—Jurisdiction over highways in police villages remains in a township or county municipality as the case may be; see s. 434, with consequent liability under s. 460, with a remedy over by the joint operation of s. 533 and s. 460.

There is no section in Part XXIII. corresponding to s. 460 giving a statutory action against the trustees or the board of trustees in highway cases. The duty to maintain certain highways is imposed on trustees under s. 519 (2), and the power given by s. 513 involves duties once its exercise is undertaken.

The duties of the county or the township having jurisdiction are concurrent with the duties of the trustees as to highways and the right of action, if any, against the trustees for default in the performance of highway duties, becomes merely of academic interest.

See s. 519.

534.—(1) The Board shall have the like powers as the council of a village for constructing, purchasing, improving, extending, maintaining, managing and conducting water, light, heat, power and gas works.

(2) A copy of every by-law passed under the authority of sub-section 1, shall be filed with the clerk of every township in which any part of the village is situate.

(3) Where the village is situate in one township, the council of that township shall levy and collect the amount required to be raised under any such by-law by a special annual rate upon the rateable property in the village, and where the village comprises parts of two or more townships, the council of each township shall levy and collect the proportion of the amount to be raised by it by a special annual rate on the rateable property in that part of the village situate in such township. 3 Edw. VII. c. 19, s. 756, *redrafted.*

(4) The proportion to be raised by each township shall be determined under the provisions of section 510. *New.* 3 & 4 Geo. V. c. 43, s. 534 (1-4).

Section 534.—This section apparently contemplates that the board of trustees shall pass by-laws for the purposes mentioned and upon the by-laws being filed with the clerk of the township or townships in which the village or any part of it is situated, it becomes the duty of the township council to pass a by-law providing for the levying and collecting of the amount on the rateable property in the village. Contrast the power to establish works given by this section with the power given trustees under s. 513 (b).

Waterworks.—The powers of a village council with regard to waterworks may be ascertained by reference to s. 399 (70), s. 400 (3) of the Municipal Act, s. 51 of the Local Improvement Act, R. S. O. 1914, c. 193, ss. 89-93 and 95 to 98 of the Public Health Act, R. S. O. 1914, c. 218, and ss. 3 *et seq.* of the Public Utilities Act, R. S. O. 1914, c. 204.

The conditions under which money may be borrowed without the consent of the electors will be found in s. 400, s.-s. (3), of the Municipal Act. See article *Waterworks.*

Light, Heat, Power and Gas Works.—The authority of the village to construct public utility works other than waterworks, may be found in the Public Utilities Act, R. S. O. 1914, c. 204, ss. 17 *et seq.*

535.—(1) The powers expressly conferred on boards of trustees of police villages shall be in addition to the powers conferred by this Part on trustees of a police village, and except where other provision is made by this Part with respect to such boards all the provisions of this Part relating to trustees of police villages shall apply to such boards. 3 Edw. VII, c. 19, s. 757, *redrafted.*

(2) Section 497, sub-section 2 of section 498, and sections 499 and 500 shall apply *mutatis mutandis* to by-laws passed under the authority of this Part by a board of trustees of a police village. 5 Edw. VII. c. 22, s. 51, *redrafted.* 3 & 4 Geo. V. c. 43, s. 535 (1-2).

PART XXIV.

MISCELLANEOUS.

536. Where the Forms therefor are not prescribed by this Act the Municipal Board may approve of forms of by-laws, notices and other proceedings to be passed, given, or taken under or in carrying out the provisions of this Act, and every by-law, notice or other proceeding which is in substantial conformity with the Form so approved, shall not be open to objection on the ground that it is not in accordance with the provisions of this Act applicable thereto, but the use of such Forms shall not be obligatory. 3 & 4 Geo. V. c. 43, s. 536.

537. The Lieutenant-Governor in Council may by proclamation declare that section 566 of *The Consolidated Municipal Act, 1903*, shall cease to have effect on and from a day to be named in such proclamation and on and from that day the section shall be deemed to be repealed.

AMENDMENTS OF 1920.

10 Geo. V. (1920), Chapter 58.

The Municipal Amendment Act, 1920.

(*Assented to 4th June, 1920*).

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. Section 53*a* of *The Municipal Act* as enacted by section 3 of *The Municipal Amendment Act, 1918,* and as amended by section 2 of *The Municipal Amendment Act, 1919,* is repealed.

2. Subsection 4 of section 69 of *The Municipal Act* is amended by striking out the words "in an urban municipality" in the first line thereof.

3. *The Municipal Act* is amended by inserting after section 73 thereof the following as section 73*a*:—

73*a*. Notwithstanding the provisions of section 73, the council of any city having a population of not less than 200,000 may by by-law passed not later in the year than the 15th day of November, provide that the meeting of electors for the nomination of candidates for mayor, controllers, aldermen and the board of education, shall be held on the 21st day of December, except where that day is a Saturday or a Sunday, and in that case on the preceding Friday, and that the polling shall take place on the 1st day of January next thereafter except where that day is a Sunday, and in that case on the following day, and the by-law shall remain in force from year to year until repealed.

4.—(1) Section 240 of *The Municipal Act* is amended by adding the following as subsection 2:—

(2) Every auditor appointed for a city shall hold office during good behaviour and shall be removable for cause by the council upon a vote of two-thirds of the members thereof.

(2) Section 236 of *The Municipal Act* is repealed.

5. Subsection 1 of section 242 of *The Municipal Act* is amended by striking out the words "as a member of the Council of a Township or."

6. Subsection 3 of section 263 of *The Municipal Act* is amended by adding thereto the following: "but this subsection shall not apply to a proposed by-law for the purpose of establishing, erecting or constructing by a municipal corporation of a public utility."

7. —(1) Subsection 3 of section 278 of *The Municipal Act* is amended by inserting the words "a tobacco drier" after the word "factory" in the fourth line thereof

(2) Section 396 of *The Municipal Act* is amended by inserting the words "a tobacco drier" after the word "factory" in the sixth line thereof.

8. Clause (*a*) of subsection (2) of section 288 of *The Municipal Act* is amended by inserting after the word "houses" in the seventh line thereof the words "public hospitals."

9. Subsection 1 of section 363 of *The Municipal Act* is repealed and the following substituted therefor:—

(1) The board shall, on or before the 1st day of March in each year, prepare and submit to the council for its consideration and approval, its estimates of all moneys required for the ensuing year to pay the remuneration of the members of the police force and to provide and pay for offices, watch-houses, watch-boxes, arms, accoutrements, clothing, and other things for the accommodation, use and maintenance of the force.

10.—(1) Section 398 of *The Municipal Act* is amended by adding the following as paragraph 28*a*:—

28*a*. For erecting and placing memorial windows and tablets in commemoration of officers and men of the municipality who have been on active service during the late war with the naval or military forces of Great Britain or her allies.

(*a*) The municipal corporation may borrow money for said purpose by the issue of debentures payable in not more than ten years from the date of issue, and may levy a special rate in each year on all the rateable property in the municipality sufficient to pay the instalments of principal and the interest falling due in respect of the debentures or to pay the interest and provide for a sinking fund to retire the debentures at their maturity;

(*b*) It shall not be necessary to obtain the assent of the electors to any by-law passed under the authority of this section or to observe the formalities in relation thereto prescribed by this Act in respect of other money by-laws.

(2) This section shall come into force and take effect on the day upon which it receives the Royal Assent.

11.—(1) Section 398 of *The Municipal Act* is amended by adding the following as paragraph 30*a*:—

30*a*. For granting aid to any patriotic organization.

(2) Section 398 of *The Municipal Act* is amended by inserting after paragraph 31 the following as paragraph 31*a*:—

31*a*. For the corporation becoming a member of the Canadian Deep Waterways and Power Association and paying the fees for such membership and for making contributions

towards the expenses of such association and paying the expenses of delegates to any meeting of it or upon its business.

12. Paragraph 49 of section 400 of *The Municipal Act* is amended by adding thereto the following words:—

"Or in which, in the opinion of the council, it is desirable that traffic should be limited to one direction."

13. Section 400 of *The Municipal Act* is amended by inserting after paragraph 49 the following as paragraph 49*a*:—

49*a*. For setting aside and designating in a suitable visible manner, on any highway upon which street cars are operated, any part or parts as a "safety zone" and for prohibiting motor or other vehicles from driving over or upon any such safety zone while any pedestrian is thereon or about to enter thereon.

14. Subsection 8 of section 402 of *The Municipal Act* is repealed and the following substituted therefor:—

(8) No fees may be imposed, levied or collected for weighing or measuring greater than those contained in the following scale:—

For weighing a load of hay .....25 cents.

For weighing slaughtered meat, or grain or other articles exposed for sale, if weighing less than one hundred pounds ..... 2 cents.

If weighing more than one hundred and less than one thousand pounds ..... 5 cents.

If weighing more than one thousand pounds .....10 cents.

For weighing live animals other than pigs, sheep or calves—

Per head when only one weighed.10 cents.

For each additional animal weighed at the same time ..... 5 cents.
For weighing sheep, pigs or calves
One or two .....10 cents.
Three, four or five .....15 cents.
Six or seven .....20 cents.
Eight, nine or ten .....25 cents.
For each additional animal above ten. . . .. 2 cents.
For measuring a load of wood ....10 cents.

15. Paragraph 2*f* of section 409 of *The Municipal Act*, as enacted by section 17 of *The Municipal Amendment Act, 1919*, is amended by striking out the words:—

"A building which was on the 1st day of April, 1919, erected or used for any such purpose so long as it is used as"

in the ninth, tenth and eleventh lines thereof.

16. *The Municipal Act* is amended by adding the following as section 410*a*:—

410*a*. By-laws may be passed by the councils of townships bordering on a city having a population of not less than 100,000.

1. For prescribing the distance from the line of street in front of it at which no building shall be erected or placed—
   (*a*) The by-law shall apply only to streets which are less than 66 feet in width, and it shall not be necessary that the distance shall be the same on all parts of the same street;
2. For requiring that in connection with all buildings hereafter erected and used solely as residences, there shall be a passage-way at one side thereof of at least two feet (2′) in width from front to three feet (3′) in rear of such building;

3. For exercising the powers conferred on cities by paragraph 4 of section 406*a*, as enacted by 4 Geo. V., c. 33, s. 13, with reference to public garages and the powers conferred on cities having a population of not less than 100,000 by paragraph 1 of section 410 with reference to garages to be used for hire or gain;
4. For licensing, regulating and governing teamsters, carters, draymen, drivers and owners of cabs, busses and other vehicles for hire and for establishing the rates or fares to be charged by the owners or drivers of such vehicles for the conveyance of goods or passengers within the township;
5. For requiring the owners, lessee, tenant, agent, manager or occupant of any premises in, or of a steam boiler in connection with which a fire is burning and every person who operates, uses or causes or permits to be used any furnace or fire, to prevent the emission to the atmosphere from such fire of opaque or dense smoke for a period of more than six minutes in any one hour, or at other point than the opening to the atmosphere of the flue, stack or chimney;
   (*a*) This paragraph shall not apply to a furnace or fire used in connection with the reduction, refining or smelting of ores or minerals, or the manufacture of cement or to dwelling houses, except apartment houses;
   (*b*) No person shall incur a penalty for an infraction of the by-law until 90 days after notice from the corporation of the existence of such by-law and such notice may be given by publication of the by-law in *The*

Ontario Gazette and in a daily newspaper published in the city on which the township borders, for four successive weeks.

17. Paragraph 1 of section 413 of *The Municipal Act* is amended by adding the following as clause (*e*):—

(*e*) Any license issued under paragraph 1 of this section may be issued to authorize the licensee to deal in one class only of second-hand goods or in more than one class as may be specified in the license and such licensee shall not be entitled to deal in any class of second-hand goods not covered by his license.

18. Section 424 of *The Municipal Act* is amended by striking out the words "five cents" in the fourth line thereof and substituting therefor the words "ten cents."

19. Section 424 of *The Municipal Act* is amended by adding the following as subsection 2:—

(2) By-laws may be passed by councils of cities having a population of less than 100,000, towns and villages for paying the members of the council for their attendance at meetings of the council or of its committees at a rate not exceeding five dollars a day.

10 Geo. V. (1920), Chapter 59.

An Act to reduce Property Qualifications of Candidates for Membership in Municipal Councils.

(*Assented to 4th June, 1920*).

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. Section 52 of *The Municipal Act* as amended by 5 Geo. V., chapter 34, section 11, is repealed and the following substituted therefor:—

52.—(1) Every person shall be qualified to be elected a member of the council of a local municipality who

(*a*) Is a householder residing in the municipality, or is rated on the last revised assessment roll of the municipality for land held in his own right for an amount sufficient to entitle him to be entered on the voters' list and resides in or within two miles of the municipality;

(*b*) Is entered on the last revised voters' list as qualified to vote at municipal elections;

(*c*) Is a British subject;

(*d*) Is of the full age of twenty-one years; and

(*e*) Is not disqualified under this or any other Act.

(2) The rating for land shall be in respect of a freehold or leasehold, legal or equitable, or partly of each.

(3) "Householder" shall mean the person who occupies and is assessed as owner or tenant of a dwelling or apartment house or part of a dwelling or apartment house separately occupied as a dwelling.

(4) Where territory has been annexed to an urban municipality, until an assessment roll for the municipality, including such territory, has been made and revised, it shall be sufficient for the purposes of this section if the assessment is upon the last revised assessment roll of the municipality in which the territory, before its annexation,

was situate, and for a sufficient amount to qualify him for election to the council of that municipality.

(5) Where the inhabitants of a township or locality in unorganized territory have become incorporated as a township or a union of townships, the only qualification necessary at the first election shall be that the person is of the full age of twenty-one years, a British subject and a householder resident in the municipality.

2. Form 2 appended to *The Municipal Act* is repealed and the following substituted therefor:—

FORM 2.

DECLARATION OF QUALIFICATION BY CANDIDATE.

I,—*A. B.* declare that

1. I am a householder residing in this municipality (or am rated on the last revised assessment roll for land held in my own right for an amount sufficient to entitle me to be entered on the voters' list and that I reside in or within two miles of the municipality):
2. I am entered on the last revised list as qualified to vote at municipal elections;
3. I am a British subject and am not a citizen or a subject of any foreign country;
4. I am of the full age of twenty-one years:
5. I am not liable for any arrears of taxes to the corporation of this municipality.

Declared before me at this day of 19 } *A. B.*

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